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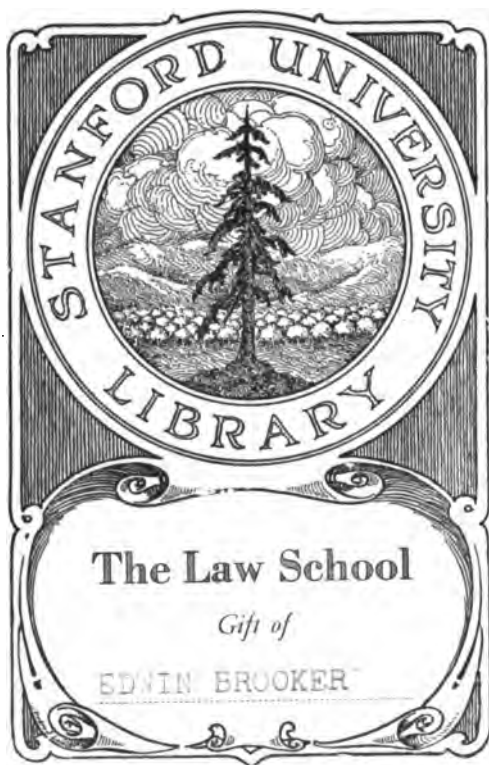
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**A TREATISE ON**

**THE MODERN LAW OF**

**REAL PROPERTY**

**AND OTHER INTERESTS IN LAND**

By HERBERT THORNDIKE TIFFANY

TWO VOLUMES IN ONE

CHICAGO  
CALLAGHAN AND COMPANY  
1912

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## PREFACE.

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The intention, in writing this work, is to present, in moderate compass, the principles which govern the various branches of the law of land, adopting for the purpose a method of analysis and order calculated to make plain the relations of these various branches to one another and to the whole. The treatment is believed to be sufficiently simple to assist, and not repel, those previously unacquainted with the subject, and yet sufficiently full to render the book useful to the practicing lawyer, and to furnish at least a clue to the solution of questions ordinarily arising in connection with land-title examination and litigation.

The labor involved in the preparation of this treatise, however considerable, would have been largely ineffective, had it not been preceded by, and to a great extent based on, the labor of others. Some of the weightiest of my obligations I desire to specify. "The Digest of the Law of Property in Land," by the late Stephen Martin Leake, and its companion volume, "The Law of Uses and Profits of Land," have been of the greatest assistance. Exhibiting, as they do, a thorough grasp of the subject as a whole, an admirable method of analysis, and a singular power of lucid and elegant expression, these volumes stand well in the front rank of English legal literature. The splendid collection of "Cases on the Law of Property," by John C. Gray, Esq., of Harvard University, has been constantly used, and has been freely cited. "The Rule against Perpetuities," by the same profound scholar, is the basis of my discussion of that subject, and was much utilized in my treatment of other parts of the law of future estates and interests. The classi-

fication and notes of the volume of "Cases on Trusts," by James Barr Ames, Esq., of Harvard University, was also most helpful, in connection with my chapter on "Equitable Ownership." In the consideration of other doctrines of an equitable character, the admirable treatise on "Equity Jurisprudence," by the late John Norton Pomeroy, has been an unfailing guide. The "Selected Cases on the Law of Property in Land," by William A. Finch, Esq., of Cornell University, has been much used, particularly in connection with my chapter on "Rights of Enjoyment Incident to Ownership," and the scholarly collection of "Cases on the Law of Mortgage," by George W. Kirchwey, Esq., of Columbia University, has been freely cited. The "Syllabus of Lectures on Real Property," delivered at the University of Maryland by Richard M. Venable, Esq., unfortunately not finished, and now, I believe, out of print, has, in parts of my work, been helpful and suggestive, and I take particular pleasure in acknowledging this indebtedness, in that it was under the instruction of this learned member of the Baltimore bar that I first acquired a knowledge of, and interest in, the subject of this work. I desire, also, to mention my obligations to a number of articles in the American and English Encyclopaedia of Law, which, by reason of their clear analysis and full citation of authorities, have been most useful, and also to the notes and comments on current cases in the Harvard Law Review, and to the compilation of "American Statute Law," by F. J. Stimson, Esq. The above list includes but a small portion of the works from which I have derived assistance, but for the rest I must refer to the citations to be found in the notes, which show, better, perhaps, than I can state, the extent of my obligations to others.

In conclusion, I desire to express my appreciation of the courtesies extended to me by those in charge of the rooms of the Social Law Library of Boston, where it was my privilege to write a considerable portion of this work.

H. T. T.

Baltimore, January, 1908.

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# REAL PROPERTY

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## PART I.

### PRELIMINARY CONSIDERATIONS.

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#### CHAPTER I.

##### THE NATURE OF REAL PROPERTY.

- § 1. The place of real property in the law.
2. The terms "real" and "personal."
3. Classification of rights in land.
4. Lands, tenements, and hereditaments.
5. Incorporeal things real.
6. Distinctive characteristics of real property.

Real property includes all rights and interests in things real, with the exception of liens and chattels real.

Things real are corporeal or incorporeal. Corporeal things real are land, and things permanently annexed thereto. Incorporeal things real are, in this country, rights as to the use or profits of another's land, and some classes of franchises.

- § 1. The place of real property in the law.

The rights, with their corresponding duties, which are the subject of private law, are rights either *in personam* or *in rem*. A right *in personam* exists against some particular person or persons, and generally arises from a contract entered into by such person or persons, or from a wrongful act committed by him or them. A right *in rem*,

(1)

on the other hand, is a right which may be exercised against the whole world, and not against certain persons only. Among rights *in rem* are the rights to personal safety and freedom, to reputation, to the society and limited control of one's family and employes, and what may be called proprietary or property rights, meaning thereby rights as to the possession, use, or disposition of particular things.<sup>1</sup>

There are certain groups of rights which, by analogy to things of a physical nature, are treated as the subjects of proprietary rights; but excluding these for future consideration,<sup>2</sup> we can say that the things which are the subjects of proprietary rights may belong to either of two classes,—that is, they may consist (1) of land or of things so annexed thereto as to be considered a part of the land; (2) of articles of a movable character, not annexed to land, or not annexed thereto in such a way as, in the view of the law, to be part thereof. This classification of the objects of enjoyment, based as it is on an essential difference in their character, was recognized in Roman law and in systems derived therefrom; but in English law it has attained a peculiar importance.<sup>3</sup>

Speaking generally, though not with entire accuracy, proprietary rights in the class of things first mentioned—that is, in land and things annexed thereto—constitute what is called “real property,” while rights in movable things constitute “personal property.” The want of absolute correspondence between the two classes of rights and objects of rights arises chiefly from the fact that there are certain property interests in lands which are treated as personal property, they being what are hereafter considered as “es-

<sup>1</sup> Holland's Jurisprudence, c. 9, III., c. 11; Digby, *Hist. Real Prop.* 297 (appendix to Part I.).

<sup>2</sup> See post, § 5, “Incorporeal Things Real.”

<sup>3</sup> See 1 Leake, 2; Holland's Jurisprudence, 91; Digby, *Hist. Real Prop.* 301; Maine's Ancient Law (3d Am. Ed.) 265, 274.



tates less than freehold." These, owing to their identification with personal property, have received the name of "chattels real," and sometimes of "leasehold" estates or interests, they being generally created by an instrument called a "lease."<sup>4</sup> Furthermore, the class of rights called "liens," even when they concern land, and not movable things, are to be regarded as personal rather than real property.<sup>5</sup>

### § 2. The terms "real" and "personal."

The terms "real property" and "personal property," now so generally used, are of modern origin, going back apparently to about the middle of the seventeenth century.<sup>6</sup> They are derived from the names given to different classes of actions,—“real actions” and “personal actions.” Real actions were those in which one who had been deprived of freehold interests in land, or of those “incorporeal” things which we shall hereafter consider as assimilated to land by the English law, could obtain restitution of the very property itself; while personal actions were those to which one deprived of goods or chattels was compelled to resort, and in which he could not insist upon recovery of the very property itself, but might, at the option of the defendant, be compelled to take the pecuniary value of the property. The two classes of action were accordingly said to “sound in the realty or personalty,” respectively.<sup>7</sup>

<sup>4</sup> See post, § 18.

<sup>5</sup> See post, § 3.

<sup>6</sup> Williams, *Real Prop.* (18th Ed.) 26, note.

<sup>7</sup> Litt. §§ 492, 500; Co. Litt. 118b, 285a, 288b. This distinction between the two classes of actions originated with Bracton, who appropriated the terms of Roman law, “*actio in rem*” and “*actio in personam*” (see 2 Pollock & Maitland, *Hist. Eng. Law*, 173), on the theory that the former phrase properly designated an action in which the thing itself could be recovered, and the latter an action in which the final recourse was against the person only. These

The terms "real" and "personal" were also applied to the things which were the subjects of actions; those things which were recoverable specifically being termed "things real," while those things not so recoverable, but for the wrongful withholding of which damages only could be recovered, were termed "things personal."<sup>a</sup>

### § 3. Classification of rights in land.

The most important of the proprietary rights over land are those to which we commonly apply the term "ownership," involving, within limitations more or less wide, the idea of rights in some particular person or persons (the owner or owners) to use the land according to his or their pleasure, without accountability to others. Accordingly we devote Part II. of this work to the subject of "The ownership of land," using the word "ownership" without reference to the greater or less duration of the rights involved.<sup>b</sup>

A person may be given power to transfer or dispose of land even in derogation of rights of ownership in another. "Rights to dispose of land," thus existing independently of ownership, are treated in Part III. of this work.

terms were afterwards changed into the forms *actio realis* and *actio personalis*, and these latter were translated as above. The distinction between "*actiones in rem*" and "*in personam*" in Roman law was, however, not based on the character of the relief granted, but purely on the character of the rights involved. See, on this subject, the learned article by Mr. T. Cyprian Williams in 4 *Law Quart. Rev.* 394, on which this section is based.

<sup>a</sup> Co. Litt. 118b; 1 Leake, 8; 4 *Law Quart. Rev.* 394.

<sup>b</sup> The term "ownership of land," here used to designate what might perhaps be more exactly designated by the expression "ownership of estates in land," is taken from Mr. Digby's valuable work. He says (page 302, note 3): "I do not forget that in common parlance we distinguish between tenant for years and the freeholder by saying that the former has the possession or occupation of the land, and that the latter only is the owner. But it is impossible to attempt to invest any word in common use with a technical

There are, moreover, proprietary rights in land involving the right to use the land in a particular manner, to take or receive particular profits therefrom, or to restrict its use in a particular regard, the ownership of the land, with the rights of use and profit in other respects, remaining all the time in another person. Rights of this class we consider hereafter under the title, "Rights as to the use or profits of another's land," comprising Part IV. of this work.

One may also have certain rights as against another's land, not for the purpose of use or profit, but to secure the performance of some obligation imposed by contract or by law; the person entitled thereto being authorized to appropriate or sell the land in case of nonperformance of the obligation. Such a right is termed a "lien."

Liens on land are personal, and not real, property, being in the nature of choses in action rather than rights in the land, and being furthermore regarded as merely accessory to the personal claims secured by them, and partaking of their character.<sup>10</sup> Liens are not, therefore,

meaning, without running counter in some instances to popular usage. At all events, a tenant farmer talks of 'my farm,' and has the exclusive right of possession." See, as to the earliest use of the term "ownership," 3 Pollock & Maitland, *Hist. Eng. Law*, 151, note.

<sup>10</sup> See 2 Bl. Comm. 161, and Butler's note to Co. Litt. 208b, as to the chattel character of the estates by statute merchant, statute staple, and elegit.

Liens on land, in which we here include, for the purpose of classification, the ordinary mortgage, answer to the Roman hypotheca, which was regarded as a right in re aliena. See Langdell, *Classification of Rights and Wrongs*, 13 Harv. Law Rev. 539; also Holland's *Jurisprudence*, 202, 204; Sandar's *Justinian*, pp. 205, 206, quoted 3 Pomeroy, *Eq. Jur.* § 1233, note. It is, however, the doctrine of the English and American courts of equity, where liens on land are generally alone enforceable, that a lien is not, in strictness, either a jus in re or a jus ad rem; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing, but is more properly a charge upon the thing.

when looked at in one way, properly within the scope of a treatise on real property. Looked at, however, from the side of the results which arise from their existence, liens so frequently burden rights of ownership in land and so constantly are the means of transferring such rights, that a complete treatment of the subject of real property seems to require a consideration of liens sufficiently full, at least, for a statement of their general nature and mode of creation. They are consequently hereafter considered in Part VI., under the title, "Liens on another's land."

#### § 4. Lands, tenements, and hereditaments.

Things of a real character were formerly referred to by the phrase "lands, tenements, and hereditaments," which is still occasionally used. The meaning of these words, particularly the last two, calls for a brief consideration.

Land includes whatever is parcel of the terrestrial globe, or is permanently affixed to such parcel.<sup>11</sup> This statement of the meaning of the term is sufficient for our present purpose, which is concerned chiefly with definitions, and the complex questions frequently arising as to whether specific classes of things are, under particular circumstances, owing to their connection with or annexation to the soil, to be regarded as a part of the land, are reserved for consideration in connection with a discussion of the rights incident to the ownership of land.<sup>12</sup>

"Tenement" is defined as including anything which may be the subject of common-law tenure,<sup>13</sup> or, as Blackstone

to enforce payment of which an action may be maintained. Pomeroy, Eq. Jur. §§ 165, 1233, 1234; Ex parte Foster, 2 Story, 131, 142, Fed. Cas. No. 4,960; Peck v. Jenness, 7 How. (U. S.) 612, 620; Brace v. Duchess of Marlborough, 2 P. Wms. 491.

<sup>11</sup> Co. Litt. 4a, 6a; Challis, Real Prop. 36.

<sup>12</sup> See post, chapter VIII.

<sup>13</sup> Challis, Real Prop. 37.

says, it "signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal, kind."<sup>14</sup> This word, the meaning of which will more clearly appear after a consideration of the system of feudal tenure, to which the next chapter is devoted, is of a more extensive signification than land, which it includes, in addition to most of what we will later refer to as "incorporeal things." In fact, it seems at all times to have been regarded as a convenient term by which to designate these incorporeal things, provided they had what was regarded as a connection with the land; it being thus improperly applied to some things which were not in fact the subjects of common-law tenure.<sup>15</sup>

"Hereditament" includes whatever, upon the death of the owner, passes, in the absence of disposition by will, by act of the law, to the heir, and not to the executor. The term is more extensive in its signification than the word "tenement," which it generally, though not always, includes,<sup>16</sup> and it may, at least in England, include things of a personal character.<sup>17</sup>

### § 5. Incorporeal things real.

Things which are the subject of proprietary rights are

<sup>14</sup> 2 Bl. Comm. 17.

<sup>15</sup> See 2 Pollock & Maitland, Hist. Eng. Law, 148; Challis, Real Prop. 37; Co. Litt. 18a; Gray, Perpetuities, § 43, note.

The word has perhaps acquired its chief importance because used in the statute De Donis, to describe those things subject to the operation of the statute. See post, § 26.

<sup>16</sup> Co. Litt. 6a; Bl. Comm. 17; Challis, Real Prop. 39.

<sup>17</sup> Co. Litt. 6a; Challis, Real Prop. 39; Stafford v. Buckley, 2 Ves. Sr. 170; Mitchell v. Warner, 5 Conn. 518.

The term seems to be susceptible of considerable uncertainty in its application as between things and estates in things. See Challis, Real Prop. 38; and compare Moor v. Denn, 2 Bos. & P. 247, 251 and Doe v. Allen, 8 Term R. 497, with Metropolitan Ry. Co. v. Fowler [1892] 1 Q. B. 165, 171, [1893] App. Cas. 416.

sometimes divided according to whether they are physical objects of a visible and tangible nature, these being known as "corporeal" things, or are mere intellectual or artificial things, consisting in fact of rights or groups of rights only, which inhere in and are supported by corporeal things, but which, being themselves of an invisible and intangible character, are known as "incorporeal" things.<sup>18</sup>

The only corporeal things of a "real" character are lands, and whatever may be considered as a part thereof.<sup>19</sup> Of incorporeal things real, Blackstone enumerates, under the name of "incorporeal hereditaments," ten varieties, to wit, advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents.<sup>20</sup>

"Advowsons," which are rights of appointment to a church or ecclesiastical benefice; "tithes," which are the rights of the rector of a parish to one-tenth of the yearly increase of the inhabitants, arising either from lands, from

<sup>18</sup> Holland's Jurisprudence, 88, 120, 186; Challis, Real Prop. 36; Bl. Comm. 17, 19.

The division of real things or "hereditaments" into "corporeal" and "incorporeal" is the subject of vehement objection by Austin (Jurisprudence [3d Ed.] 371, 804) and by Digby (Hist. Real Prop. 304, note), on the ground that the lawyer is concerned only with rights, and that these should be classified alone, while this division confuses rights and things which are the objects of rights, and treats them as if they were in *pari materia*.

<sup>19</sup> 2 Bl. Comm. 17; 3 Kent, Comm. 401; Challis, Real Prop. 41.

<sup>20</sup> 2 Bl. Comm. c. 3. The distinctive words "corporeal" and "incorporeal" have generally, by the modern English writers, as by Blackstone, been used in connection with the word "hereditaments," which are spoken of as being "corporeal" or "incorporeal." As the characteristic of heritability is, however, here in question only incidentally, and that of "incorporeality" is in no way connected therewith, we will generally speak of "incorporeal things," rather than "incorporeal hereditaments." Blackstone's predecessor, Lord Hale, speaks of "things" corporeal and incorporeal (see Hale's Analysis, 46-50, quoted in Kirchwey's Readings in Real Property Law, 23).

stock on the lands, or from their personal industry; and "dignities," which are titles, such as that of an English peer,—do not exist in this country. "Corodies," which were rights to receive sustenance at a monastery, are apparently obsolete. "Offices" are in this country never granted for longer than the life of the grantor, and cannot be considered hereditaments in any sense, and of course, being of this temporary character, cannot be classed with real things, and it is questionable whether they can be considered as property at all.<sup>21</sup>

"Commons," "ways," and "rents," with which are to be included some other incorporeal things not specifically named by Blackstone, belong to the category of what we have before referred to under the name of "Rights as to the use and profits of another's land."

— Franchises.

A franchise is in England defined as "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject";<sup>22</sup> and in this country as "a special privilege conferred by the government upon an individual or corporation, which does not belong to citizens of the country generally by common right."<sup>23</sup>

Franchises, then, are neither land, nor, except perhaps in exceptional cases, rights as to the use or profits of another's land, since rights of this character cannot be created by governmental act, as franchises are created.<sup>24</sup> They are, however, said by Blackstone to be incorporeal hereditaments of a "real" nature, and such seems to be the law in

<sup>21</sup> 3 Kent, Comm. 454; Mechem, Public Officers, § 464.

<sup>22</sup> 2 Bl. Comm. 37.

<sup>23</sup> Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 596.

<sup>24</sup> That is, the government cannot grant to a person rights as to the use or profits of another's land.

England at the present day,<sup>25</sup> and they have been quite frequently so regarded in this country.<sup>26</sup>

The question, then, naturally arises, why rights of this character, which are not land nor rights therein, should be associated with land in the quality of heritability involved in the word "hereditament," or should be regarded as things real, and not as things personal. The reason for this assimilation of franchises to land seems to lie in the fact that whatever may be the nature of franchises at the present day, in former times in England they were always exercisable within the limits of lands held by their owners, or at least were exercisable at a particular place, or within certain territorial limits, and accordingly, with other things of an incorporeal nature, were regarded as in the nature of land.<sup>27</sup>

The franchises which were of the greatest importance in mediaeval times possessed this element of locality to a decided extent, being generally rights granted to the great feudal landholders to exercise judicial or governmental powers within the limits of the land held by them of the crown, or similar rights granted to the members of a particular borough community;<sup>28</sup> or quite frequently they involved

<sup>25</sup> *Reg. v. Cambrian Ry. Co.*, L. R. 6 Q. B. 427.

<sup>26</sup> 3 Kent, Comm. 457; *Alexandria Canal, etc., Co. v. District of Columbia*, 5 Mackey (D. C.) 376; *Gibbs v. Drew*, 16 Fla. 147; *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 42, 76; *Sellers v. Union Lumbering Co.*, 39 Wis. 527; *Phalen v. Commonwealth*, 1 Rob. (Va.) 713; and see post, note 30.

<sup>27</sup> "The realm of mediaeval law is rich with incorporeal things. Any permanent right which is of a transferable nature, at all events if it has what we may call a 'territorial ambit,' is thought of as a thing that is very like a piece of land." 2 Pollock & Maitland, *Hist. Eng. Law*, 124 ("Incorporeal Things," book 2, c. 4, § 6). See, also, *Co. Litt.* 18a, as to rights which concern or "savor of" the realty.

<sup>28</sup> See 1 Pollock & Maitland, *Hist. Eng. Law*, 574, 642.



the right of hunting in a particular district.<sup>29</sup> The same local quality attaches to franchises to maintain a ferry at a particular point, and charge tolls for the use thereof, which have been in this country, as well as in England, regarded as real hereditaments;<sup>30</sup> and the same may be said of a franchise to maintain a toll bridge.<sup>31</sup>

The most usual franchise at the present time is the right to exist as or form a corporation; a character of right which is sometimes spoken of as vested in the corporation itself, and sometimes as vested in the individuals composing the corporation.<sup>32</sup> Such franchises have been stated to be hereditaments,<sup>33</sup> but there seems to be some impropriety in so classi-

<sup>29</sup> See 2 Bl. Comm. 37 et seq.; 3 Cruise, Dig. tit. 27, §§ 1-31. "The principal franchises are (1) liberties to hold courts; (2) grants of Jura Regalia and Counties Palatine; (3) grants of forest courts; (4) liberty to make a park; (5) the right of freewarren; (6) to have the goods of felons etc.; (7) to have waifs and strays; (8) to hold a fair or market; (9) to keep a ferry." Elphinstone, Interpretation of Deeds, 581.

<sup>30</sup> *Dundy v. Chambers*, 23 Ill. 369; *Gunterman v. People*, 138 Ill. 518; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Reg. v. Cambrian Ry. Co.*, L. R. 6 Q. B. 422.

In this country, the statute quite frequently provides that a ferry franchise shall be granted only to a riparian proprietor, and in such cases it is an incorporeal hereditament, which will descend with or pass with a devise or deed of the land of such proprietor (*Haynes v. Wells*, 26 Ark. 464; *Trustees of Maysville v. Boon*, 2 J. J. Marsh. [Ky.] 224; *Lewis v. Town of Gainesville*, 7 Ala. 85), unless the riparian proprietor grants this right of maintaining the ferry to another, which it has been decided he may do (*Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740. But see *Haynes v. Wells*, 26 Ark. 464).

<sup>31</sup> *Enfield Toll Bridge Co. v. Hartford & New Haven R. Co.*, 17 Conn. 40, 69.

<sup>32</sup> See 2 Morawetz, Priv. Corp. § 923 et seq.; *Fletsan v. Hay*, 132 Ill. 293; *Memphis & Little Rock R. Co. v. Railroad Commissioners*, 112 U. S. 609; *Pierce v. Emery*, 32 N. H. 507; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

<sup>33</sup> 2 Bl. Comm. 37; *Price v. Price's Heirs*, 6 Dana (Ky.) 107;

ying them, since, as remarked by Chancellor Kent, "they have no inheritable quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by charter, is supposed never to die, but to be clothed with a kind of legal immortality."<sup>34</sup> Furthermore, it may be said of franchises of this character, as of others, that, when granted only for a limited number of years, as is the custom in this country at the present day, they cannot be regarded as hereditaments, or "real" things in any way, they lacking the element of perpetuity necessary for this purpose.<sup>35</sup>

— Annuities.

The right of one person to receive a yearly stipend from another person, if not secured by a charge on land, is known as an annuity. Formerly such rights were regarded as in the nature of rents, from which they differ in that the latter are charged on land, and they were treated as things, and not merely rights. Gradually, as it was fully recognized that they did not issue out of land, or, indeed, out of anything, they ceased to be regarded as things, and took their proper legal standing as merely contractual rights of a personal nature.<sup>36</sup>

It is well settled in England, however, that if, by the terms of its creation, an annuity is granted to one "and his heirs," it will pass on the grantee's death, like real

*Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 42, 76.

<sup>34</sup> 3 Kent, Comm. 459; and see *State v. Georgia Medical Soc.*, 38 Ga. 608, 626, to the effect that such a franchise is not a hereditament.

<sup>35</sup> So it was held that a ferry franchise granted for a definite number of years passed to the personal representatives of the grantee. *Lippencott v. Allander*, 27 Iowa, 460.

<sup>36</sup> 2 Pollock & Maitland, Hist. Eng. Law, 133.

property, to his heirs, and not to his executors,<sup>37</sup> though for other purposes it is regarded as personal property.<sup>38</sup>

— Corporate stock.

In some early cases in England, as well as in this country, it was held that each stockholder in a corporation had an estate in the corporate property, and that consequently, if that property was real, his share was also realty.<sup>39</sup> In other and later cases the stockholder has rightly been regarded as having only a right of action for his share of the profits as dividends, and it may now be considered as settled that corporate stock is personal, and not real, property.<sup>40</sup>

— Summary of conclusions.

Summarizing, then, the results of our inquiry into the nature of incorporeal things real, we find that the only things of this nature recognized in this country are rights as to the use or profits of another's land, and franchises, or certain classes of franchises, and consequently these, together with land and things annexed thereto (corporeal things real), are alone the subjects of real property.

<sup>37</sup> Co. Litt. 2a; *Stafford v. Buckley*, 2 Ves. Sr. 170; *Turner v. Turner*, Amb. 776. An annuity so limited is known as a "personal hereditament." See Challis, *Real Prop.* 40; 2 *Am. Law Mag.* 68.

If not limited to the heirs, it passes to the executor, as other personal property does. *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, L. R. 8 Eq. 260.

<sup>38</sup> *Aubin v. Daly*, 4 Barn. & Ald. 59, 1 *Gray's Cas.* 2; *Radburn v. Jervis*, 3 Beav. 450.

<sup>39</sup> *Buckeridge v. Ingram*, 2 Ves. Jr. 652; *Price v. Price's Heirs*, 6 Dana, 107; *Welles v. Cowles*, 2 Conn. 567.

<sup>40</sup> *Johns v. Johns*, 1 Ohio St. 350, *Finch's Cas.* 14; *Russell v. Temple*, 3 Dane's Abr. 108; *Saup v. Morgan*, 108 Ill. 326; *Blight v. Brent*, 2 *Younge & C.* 268, 294; *Bradley v. Holdsworth*, 3 *Mees. & W.* 422; *Lindley, Companies* (5th Ed.) 451; *Cook, Corporations* (4th Ed.) § 12.

**§ 6. Distinctive characteristics of real property.**

The primary distinction between personal and real property, is that, on the death of the owner, the former passes to his executor or administrator, to be distributed among the legatees or next of kin after payment of the debts of the deceased, while real property passes immediately to the heirs or devisees, and is subjected to payment of the decedent's debts only in case the personal property is insufficient for the purpose.<sup>41</sup>

In case of intestacy, the persons who take the real property as heirs are in England generally different from those who take the personal property as next of kin. In this country, the tendency of the statutes is to make the persons

<sup>41</sup> 1 Woerner, Administration, § 276; 11 Am. & Eng. Enc. Law (2d Ed.) 830-845, 984, 1035, 1068, 1085. See Webster v. Parker, 42 Miss. 465, Finch's Cas. 42.

This distinction, however, so far as concerns the nonintervention of the executor or administrator in the case of succession to real property, has been destroyed by a late statute in England (60 & 61 Vict. c. 65; A. D. 1897), and by statutes in a number of states in this country, providing that the real estate shall pass to the executor or administrator, to be administered more or less in the same way as personal property. See 11 Am. & Eng. Enc. Law (2d Ed.) 1037 et seq.

As we have seen, in rare cases personal property consisting of an annuity may go to the heir (see supra, § 5), and in England there are a few other "personal hereditaments." See Challis, Real Prop. 40.

"Heirlooms," in ancient times, were chattels which, by the custom of an estate or a place, descended to the heir. Co. Litt. 18b, 185b. Such heirlooms are now obsolete even in England, and what are now called heirlooms are merely chattels expressly limited, so that they will pass along with the land. 2 Leake, 136, 137. Deer, fish, and the like in a private park, mentioned by Blackstone (2 Comm. 428) as being heirlooms, are not such, but, when they pass to the heir, do so as being *ferae naturae*. See 2 Leake, 77. Heirlooms by custom have never existed in this country.

to whom real and personal property will pass on intestacy the same.<sup>42</sup>

The rights of the husband or wife of a decedent as to the latter's real and personal property are different in England, and are quite frequently so in this country.<sup>43</sup>

The distinction between real and personal property is, however, at the present day, not generally so important as that between land and chattels personal, or "movables," as we may call them, which exists in the very nature of the two things. The fundamental distinction between land and movables, from a legal point of view, lies in the fact, as we shall see later,<sup>44</sup> that what we call "estates" exist in land, and not in movables, and that, on this doctrine of estates, there has been built up an elaborate system of rules as to the ownership of land and the creation of rights therein, which differ materially from those prevailing in the case of chattels.

In the case of land, as we have seen, some of the uses thereof are capable of detachment from the general ownership, and may be given to another person, while the other uses and the possession remain with the owner. This division of use cannot generally exist in the case of movables, since the use is almost of necessity confined to the person actually in possession. Furthermore, such rights as to the use of another's land quite generally appertain to the ownership of neighboring land, and, in the case of movables, there is no such continuous juxtaposition as will support rights of this character. For these reasons, what we treat of under the name of "Rights as to the use or profits of another's land" have counterparts to but a very limited degree in the case of movables.

<sup>42</sup> See 1 Stimson, Am. St. Law, §§ 3101, 3104.

<sup>43</sup> See 1 Stimson, Am. St. Law, §§ 3105, 3106. Also see, as to dower and curtesy, post, §§ 179-212.

<sup>44</sup> See post, § 17.

A distinction is generally made by statute between land and movables as regards the form of creation or transfer of rights therein; the mere delivery of possession being generally sufficient in the case of chattels, while, for the transfer of any but the smallest interests in land, a written instrument is required.<sup>45</sup>

Land, having a fixed location, is controlled in all respects, including the mode of its transfer, and the rights of succession on intestacy, by the law of the place where it is located, the *lex rei sitae*, as it is called; while movable chattels are regarded by fiction of law as accompanying the person of the owner, and are therefore controlled by the law of the place of his domicile.<sup>46</sup>

The remedies for the recovery of land and of movables have always, except in case of the abolition of the forms of action by statute, been entirely different. Furthermore, actions involving land must generally be brought in the jurisdiction where the land lies, as "local actions," while those involving movables are generally "transitory" in their nature.<sup>47</sup>

<sup>45</sup> Williams, Pers. Prop. 36; Browne, Statute of Frauds, c. 1; 1 Stimson's Am. St. Law, § 4143.

<sup>46</sup> Minor, Conflict of Laws, § 13; Dicey, Conflict of Laws (Am. Ed.) 72; Freke v. Lord Carbery, L. R. 16 Eq. 461.

By some of the earlier English cases, the distinction in this respect was made between real and personal property, and not between movables and immovables, and so it has been held in New York—erroneously, it would appear—that leasehold interests are governed by the law of the domicile. *Despard v. Churchill*, 53 N. Y. 192. Compare authorities above cited.

<sup>47</sup> 3 Bl. Comm. 294; Brantley, Pers. Prop. § 7; notes to *Mostyn v. Fabrigas*, 1 Smith's Lead. Cas. 652; *McGonigle v. Atchison*, 23 Kan. 726, *Finch's Cas.* 65.

## CHAPTER II.

### TENURE AND SEISIN.

- § 7. The feudal system.
8. Classes of tenure.
9. The manor.
10. Incidents of tenure.
11. Descent of the feud.
12. Alienation of the feud.
13. Abolition of military tenures.
14. Tenures in the United States.
15. Seisin and disseisin.
16. Livery and grant.

"Tenure" is the term used to designate the specific feudal relation existing between a feudal lord and his tenant, it being based on a grant by the lord of land to be held by the tenant on condition of the rendition of certain services. In England, all land was and is held of the king as "lord paramount," either directly, or through the interposition of "mesne" lords.

The feudal holdings of the tenants were usually descendible to their heirs, and could be alienated. By the statute of *Quia Emptores*, alienations by tenants, conditioned that the grantees should hold of them, rather than of their lords (subinfeudation), were forbidden.

By statute (12 Car. II., c. 24), the burdens incident to the feudal tenures were removed, and the various systems of tenure changed to that "in free and common socage." At the present day in England, mesne lordships are but seldom recognized, and land is generally held directly of the crown, free from the rendition of any services or other evidences of the feudal relation. In some, but not all, of the states of this country, land may be regarded as held of the state as the lord, free from any claim for services.

Seisin of land was the possession thereof by one claiming a

(17)

freehold therein, and might exist rightfully, or by wrong, as when obtained by the disseisin or ouster of the rightful tenant.

At common law, the alienation of land by a tenant in possession was by transfer of the possession, called "livery of seisin." Incorporeal things and future estates in land were, on the other hand, transferable only by grant.

### § 7. The feudal system.

For a full understanding of the law of real property as it exists at the present day, even in this country, some knowledge of the doctrine of tenures on which the English law was based is necessary.<sup>1</sup> The fundamental principle of the feudal system of property in lands, as it was established in England after the Norman Conquest, was that all land held by a subject was derived originally by grant from the crown, and that the subject held the land merely on condition of his performance of certain duties and services,

<sup>1</sup> "The principles of the feudal system underlie all the doctrines of the common law in regard to real estate, and, wherever that law is recognized, recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitation in deeds,—the distinction between words of limitation and words of purchase,—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of a particular estate or eo instanti that it determines, that the heir cannot take as a purchaser an estate the freehold of which by the same deed is vested in the ancestor, and many more rules and principles of very great practical importance, and meeting us at every turn in the American as well as the English law of real estate, are all referrible to a feudal origin. 'The principles of the feudal system,' said Chief Justice Tilghman, 'are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture.' *Lyle v. Richards*, 9 Serg. & R. 333. 'Though our property is allodial,' said Chief Justice Gibson, 'yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee.' *McCall v. Neely*, 3 Watts, 71." Sharswood's note, 2 Bl. Comm. 78.



imposed either by law or the terms of the grant. The relation thus established between the crown and the person to whom, either actually or by fiction of law, the grant was made, was termed "tenure."<sup>2</sup> The persons who thus held lands of the crown could themselves make grants of parts of their lands to others, creating thereby a "sub-tenure" between themselves and their grantees, without affecting the tenure already existing between themselves and the crown. These subtenants could again grant out parts of the land held by them to others, who would hold of them. This process of the creation of subtenancies could, in theory, continue to an indefinite degree, and in fact sometimes there were as many as six or seven persons (mesne lords) standing between the king (the lord paramount) and the lowest in the scale of tenants,—the one who actually enjoyed possession of the land, termed the tenant "in demesne," or tenant "paravail." Each person in the scale, except the tenant in demesne, while tenant merely as to those above him, was lord as regards those below him, and was accordingly termed a "mesne" or "middle" lord.<sup>3</sup>

While the tenant in demesne alone had the general rights of use in the land, those above him in the scale were all regarded as having certain rights in the land, and, in a sense, as possessed of it. Furthermore, the land itself was regarded as owing the services due by the respective tenants, so that the same land might owe to one of the lords in the scale, on behalf of his immediate tenant, services of one kind, of a military nature, perhaps, and to another of such lords, on behalf of the latter's tenant, another service, the payment of rent, for example, and so on, and the right to any or all of the services due to the various lords of

<sup>2</sup> 1 Pollock & Maitland, *Hist. Eng. Law*, 210 et seq.; Digby, *Hist. Real Prop.* 34; Co. Litt. 65a, and Hargrave's note.

<sup>3</sup> 1 Pollock & Maitland, *Hist. Eng. Law*, 211; 2 Bl. Comm. 59.

whom the land was held might be enforced against the land by the seizure of chattels found thereon (distress), and sometimes by the recovery of the land itself.<sup>4</sup>

Land thus held by one as tenant of a superior on condition of the rendition of services was known, at least in certain stages of the development of the system, as a "feud," "fief," or "fee," all varieties of the same word, "feodum" or "feudum," and was contradistinguished from "allodial" land,—that is, land which was possessed by a man in his own right, not in dependence on another, and without any obligation of rent or service.<sup>5</sup> Such allodial land had existed in Anglo-Saxon times in England, and was found in parts of the continent even after the establishment of the feudal system there, but, as stated above, it disappeared from England after the Norman Conquest, as a result partly of the Conquest, and partly of the tendency, in those times, of holders of land to put themselves under the protection of their more powerful neighbors.<sup>6</sup>

### § 8. Classes of tenure.

Tenures were divided primarily into free tenures and base or villein tenures, the first being based on services of a character such as it was considered proper for a free man to render, while base or villein tenure was based on

<sup>4</sup> 1 Pollock & Maitland, *Hist. Eng. Law*, 215.

<sup>5</sup> Co. Litt. 65a, Hargrave's note; 2 Bl. Comm. 104; Digby, *Hist. Real Prop.* 13, 32. As to the meaning of "allodial," see Gray, *Perpetuities*, § 23.

The word "tenement," however, finally became the established term properly descriptive of lands, as well as "incorporeal things," which were held by one man of another (1 Pollock & Maitland, *Hist. Eng. Law*, 215, note 3; Digby, *Hist. Real Prop.* 72, note 5. See ante, § 4); the word "fee" having acquired a new meaning as descriptive of an estate of inheritance. 2 Bl. Comm. 105. See post, § 19.

<sup>6</sup> Co. Litt., Butler's note 77, V, 1; Digby, *Hist. Real Prop.* 32.

services of a "villein" character, involving generally the cultivation of the lord's land under particular conditions.<sup>7</sup> Of free tenures there were three classes: (1) Tenure in frankalmoign, by which ecclesiastical persons or bodies held land on condition of their rendition of services of a spiritual character, (2) tenure in chivalry, and (3) socage tenure.<sup>8</sup>

Tenure in chivalry included what was known as tenure by "grand sergeanty," which existed only in the case of a holding directly of the king, and was based on the rendition of some particular honorary services to the king in person, as to carry his sword, or to act as his champion upon his coronation.<sup>9</sup> The other tenure in chivalry, by far the more important, was that by "knight service."

Tenure by knight service involved military service on the part of the tenant with the king in time of war, and frequently, by the conditions of the tenure, the furnishing of the services of other knights. Gradually, as time went on, the persons who were thus bound to furnish military services were allowed to pay a certain sum in lieu thereof; this payment being termed "scutage," or "escuage." This commutation of services into money did not, however, affect the character of the tenure in other respects, and it was still regarded as military, with the burdens incident to that character of tenure.<sup>10</sup>

Tenure in free socage comprised all tenures not in frankalmoign, by knight service, or by grand sergeanty. While the services rendered in connection with this class of tenure

<sup>7</sup> 2 Bl. Comm. 61; Challis, Real Prop. 6; 1 Pollock & Maitland, Hist. Eng. Law, 337.

<sup>8</sup> Litt. § 118; Co. Litt. 86a; Challis, Real Prop. 7.

<sup>9</sup> 1 Pollock & Maitland, Hist. Eng. Law, 262. The word "sergeanty" involved the notion of "servantship"; "sergeant" and "servant" being originally the same word. Id.; and see Co. Litt. 105b.

<sup>10</sup> Litt. § 95; 2 Bl. Comm. 74; 1 Pollock & Maitland, Hist. Eng. Law, 253, note 1; Hargrave's note 35 to Co. Litt. 73a.

were originally of an agricultural or profitable character, to be rendered on lands in the possession of the lord, its distinctive characteristic was that the services to be rendered were fixed and determinate in amount, and consequently it included all tenures by fixed rents, whether these rents were of considerable pecuniary value, or were merely nominal, as the gift of a rose or a peppercorn, reserved only in order to evidence the tenure.<sup>11</sup>

There were various kinds of free socage tenure, including "petit sergeanty," which was of the king alone, involving the yearly presentation to him of a thing of slight value, as a bow, a sword, or a lance, and "burgage" tenure, which existed where the king or other person was lord of an ancient borough, in which the tenements were held by certain rent. Another species of socage tenure was that of "gavelkind," which was chiefly confined to the county of Kent. This tenure was subject to certain customs, the most important of which were that the holding did not escheat in case of execution for felony; the tenant could devise the land even at common law, and the land descended to all the sons equally. The bulk of free socage tenures did not, however, fall into one of these subclasses, but were merely in "free and common socage."<sup>12</sup>

### § 9. The manor.

A grant by the crown of a certain portion of territory conferred rights of jurisdiction and other sovereign rights or franchises within such territory, by which it was constituted a "manor." The exact characteristics which were necessary to constitute a manor seem to have been somewhat indefinite, but the typical manor presented certain features which demand a brief consideration.

<sup>11</sup> Litt. §§ 117, 119, 129, 130; 2 Bl. Comm. 79 et seq.; 1 Pollock & Maitland, Hist. Eng. Law, 271 et seq.

<sup>12</sup> Litt. §§ 159-169; 2 Bl. Comm. 79 et seq.; Chailly, Real Prop. 9.

The most important characteristic of the manor was the manorial court, called the "court baron," composed of the freeholders of the manor. This court exercised certain governmental functions in connection with the various tenancies of the manor, and also had a limited jurisdiction of personal actions between the various tenants. It furthermore had jurisdiction of litigation between the lord and his tenant, and of disputes as to freehold land in the manor, as well as of villein tenements. Except, however, as to questions of the title to villein tenements, which was based, as will hereafter appear, on the custom of the manor, the jurisdiction of the court baron was early curtailed by the organization of the crown courts, to which suits in the court baron could be removed.<sup>13</sup>

Of the land comprised in the manor, a part was usually retained by the lord himself as demesne land, actually cultivated by him, or by others under contract with him, and on this he had a mansion or manor house, or a homestead of some sort. Other land in the manor was granted by him to free men, some of whom would be tenants by knight service, and others tenants in socage, bound to render service of a certain character, as by payment of rent, or attendance at the lord's court, or perhaps by aiding in the cultivation of the lord's demesne land. Land not in occupation for the purpose of cultivation was termed "waste" land, and this the tenants of the manor might use in common for pasturage and like purposes, though it still belonged to the lord. Besides the free men on the manor who held of the lord by one of the recognized forms of free tenure, and those persons who might cultivate a part of the demesne lands of the lord under contracts of lease, there were always on a manor a large and important class of persons

<sup>13</sup> 1 Pollock & Maitland, *Hist. Eng. Law*, 574 et seq.; 3 Bl. Comm. 33; Digby, *Hist. Real Prop.* 52-54.

who were not free men. The chief duties of this class of persons, who were called "tenants in villeinage," consisted in the cultivation of the lord's demesne lands, and the services of a "villein" character so rendered appear to have been to a certain degree uncertain, and at the will of the lord.<sup>14</sup>

These unfree or villein tenants had allotted to them for their dwellings and maintenance parcels of the lord's demesne land. Originally these holdings of land were regarded as being at the will of the lord, but, as time went on, the usage of the manor, under the control and influence of the general law or the land, imposed restrictions upon the right of the lord to dispossess such tenants, and finally they acquired absolute fixity of tenure, together with absolute freedom of person and certainty of services. The amount and character of the services rendered in return for the holding came to be determined by what was known as the custom of the manor, and such custom was settled by the rolls of the manorial court, on which were entered all transactions as to the surrender of the holding by a tenant who had sold it, or as to the admittance by the lord to the land of a purchaser of the holding, or of the heir of a previous tenant. Copies of the rolls were delivered to the tenants as evidence of their title, and accordingly such tenants by "customary tenure" are also spoken of as "copyholders," and their lands as "copyholds." Tenancies of this character exist in England at the present day.<sup>15</sup>

#### § 10. Incidents of tenure.

There were certain incidents to the relation of tenure, or to particular varieties of tenure, which existed without

<sup>14</sup> 1 Pollock & Maitland, *Hist. Eng. Law*, 582 et seq.; Digby, *Hist. Real Prop.* 43-51; Williams, *Real Prop.* 119.

<sup>15</sup> Litt. §§ 73-76; Digby, *Hist. Real Prop.* c. 5, § 6; 1 Leake, pt. 1, c. 2.

special reservation at the time of the grant. These call for a brief consideration.

"Homage" and "fealty" seem to have had to do chiefly with the personal relation between the lord and the tenant, and were in effect oaths of allegiance at the beginning of the tenancy. Homage was the more solemn in character, and was restricted chiefly to tenancy by knight service and tenancy directly of the king. Fealty was incident to every tenancy, whether free or unfree, except what we shall hereafter know as "tenancy at will."<sup>16</sup>

If, upon the death of a tenant in chivalry, his heir was under age, the lord then had what were known as the rights of "wardship" and "marriage." By the right of wardship, the lord became entitled to the custody of the land and body of the heir till he or she became of full age, the lord not being bound to account for the profits of the land, and being burdened only with the maintenance of the heir. The right of marriage grew out of the right of wardship, and consisted of the right of the lord to dispose of the ward in marriage. In case of the ward's refusal of the marriage proposed to him or her by the lord, there was forfeited to the lord the value of the marriage, as it was called, this value being what any one would have paid the guardian for the alliance; and in case the ward married without the lord's assent while under age, the forfeit was of twice the value of the marriage, by force of the statute of Merton (20 Hen. III., A. D. 1235). These rights of wardship and marriage were regarded as vendible commodities, involving no relation of trust, were frequent subjects of investment, and were "chattels real," which passed to the executor on the owner's death.<sup>17</sup>

<sup>16</sup> Litt. §§ 85, 91; 2 Bl. Comm. 53; Digby, Hist. Real Prop. 76; 1 Pollock & Maitland, Hist. Eng. Law, 277 et seq.

<sup>17</sup> Litt. §§ 103, 110; 2 Bl. Comm. 67-70; 1 Pollock & Maitland, Hist. Eng. Law, 299 et seq.

"Aids" were contributions which could be exacted by the lord of his tenant, whether by knight service or in socage, for the purpose of giving a portion to the lord's daughter on her marriage, of paying the expense of the knighting of his eldest son, or of ransoming the lord if taken prisoner.<sup>18</sup>

"Escheat" was the name given to the determination of the tenure either by the death of the tenant without leaving any heir, or by the corruption of his blood consequent upon his commission of treason or felony, whereupon, there being no longer any tenant to enjoy the land, the lord became entitled thereto free from the burden of the tenure, the land being said, in such case, to "escheat" to the lord.<sup>19</sup>

#### § 11. Descent of the feud.

Upon the death of the tenant, his rights passed to his heir or heirs, provided the tenant had an estate of inheritance, as it was called,—that is, an estate which, by the terms of the grant, would pass to his heirs. This descent of lands was absolutely fixed by law, and the tenant had usually no power, by the making of a will, to defeat the rights of the heir, though this was allowed by custom in some parts of the kingdom.<sup>20</sup> The heir was, except when there was a custom to the contrary, as in the case of gavelkind tenure, the eldest son of the deceased tenant; while, if there were daughters only, all the daughters were joint heirs.<sup>21</sup>

The right of the tenant's heir, if of full age, to take pos-

<sup>18</sup> Co. Litt. 76a, 91a; 2 Bl. Comm. 64; 1 Pollock & Maitland, Hist. Eng. Law, 330.

<sup>19</sup> Co. Litt. 13a; 2 Bl. Comm. 72; 1 Pollock & Maitland, Hist. Eng. Law, 332.

<sup>20</sup> Litt. §§ 1-9, 167; Co. Litt. 111b, and Hargrave's note; 1 Leake, 66; 1 Pollock & Maitland, Hist. Eng. Law, 288; Digby, Hist. Real Prop. 94.

<sup>21</sup> See post, § 425.



session of the land in place of his father, was subject, however, to a claim on the part of his lord for what was known as a "relief," this being a pecuniary payment, which varied in amount according to the species of tenure, the decrees of the crown, and sometimes the will of the lord himself. Somewhat similar to this right to relief was that of "primer seisin," being the right of the king to take possession of land held of him on the death of his immediate tenant, and to take the profits for a certain period, generally a year.<sup>22</sup>

### § 12. Alienation of the feud.

According to the weightiest modern authority, a tenant probably had the right, before the date of *Magna Charta* (A. D. 1217), freely to dispose of his land to others, provided such disposition did not seriously injure the interests of his lord, and such alienation of the land, while generally made by a grant to one to hold of him (subinfeudation), might also be made by a grant conditioned that the grantee should hold of the grantor's lord, the grantee being thus substituted in the grantor's place. *Magna Charta* provided, in the interest of the great landholders, that thenceforth "no free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service which pertains to that fee." Thereafter, until the passage of the statute *Quia Emptores*, considered below, it seems that, apart from the somewhat vague restraint imposed by the charter, the tenant might "alienate the whole or any part of the land by way of subinfeudation, and the whole, though perhaps not a part of it, by way of substitution," except in the case of tenants holding directly of the crown, who were allowed to alienate their holdings only with the consent of the king,

<sup>22</sup> Litt. §§ 112, 126; Co. Litt. 76a; 2 Bl. Comm. 66; 1 Pollock & Maitland, Hist. Eng. Law, 288 et seq.

who accordingly derived a considerable revenue out of licenses to alienate and fines for alienations made without license.<sup>23</sup>

— Statute of *Quia Emptores*.

The result of the right of alienation by a tenant was that, in case of subinfeudation, while the lord was still entitled to the rights incident to tenure, such as marriage, relief, wardship, and escheat, these rights might be seriously lessened in value. For instance, if a tenant by knight service granted the tenement to another to hold at a rent of a pound of pepper, on the death of the tenant by knight service, leaving an infant heir, the lord, instead of being entitled to enjoy the land itself till the heir came of age, was entitled merely to a pound of pepper annually during that time; and so, in case of an escheat, the lord, instead of obtaining the use of the land absolutely, would merely receive the rent paid by the subtenant. To remedy this state of things, the statute of *Quia Emptores*<sup>24</sup> was passed, whereby it was declared that every free man might sell his tenement or any part of it, but that the transferee should hold of the same lord and by the same services of whom and by which the transferrer held, the services being apportioned in case a part only of the land was sold. This statute was in the nature of a compromise, the great lords conceding to the tenants the full right of alienation, even to the point of substitution of several tenants for one, but succeeding in obtaining a prohibition of any future alienation by subinfeudation, with its disastrous effects upon the lord's rights to marriage, wardship, and escheat.<sup>25</sup>

<sup>23</sup> 1 Pollock & Maitland, Hist. Eng. Law, 310. And see Digby, Hist. Real Prop. 156.

<sup>24</sup> Stat. Westminster III. (18 Edw. I. c. 1; A. D. 1290).

<sup>25</sup> 1 Pollock & Maitland, Hist. Eng. Law, 318; Digby, Hist. Real (28)

The statute did not apply to alienation by persons holding directly of the crown, and the liability of such persons to fines upon alienation without the license of the crown remained as before. Furthermore, the statute applied only to the sale or alienation of the entire fee or estate in the land belonging to the grantor, and did not prevent the creation of a species of subtenure by the alienation of an estate less than that owned by the grantor; the residue, called the "reversion," being retained by him.<sup>26</sup> Otherwise, however, the statute effectually checked all subinfeudation, and consequently all manors existing in England at the present day, or holdings in fee simple of a lord other than the crown, must date from a period anterior to the date of this statute.<sup>27</sup>

### § 13. Abolition of military tenures.

For various reasons tenure in socage tended to grow at the expense of the other tenures,<sup>28</sup> but the rights of wardships, marriage, and the other feudal burdens continued to press heavily on a large portion of the country, and finally, after abortive proposals to that end in the reign of James I., and the actual removal of the burdens during the time of the Commonwealth, it was provided by the statute 12 Car. II. c. 24 (A. D. 1660) that all the military tenures should be thereafter tenure in free and common socage, and all the burdens in favor of the lord, whether a mesne lord or the king, were by the same act taken away, with the exception of "rents certain" and one or two other minor

Prop. 233; Challis, Real Prop. 16. See *Van Rensselaer v. Hays*, 19 N. Y. 68, Finch's Cas. 81.

<sup>26</sup> 1 Leake, 19, 317; Challis, Real Prop. 18, 20.

<sup>27</sup> 2 Bl. Comm. 92; Digby, Hist. Real Prop. 233; Williams, Real Prop. 119, 127. Occasionally, manors have been created since that date by special license from the crown. Challis, Real Prop. 19.

<sup>28</sup> 1 Pollock & Maitland, Hist. Eng. Law, 386.

services. The result of this act was that generally all trace or remembrance of the relation of freeholder and lord passed away, except within the known precincts of a manor, and the freeholder became for practical purposes the owner of the soil.<sup>29</sup>

#### § 14. Tenure in the United States.

In all the colonies, the lands were granted to the colonial proprietors to hold in free and common socage; the services reserved consisting sometimes of a nominal rent, and sometimes there being merely the incident of fealty to mark the feudal relation.<sup>30</sup> After the Revolution, the feudal position of paramount lord, previously occupied by the crown, presumably passed to the state with the other sovereign rights,<sup>31</sup> since, as stated by a most competent authority, "it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversion; and so, in like manner, it is conceived a tenant in fee simple holds of the chief lord,—that is, of the state."<sup>32</sup> The same writer, however, enumerates a number of states in which, in view of the statutes or particular judicial decisions, tenure must be regarded as nonexistent.<sup>33</sup> In this latter class of states, the statute of *Quia Emptores* is, of course, not in force, since, in the absence of tenure, the statute is

<sup>29</sup> Digby, Hist. Real Prop. c. 39; 2 Bl. Comm. 76; Challis, Real Prop. 21.

<sup>30</sup> 1 Story, Const. Law, § 172; 1 Gray's Cas. 407, note.

<sup>31</sup> Sharswood's note, 2 Bl. Comm. 78.

<sup>32</sup> Gray, Perpetuities, § 22. Tenure is recognized by the statutes of Georgia (Code 1895, § 3051) and New Jersey (1 Gen. St. 1895, p. 879).

<sup>33</sup> "In this condition are at least Connecticut, New York, Maryland, Virginia, Ohio, Wisconsin, West Virginia, Kentucky (?), Minnesota, California." Gray, Perpetuities, § 24.

meaningless. In the other states, however, where, as stated above, there seems good reason to assume the existence of tenure, this statute is probably in force, with the exception only of Pennsylvania and South Carolina, and consequently, except in those two states, all tenure, so far as existent, must be directly of the state.<sup>84</sup>

§ 15. Seisin and disseisin.

The theory of seisin, which at one time played a most important part in the English law of land, gave rise to rules which still exist as to the creation of estates, and this fact, together with the frequent reference to the subject in the older text books and decisions, renders a brief consideration thereof desirable,<sup>85</sup> though it can be regarded as a part of the law at the present day for but very few purposes.<sup>86</sup>

Seisin primarily means possession,<sup>87</sup> and for several centuries after the Conquest it was the only word known to the English lawyers capable of conveying this meaning. It was consequently applied at one time to the possession of chattels, as well as of land.<sup>88</sup> Later it was applied only to the

<sup>84</sup> Gray, *Perpetuities*, §§ 25-28.

<sup>85</sup> "In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences." 2 Pollock & Maitland, *Hist. Eng. Law*, 29.

<sup>86</sup> The law of seisin has still a bearing on the subjects of dower and curtesy. See post, §§ 180, 205.

<sup>87</sup> The word, while suggestive to our minds, from its similarity to the word "seize," of the idea of violence, is in reality only distantly connected with the latter word, and is to be associated rather with the words to "sit" and to "set," with which it is also connected etymologically, and properly implies the idea of one being "set" on land, and thereafter sitting there in rest and quiet. 2 Pollock & Maitland, *Hist. Eng. Law*, 29.

<sup>88</sup> § Pollock & Maitland, *Hist. Eng. Law*, 32.

possession of land or of incorporeal things, and in this connection it came finally to be used only in reference to possession by one claiming a freehold estate; he being said to be "seised," while a tenant for years or at will was said to be merely "possessed."<sup>39</sup> The possession of the tenant for years or at will did not, however, exclude the idea of seisin in another; such possession being in fact regarded as being in behalf of the person claiming the freehold, the person "seised."<sup>40</sup> Consequently "seisin," at least before the Statute of Uses (27 Hen. VIII. c. 10; A. D. 1535), may be regarded as meaning the possession of land by one having or claiming a freehold estate therein, either by himself or by another in his behalf.<sup>41</sup>

Seisin might be either seisin "in deed" or seisin "in law." Seisin in deed was the actual possession, obtained by the actual and corporeal entry of the freeholder upon the lands, while seisin in law existed when an estate came to one by act of the law, as by descent, and he failed to make an entry thereon, it being, however, turned into seisin in deed in case he made such entry.<sup>42</sup>

After the Statute of Uses, for reasons connected with the construction of that statute as giving, under certain cir-

<sup>39</sup> Litt. 324; Co. Litt. 200b, 201a; Challis, Real Prop. 47.

<sup>40</sup> Challis, Real Prop. 181. "On the whole, we may say that the possession of land which the law protects under the name of a 'seisin of freehold' is the occupation of land by one who has come to it otherwise than as tenant in villeinage, tenant at will, tenant for term of years or guardian, that occupation being exercised by himself, his servants, guardians, tenants in villeinage, tenants at will, or tenants for term of years." 2 Pollock & Maitland, Hist. Eng. Law, 39.

<sup>41</sup> 2 Pollock & Maitland, Hist. Eng. Law, 32. The definition of seisin, frequently found, as being "the completion of that investiture by which the tenant was admitted into the tenure," more properly describes the "livery of seisin." See 12 Law Quart. Rev. 239.

<sup>42</sup> Litt. § 448; Co. Litt. 266b, and Butler's note; 1 Cruise, Dig. tit. 1, § 20; Challis, Real Prop. 180-183.

sumstances, seisin even "in deed," without actual entry on or possession of the land,<sup>43</sup> seisin apparently acquired a different and broader meaning than before, and one was generally said to be "seised" if he had the legal estate, either in possession, or in remainder or reversion, provided it had not been turned into a mere right of entry, as where a wrongdoer obtained the actual possession.<sup>44</sup>

— Disseisin.

From the mere seisin of land, independently of whether the seisin was rightfully acquired, certain rights accrued at common law to the person seised, and accordingly the effect of a disseisin, as the putting of a person out of possession and usurpation of his place was called, was frequently in question. The wrongdoer, or "disseisor," while liable to be turned out by the rightful owner either by actual entry or by process of law, had in fact a defeasible title, and for many purposes acts done by him were as effectual as if he were what we would call the owner. The person wrongfully ousted, the "disseisee," was considered to have a mere "right of entry," and this was lost by his failure to assert it in the proper way, and within the proper time, or before the seisin passed from the disseisor to another by alienation or descent.<sup>45</sup>

<sup>43</sup> 1 Cruise's Dig. tit. 11, c. 3, § 34. See post, § 88.

<sup>44</sup> Goodeve, Real Prop. (3d Ed.) 364; article by Charles Sweet, Esq., in 12 Law Quart. Rev. 239, 247.

So late as 1878 it was decided in England that a devise of "all real estate of which I may die seised" did not cover land to which the testator was entitled, but which had been entered upon some years before by another person claiming title. *Leach v. Jay*, 9 Ch. Div. 42.

<sup>45</sup> Litt. §§ 385, 414, 417, 422, 423, 592; Co. Litt. 239a, Butler's note; 3 Bl. Comm. 169 et seq.; Digby, Hist. Real Prop. 108.

The person disseised could exercise his right of entry by re-entering on the land, or, in case he was forcibly prevented from re-entering, he could formally assert his claim near the land, and

Disseisin has an historical connection, at least, with what we now term "title by adverse possession," and will be hereafter referred to in the consideration of that subject.<sup>46</sup>

### § 16. Livery and grant.

The seisin, as representing the freehold interest of the tenant, was at common law made use of for the purpose of a conveyance of such interest, the latter being in fact transferable only by a delivery of the possession of the land, called "livery of seisin." This livery of seisin was effected by the delivery on the land, "in name of seisin of the land," of a turf or twig (livery in deed), or by a statement made in view of the land to the effect that possession was given, followed by entry by the alienee (livery in law). This ceremony was usually accompanied by a deed or charter "of feoffment," as it was called, attesting the livery of seisin, and stating the purpose, nature, and extent of the transfer, the whole transaction being known as a "feoffment."<sup>47</sup>

Since a feoffment operated merely by a transfer of possession, it resulted that it might be wrongfully made by one who was rightfully in possession in behalf of the owner of the freehold; and so a tenant for life or years, by a livery of seisin to another, could in effect disseise the owner

this assertion of claim, if repeated yearly, constituted what was known as "continual claim." If the disseisee failed to assert his right of entry either by re-entry or by continual claim, it was lost to him in case the disseisor died, the seisin then passing to the disseisor's heir, or, in case the disseisor aliened the fee, to the alienee, and in such cases the disseisee was compelled to resort to legal proceedings to assert his rights. See authorities *supra*. The student would do well to read 3 Bl. Comm. c. 10, treating of the various kinds of "ouster of the freehold," and remedies therefor at common law.

<sup>46</sup> See post, §§ 436-444.

<sup>47</sup> Litt. § 59; Co. Litt. 48, 49; 4 Cruise, Dig. tit. 32, c. 1, § 18; 2 Bl. Comm. 315, and appendix I; *Thoroughgood's Case*, 9 Coke, 126b, 1 Gray's Cas. 437; Digby, Hist. Real Prop. 145.



of the freehold. Such a transaction was known as a "tortious" feoffment or alienation, and was at common law, as we shall see later, a cause for forfeiture of his estate by the tenant guilty of the wrong.<sup>48</sup>

Those things which were incapable of actual possession, that is, incorporeal things, and also future estates, these not being accompanied by possession during the continuance of the preceding estate, were not capable of livery of seisin, and could be conveyed only by deed, called a deed of "grant." Hence the distinction which existed at common law between things which "lie in livery" and those which "lie in grant."<sup>49</sup> When the grant was of a manor, or a right of lordship (a seignory), to which tenure with rent or other services were incident, it was necessary that the tenant consent to hold of the new lord, such consent being known as "attornment." Likewise, as we shall see later, in case of the grant of a reversion expectant on a present estate, attornment by the tenant in possession was necessary. The necessity of attornment was afterwards dispensed with by statute (4 Anne, c. 16, §§ 9, 10; A. D. 1705), and it is no longer necessary in England or in this country.<sup>50</sup> Since a grant did not involve livery of seisin, it could convey only the estate of the grantor, and consequently it could never take effect as a tortious conveyance.<sup>51</sup>

<sup>48</sup> Litt. §§ 415, 416, 511; Co. Litt. 233b, 230b, and Butler's notes; Challis, Real Prop. 68, 110. See post, § 22.

<sup>49</sup> Co. Litt. 9a, 9b, 49a, 172a; Shep. Touch. 228; 1 Leake, 52 et seq.; Challis, Real Prop. 41.

<sup>50</sup> Litt. §§ 551, 567, 568; Co. Litt. 309a, and Butler's note. See post, § 47.

<sup>51</sup> Litt. §§ 609, 610; Co. Litt. 230a, Butler's note; 4 Kent, Comm. 490.

## CHAPTER III.

### ESTATES.

- § 17. The theory of estates.
- 12. The classification of estates.

Proprietary rights in land, other than rights to dispose thereof and liens, consist in the ownership of "estates" therein; the tenant or owner, according to the theory of the common law, being entitled to an estate in the land, rather than the land itself. Estates are classified primarily according to their quantum or duration in time, and secondarily according to whether they give a right of present or future enjoyment of the land.

#### § 17. The theory of estates.

The most distinctive feature of the law of land as established in England, and from there brought to this country, is the doctrine of estates, by which the rights of possession and enjoyment are rendered capable of division according to time. "The total or indefinite extension, as to duration, of property in land, may thus be portioned out by means of successive intervals of use into separate properties, measured by terms of years, or by lives, or other specified times or events of certain or uncertain occurrence. In this manner are produced the various estates in land."<sup>1</sup>

<sup>1</sup> See 1 Leake, 2.

The word "estate," or "status," originally, and even as late as the middle of the thirteenth century, was used as descriptive of the personal condition of the feudal tenant; but, under the feudal system, a man's personal status was so closely connected with his proprietary rights that even then a man was said to have the status of a tenant for life or of a tenant in fee, according to the duration of his feudal holding, and consequently but a slight change of expression was necessary to use the word with refer-

The future possession and use of the land is accordingly the subject of present ownership, and, consequently, of present transfer, apart from its present possession and use. The owner of land, or, more properly speaking, of an "estate" in land, may therefore, by an act of transfer, determine the person or persons who shall enjoy the land in the future, as well as in the present, creating, at his pleasure, interests or "estates" in various persons, to begin or end as he may declare at the time of the transfer; his power in this respect being limited, generally speaking, only by his inability to create any estate which will extend beyond the limits of his own estate.<sup>2</sup>

Estates can exist not only in land, but also in what we have considered above under the name of "incorporeal things real,"<sup>3</sup> but they cannot, properly speaking, be created in chattels, the owners of which are considered to own the chattels themselves, and not merely estates therein.<sup>4</sup> Sepa-

ence to the extent of the interest in the land. 1 Pollock & Maitland, *Hist. Eng. Law*, 391; 2 Pollock & Maitland, *Hist. Eng. Law*, 11, 78. See, also, 2 Bl. Comm. 103.

This doctrine of estates is not found in the Roman law or the continental systems derived therefrom, and apparently owes its place in our law to the universal prevalence in England of the system of feudal tenures, by which the tenant was regarded as having an interest in land which was short of absolute ownership, the lord having a possibility of the land reverting to him by the termination of the tenant's interest. The principle of a present estate in one person and a future estate in another, thus suggested or instituted, "was subsequently worked out by conveyancers, and sanctioned by the courts, to the full capacity of the subject for such mode of treatment, and in subservience it must be presumed, to the exigencies of the public." 1 Leake, *l. c.* See Digby, *Hist. Real Prop.* 43.

<sup>2</sup> See Challis, *Real Prop.* c. 9; 2 Pollock & Maitland, *Hist. Eng. Law*, 11; Digby, *Hist. Real Prop.* 307.

<sup>3</sup> 2 Washburn, *Real Prop.* 4; Williams, *Real Prop.* 334; Challis, *Real Prop.* 36 et seq.; *Huff v. McCauley*, 53 Pa. St. 206, 31 Am. Dec. 203; *Hall v. Turner*, 110 N. C. 292.

<sup>4</sup> 1 Leake, 4.

rate rights of present and future enjoyment may, however, be created in chattels personal, as distinguished from chattels real, by a contract of bailment, and in chattels real by what is known as a "sublease," and future interests may be created in chattels either real or personal by will, or by the intervention of a trustee, and, according to the weight of authority in this country, by a deed without the creation of any trust.<sup>5</sup>

— The limitation of estates.

The language in a deed or other instrument conveying or creating an estate, which states the time for the commencement of the estate, and its quantum or duration, is termed the "limitation of the estate," as fixing its limits. The words used for this purpose, called "words of limitation," are to be carefully distinguished from "words of purchase," which state the person or persons intended to take the estate or estates limited. A number of words, such as "heirs," "issue," "children," etc., are capable of use either as words of limitation or as words of purchase, and the determination of the purpose of their use in a particular instrument is frequently a matter of difficulty.<sup>6</sup>

§ 18. The classification of estates.

The primary classification of estates is into "estates of freehold," or "freehold estates," and "estates less than freehold." Freehold estates, the distinctive characteristic of which is that they endure for a period the termination of which is not fixed or ascertained by a specified limit of time, obtain the name of "freehold" from the fact that the typical holding by a free man under the feudal system,—a "free tenement," as it was called,—was always associated with a

<sup>5</sup> Gray, *Perpetuities*, §§ 71-97.

<sup>6</sup> See 1 Leake, 152; 4 Cruise's *Dig. tit. 32, ch. 20, §§ 33-90*.

right in the land enduring for such a period of uncertain termination.<sup>1</sup>

Freehold estates are divided into "estates of inheritance," which pass to the owner's heirs, and "estates not of inheritance." Estates of inheritance are such as pass to collateral as well as lineal heirs, these being termed "estates in fee simple," or are such as pass only to lineal heirs, termed "estates tail." Freehold estates not of inheritance are either estates for the life of the owner (the tenant), these being called simply "estates for life," or they may be for the life of another than the owner, termed "*estates pur autre vie*." Life estates may be created either by voluntary act, in which case they are known as "conventional" life estates, or in certain cases by act of the law, being then termed "legal" life estates. Legal life estates are either a "tenancy in tail after possibility of issue extinct," the estate of "dower," that of "curtesy," or what may be termed the "husband's estate during coverture."<sup>2</sup>

Estates less than freehold include primarily estates for a fixed period, the termination of which is capable of ascertainment from the beginning, called "estates for years." With these estates are also classed what are called "tenancies at will," which are not, strictly speaking, estates at all, except where their character has been changed by statute, they being merely rights of occupancy by permission, so long as both the owner and occupant so desire, estates or "tenancies

<sup>1</sup> Litt. § 57; Co. Litt. 43b; Challis, Real Prop. 6; Digby, Hist. Real Prop. 160.

<sup>2</sup> An estate for life is sometimes called an estate of freehold, or the freehold, as distinguished from the inheritance. 1 Leake, 43, citing Litt. § 57. "The word 'freehold' is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law, it meant rather the latter than the former. \* \* \* The word 'freehold' always imported the whole estate of the feudatory, but varied as that varied." Butler's notes to Co. Litt. 266b.

from year to year," which are a development of tenancies at will, and "tenancies by sufferance," which are not estates, and arise merely from the continuance of occupation by a tenant after his right to do so has expired. Estates less than freehold are also, as before stated, sometimes called "leasehold" estates or interests, and sometimes "chattels real."

These various estates, thus classified with reference to their quantum or duration, may be tabulated as follows:

**I. Freehold estates.**

**A. Estates of inheritance.**

(1) Fee simple.

(2) Fee tail.

**B. Estates not of inheritance (life estates).**

(1) Conventional life estates.

(a) Estates for life of the tenant.

(b) Estates pur autre vie.

(2) Legal life estates.

(a) Tenancy in tail after possibility of issue extinct.

(b) Dower.

(c) Curtesy.

(d) Estate during coverture.

**II. Estates less than freehold (leasehold estates, chattels real).**

**A. Estates for years.**

**B. Tenancy at will.**

**C. Tenancy from year to year.**

**D. Tenancy by sufferance.**

Besides being classified as above according to their quantum or duration, estates are also distinguished according as they give rights of present or future enjoyment, and those of the latter class, called "future estates," are sub-classified according to the mode or terms of their creation. A statement of these classes at the present time would, however, serve only to confuse the student, and accordingly it will be deferred till we come to consider future estates in detail.

**PART II.**  
**THE OWNERSHIP OF LAND.**

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**CHAPTER IV.**  
**THE QUANTUM OF ESTATES.**

**I. ESTATES OF FREEHOLD.**

**(A) Estate in fee simple.**

- § 19. Nature of estate.
- 20. Words of limitation.
- 21. Incidents of estate.

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- 26. Things in which estate may exist.
- 27. Barring the entail.
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**II. ESTATES LESS THAN FREEHOLD.**

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- § 35. Nature of estate.
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- 38. Entry by lessee.
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- 41. Right to possession during term.
- 42. Express covenants.
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- 45. Reservation of rent.
- 46. Assignment of term.
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- 48. Sublease.
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- 50. Estoppel to deny landlord's title.
- 51. Eviction of tenant.
- 52. Termination of estate.
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(B) Tenancy at will.

- § 54. Nature and creation.
- 55. Incidents of tenancy.
- 56. Termination.

(C) Tenancy from year to year.

- § 57. Nature and creation.
- 58. Incidents of tenancy.
- 59. Termination.

(D) Tenancy by sufferance—Tenant holding over.

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- 75. Persons entitled to enforce forfeiture.



76. Effect of enforcement of forfeiture.

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(B) Estates on special limitation.

§ 78. Nature of special limitation.

79. Words appropriate to special limitation.

80. Particular estates subject to special limitation.

81. Determinable, base, or qualified fees.

I (A). ESTATE IN FEE SIMPLE.

An estate in fee simple is the entire interest and property in land, the tenant holding the land to him and his heirs forever.

To create a fee simple by an express limitation in a deed to a natural person or persons, as distinguished from a corporation, the limitation must, at common law, be to the grantee "and his heirs," or, in case of two or more grantees, to them "and their heirs." By statute, however, in many states, the use of the word "heirs" is no longer necessary.

In a will, as distinguished from a deed, a fee simple may be created, in the absence of the word "heirs," by any expressions or provisions indicating an intention to that effect. By statute in most states, the devisee takes a fee simple unless a different intention is apparent.

The incidents and characteristics of an estate in fee simple are—

(1) On the owner's death intestate, it passes to his heirs, either lineal or collateral.

(2) It may be alienated by the owner by conveyance inter vivos or by will.

(3) It is liable for the owner's debts.

(4) There is no restriction upon the owner's manner of using the property, provided he does not create a nuisance.

(5) It is subject to dower and curtesy.

(6) It is subject to the power of eminent domain, and is liable to escheat to the state in certain cases.

§ 19. Nature of estate.

The word "fee" was originally used in the sense of "feud,"

referring to land which was held of a feudal superior, in contradistinction to land held allodially; but as it came to be recognized that all land was held of a superior, the word gradually acquired the signification of an estate of inheritance,—that is, one which passes to the heirs of the owner.<sup>1</sup>

The words “fee simple,” or “fee simple absolute,” are used in contradistinction to other estates of inheritance, hereafter discussed, such as “fee tail” or “qualified fee,” but the word “fee” alone, without any qualifying words, means a fee simple, and is often used in that sense.<sup>2</sup>

An estate in fee simple is, even in England, equivalent to the absolute interest in the property, with the exception that the lord, who is now in most cases the king, has certain rights of seignory, rarely exercised.<sup>3</sup> So, in this country, a fee simple is the absolute and entire property in the land; this being true for all practical purposes, even in jurisdictions in which land is to be regarded as held of the state.<sup>4</sup>

### § 20. Words of limitation—(a) In deed.

Originally, under the feudal system, land being granted by the lord as strictly in compensation for personal services, the estate granted was for the life of the grantee only, and the land reverted to the lord upon the grantee's death. Later the grant was extended to the sons and other issue of the grantee, under the designation of “heirs,” they being entitled to stand in the place of their ancestor after his death, if mentioned in the grant, and only then. Thereafter the word “heirs,” when used in a grant, in the phrase “to a man and his heirs,” came to include collateral as well as lineal heirs,

<sup>1</sup> 2 Bl. Comm. 106; Challis, Real Prop. 167. See ante, § 7.

<sup>2</sup> 2 Bl. Comm. 104; 1 Washburn, Real Prop. 51; Jecko v. Tausig, 45 Mo. 167; Haynes v. Bourn, 42 Vt. 686.

<sup>3</sup> 2 Bl. Comm. 105; Challis, Real Prop. 29, 42.

<sup>4</sup> Haynes v. Bourn, 42 Vt. 686. See, as to holding of the state, ante, § 14.

and finally ceased, when thus used, to designate the person or persons to take in place of the original grantee, but was regarded as merely indicating that such grantee took an estate which would pass to his heirs, or the heirs of any one to whom he aliened it; that is, it ceased to be a word of purchase, and became one of limitation.<sup>5</sup> The original rule, however, requiring the word "heirs" to be used in order that an estate descending to his heirs should pass to the grantee, though thus originating in reasons connected with the feudal system, has survived to the present day, and is generally in force when not changed by statute. Accordingly, conveyances to a man by name, without more, or to him "forever," or to him "and his assigns forever," have been held to give him but a life estate;<sup>6</sup> and the same effect has been given to conveyances to one and "his children," "his executors and assigns," or "his successors and assigns," or "in fee simple."<sup>7</sup>

The word "heirs" may, however, be incorporated in the deed by reference to another instrument,<sup>8</sup> and a court of equity will reform the deed by inserting the word "heirs,"

<sup>5</sup> 2 Bl. Comm. 55, 107; 1 Leake, 32; *Cole v. Lake Co.*, 54 N. H. 242, 279, *Finch's Cas.* 489.

<sup>6</sup> Litt. § 1; Co. Litt. 8b; 2 Bl. Comm. 107; *Curtis v. Gardner* 13 Metc. (Mass.) 457.

<sup>7</sup> *Clearwater v. Rose*, 1 Blackf. (Ind.) 137; *Adams v. Rosa*, 30 N. J. Law, 505, *Finch's Cas.* 483; *Miles' Lessee v. Fisher*, 10 Ohio, 1; *Taylor v. Cleary*, 29 Grat. (Va.) 448.

It is said by Coke that a conveyance to a man "or his heirs" is insufficient to convey a fee (Co. Litt. 8b), but it has since been held otherwise (*White v. Crawford*, 10 Mass. 183). See *Wright v. Wright*, 1 Ves. Sr. 409, per Lord Hardwicke.

The use of the word "heir" instead of "heirs" is sufficient. 4 Kent, Comm. 5, note a; Co. Litt. 8b, Hargrave's note 45; *King v. King's Adm'r*, 13 Ohio, 390, 472. But see *Challis, Real Prop.* 170.

<sup>8</sup> Co. Litt. 9b; 4 Kent, Comm. 5; 1 Leake, 156; *Challis, Real Prop.* 171; *Lemon v. Graham*, 131 Pa. St. 447, *Finch's Cas.* 499, 6 L. R. A. 663; *Mercier v. Missouri River, Ft. S. & G. R. Co.*, 54 Mo. 506; *Evans v. Brady*, 79 Md. 142.

It is sufficient if the word "heirs" appear in the habendum.

if this word is omitted by mistake, under the same circumstances as will justify a reformation of an instrument in other cases, but not, of course, as against *bona fide* purchasers.<sup>9</sup>

— Exceptions to general rule.

There are certain exceptions to the general rule recognized at common law, among which are cases in which one joint tenant or coparcener releases to the other, or where one cotenant grants a rent to another, in order to equalize a partition.<sup>10</sup> Likewise, the rule does not apply to an exception in a deed in favor of the grantor.<sup>11</sup> Also in grants of land to corporations aggregate, the word "heirs" is unnecessary, as is also the word "successors," since, in judgment of law, the corporation never dies, and accordingly a grant for its life is in effect a grant of an estate forever.<sup>12</sup>

Lancaster Bank v. Myley, 13 Pa. St. 544; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365. See post, § 382.

The insertion of the word "heirs" in the warranty clause is insufficient, it being a well-settled rule of the common law that a covenant or warranty cannot enlarge an estate. Co. Litt. 385b; Adams v. Ross, 30 N. J. Law. 505, Finch's Cas. 483; Jordan v. Neece, 36 S. C. 295, 31 Am. St. Rep. 869; Rawle, Covenants for Title, p. 391. But see Anderson v. Logan, 105 N. C. 266.

\* Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Nicholson v. Caress 59 Ind. 39; McMillan v. Fish, 29 N. J. Eq. 610; Vickers v. Leigh, 104 N. C. 248; Leitensdorfer v. Delphy, 15 Mo. 161, 55 Am. Dec. 137.

<sup>10</sup> Co. Litt. 9b; 4 Kent, Comm. 7; Challis, Real Prop. 171. See Rector v. Waugh, 17 Mo. 13, Finch's Cas. 511, 57 Am. Dec. 251.

<sup>11</sup> Engel v. Ayer 85 Me. 448; Wood v. Boyd, 146 Mass. 176; Emerson v. Mooney, 50 N. H. 315, 3 Gray's Cas. 579. As to the necessity of the use of the word "heirs" in reservations, see post, 383.

<sup>12</sup> Co. Litt. 9b; 2 Bl. Comm. 109, 4 Kent, Comm. 7; Wilcox v. Wheeler, 47 N. H. 488; Congregational Society of Halifax v. Stark, 34 Vt. 243, Finch's Cas. 509; Wilkesbarre v. Wyoming Historical Society, 134 Pa. St. 616. The word "successors" is, however, generally used, and it is necessary in case of a grant to a corpora-

In this country, the requirement of the word "heirs" has never been applied to conveyances to trustees, the rule being that, if a fee-simple estate in a trustee be necessary in order to enable the trustee to carry out the purposes of the trust, he will be given such an estate, though the conveyance is otherwise insufficient to pass such an estate; and, conversely, if a less estate than a fee simple in the trustee be necessary, his estate will be so limited, in spite of the language of the instrument.<sup>13</sup> Accordingly, a trustee has a fee-simple estate, without the use of the word "heirs," when he is given a power of sale;<sup>14</sup> while he may have merely a chattel interest, though the word "heirs" is used, if he is merely to hold the estate for a short time to pay debts and legacies.<sup>15</sup> The word "heirs" is, however, as necessary in the case of a conveyance of an equitable estate in fee as in the case of a conveyance at common law to one other than a trustee.<sup>16</sup>

tion sole. Co. Litt. 9b; 2 Bl. Comm. 109; Overseers of Poor v. Sears, 22 Pick. (Mass.) 126.

<sup>13</sup> 1 Perry, Trusts, §§ 312-320; Wilcox v. Wheeler, 47 N. H. 488, Finch's Cas. 502; Newhall v. Wheeler, 7 Mass. 189, 3 Gray's Cas. 396; Doe v. Considine, 6 Wall. (U. S.) 458; West v. Fitz, 109 Ill. 425; Gould v. Lamb, 11 Metc. (Mass.) 84, 45 Am. Dec. 187; North v. Philbrook, 34 Me. 532; Hawkins v. Chapman, 36 Md. 83; Bennett v. Garlock, 79 N. Y. 302, 35 Am. Rep. 517.

<sup>14</sup> Neilson v. Lagow, 12 How. (U. S.) 98; Angell v. Rosenbury, 12 Mich. 241, 266.

<sup>15</sup> 1 Perry, Trusts, § 316.

In England, in deeds, as distinguished from wills, the presence or absence of the word "heirs" has generally the same effect in case of a conveyance to trustees as when made to others. 1 Perry, Trusts, § 319; Lewis v. Rees, 3 Kay & J. 132, 3 Gray's Cas. 389.

<sup>16</sup> Lewin, Trusts (9th Ed.) 114, and cases cited; Lucas v. Brandreth, 28 Beav. 274; McElroy v. McElroy, 113 Mass. 509; Nelson v. Davis, 35 Ind. 474.

In Fisher v. Fields, 10 Johns. (N. Y.) 495, Kent, U. J., stated that the word "heirs" was not necessary to create an equitable fee simple. The authorities cited by him in support of this view were cases either of devise, or of decisions as to the estate of the trustee, not of the cestui que trust. The actual decision was,

— Statutory changes of rule.

In this country, the necessity of the use of the word "heirs" to create a fee simple by deed has been generally recognized, in the absence of any statutory provision to the contrary.<sup>17</sup> But in many of the states the rule has been abolished by statutes dispensing with the necessity of the word, or providing in effect that a deed shall be presumed to convey a fee simple, or whatever estate the grantor has, unless a contrary intention plainly appear;<sup>18</sup> and in England it is now provided that the use of the words "in fee simple" without the word "heirs" shall be sufficient to convey a fee-simple estate.<sup>19</sup>

however, merely that a soldier's bounty-land warrant could be assigned so as to vest an absolute interest in the assignee, without the use of the word "heirs," which seems to be unquestionably correct. Of course, the word "heirs" is not necessary in the creation of an implied, as distinguished from an express, trust.

<sup>17</sup> *Foster v. Joice*, 3 Wash. C. C. 498, Fed. Cas. No. 4,974; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377; *Hoffsass v. Mann*, 74 Md. 400; *Reaume v. Chambers*, 22 Mo. 36; *Buffum v. Hutchinson*, 1 Allen (Mass.) 58; *Claffin v. Boston & Albany R. Co.*, 157 Mass. 489; *Melick v. Pidcock*, 44 N. J. Eq. 525, 540, 6 Am. St. Rep. 901; *Anderson v. Logan*, 105 N. C. 266; *Mattocks v. Brown*, 103 Pa. St. 16; *Jordan v. Neece*, 36 S. C. 295, 31 Am. St. Rep. 869.

Contra in New Hampshire. *Cole v. Lake Co.*, 54 N. H. 242, 379, Finch's Cas. 489.

<sup>18</sup> 2 Sharswood & B. Lead. Cas. Real Prop. 56; 1 Stimson's Am. St. Law, § 1474.

"It would seem that technical words of limitation are still required to pass a fee in Maine, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, South Carolina, Florida, Ohio, and Wyoming." Finch's Cas. 489.

The statutory abolition of the rule does not, of course, affect deeds made before the passage of the statute, and consequently, even where it is abolished, there is still frequent occasion for its application in the examination of titles extending back of the date of the particular statute.

<sup>19</sup> 44 & 45 Vict. c. 41 (Conveyancing Act 1881) § 51. See Challin. Real Prop. 171.

## — (b) In will.

In the case of a devise of land, it has always been held that, even in the absence of the word "heirs," other words in the will showing an intention to devise a fee simple are sufficient to pass such an estate.<sup>20</sup> It has accordingly been held that, unless a contrary intention appear, a devise of one's "estate" located at a certain place,<sup>21</sup> or of "all" his "estate,"<sup>22</sup> or of his "property," with reference to particular land or to the testator's possessions generally,<sup>23</sup> though without the word "heirs" or other words of limitation, will vest a fee simple in the devisee; such expressions being regarded as descriptive of the quantity of interest intended to be conveyed. The same effect is given to a devise to a person "in fee simple," or "forever,"<sup>24</sup> or to a devise without words of limitation, with an absolute power of disposition in the devisee,<sup>25</sup> and to such a devise with merely a charge or duty imposed on the devisee personally in regard to the payment of money, to enable him to discharge which an estate for life might not be sufficient, though not if the charge is imposed on the land alone.<sup>26</sup>

<sup>20</sup> Co. Litt. 9b; 2 Bl. Comm. 108; *Wright v. Denn*, 10 Wheat. (U. S.) 204; *Robinson v. Randolph*, 21 Fla. 629.

<sup>21</sup> *Lambert's Lessee v. Paine*, 3 Cranch (U. S.) 97; *Leland v. Adams*, 9 Gray (Mass.) 171; *Robinson v. Randolph*, 21 Fla. 629.

<sup>22</sup> *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185; *Forsaith v. Clark*, 21 N. H. 409.

<sup>23</sup> *Lincoln v. Lincoln*, 107 Mass. 590; *Fogg v. Clark*, 1 N. H. 163; *Foster v. Stewart*, 18 Pa. St. 23; *Arnold v. Lincoln*, 8 R. I. 324.

So in the case of a devise of all his "real and personal property." *Morrison v. Semple*, 6 Bin. (Pa.) 94, *Finch's Cas.* 514.

<sup>24</sup> Co. Litt. 9b; 2 Bl. Comm. 108.

<sup>25</sup> 2 Jarman, Wills, 1131, *American notes*; 4 Kent, Comm. 319; *Terry v. Wiggins*, 47 N. Y. 512; *Markillie v. Ragland*, 77 Ill. 98; *Burbank v. Whitney*, 24 Pick. (Mass.) 146; *Kelley v. Meins*, 135 Mass. 231; *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. St. 219.

<sup>26</sup> 6 Cruise's Dig. tit. 38, c. 13, §§ 26-34; 2 Jarman, Wills, 1131;

From the character of these decisions, it would appear that the courts are, even in the absence of any statute on the subject, solicitous to seize on any indication of intention to give the devisee an estate in fee simple.<sup>27</sup> But the intention must, in the absence of a statute changing the rule, appear in some way on the face of the will, and only a life estate will pass if there is no expression from which such intention can be inferred.<sup>28</sup> And it is sometimes said that there must be words from which an intention to pass a fee may necessarily be implied.<sup>29</sup>

The rule which prevails in the case of deeds, that an estate conveyed to a trustee will be measured by the necessities of the trust, regardless of the presence or absence of words of inheritance, applies *a fortiori* in the case of wills.<sup>30</sup>

— — Statutory provisions.

In England and most of the states there is now a statute changing the rule applicable to wills, and providing that a devise of land shall pass or be construed to pass a fee simple, or all the testator's interest in the land, unless a contrary intention appear from the words of the will;<sup>31</sup> the presump-

Wright v. Denn, 10 Wheat. (U. S.) 204, 231; Jackson v. Bull, 10 Johns. (N. Y.) 148; Funk v. Eggleston, 92 Ill. 515; Parker v. Parker, 5 Metc. (Mass.) 134; Snyder v. Nesbitt, 77 Md. 576; King v. Cole, 6 R. I. 584.

<sup>27</sup> For numerous applications of this principle in favor of the devisee, see 2 Sharswood & B. Lead. Cas. Real Prop. 57-73.

<sup>28</sup> Jackson v. Wells, 9 Johns. (N. Y.) 222, Finch's Cas. 518; and see cases above cited.

<sup>29</sup> Wheaton v. Andress, 23 Wend. (N. Y.) 453, Finch's Cas. 516; Goodright v. Barron, 11 East, 220.

<sup>30</sup> Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Steacy v. Rice, 27 Pa. St. 75, 67 Am. Dec. 447; Ellis v. Fisher, 3 Sneed (Tenn.) 231, 65 Am. Dec. 52.

<sup>31</sup> 2 Jarman, Wills, 1135; 1 Stimson's Am. St. Law, § 2808; 2 Sharswood & B. Lead. Cas. Real Prop. 70.

"All the states except Connecticut and Florida have shifted the presumption by statutory enactment." Finch's Cas. 518.



tion which formerly obtained that only a life estate was intended to pass, unless the contrary appeared, being thus reversed.<sup>23</sup>

### § 21. Incidents of estate—Inheritance.

On the death of a tenant in fee simple without having made a will, the estate passes to his issue, if he has any, and, if he die without issue, it passes to his parents or collateral relations, according to the rules of descent.<sup>24</sup>

#### — Alienation.

The most important quality of an estate in fee simple is the approximately absolute freedom of alienation enjoyed by the owner, a power which has been of somewhat gradual growth. The power of alienation by conveyance *inter vivos* was secured to all owners of the fee by the statute of *Quia Emptores*, the purpose and operation of which has been previously explained;<sup>25</sup> and that of alienation by devise or will was secured by various statutes, of which the Statute of Wills, passed in the reign of Henry VIII., effected the most important and far-reaching change in this connection.<sup>26</sup> This power of alienation is considered as such an essential characteristic of an estate in fee simple that any attempted restriction of an absolute character upon the power is null and void.<sup>27</sup>

<sup>23</sup> 4 Kent, Comm. 537, 538, and notes. See *McConnel v. Smith*, 23 Ill. 611; *Baldwin v. Bean*, 59 Me. 481; *Shirey v. Postlethwaite*, 72 Pa. St. 39.

Such is the effect of the English statute of wills, passed in 1537 (1 Vict. c. 26). 2 Jarman, Wills, 1185.

<sup>25</sup> Litt. §§ 1, 2; Williams, Real Prop. 60. See, as to rules of descent, post, §§ 425-435.

<sup>26</sup> See ante, § 12.

<sup>27</sup> Williams, Real Prop. 61 et seq.; Challis, Real Prop. 162, 174. See post, § 409.

<sup>28</sup> See post, § 500.

Since an estate in fee simple comprises the entire interest and property in the land, it follows that one who grants a fee simple thereby grants away his whole interest in the property.<sup>37</sup> But a tenant in fee simple may dispose of part of his interest without disposing of all, and may accordingly grant or create any inferior estate or interest.<sup>38</sup>

— Liability for debts.

The estate is liable to be sold under execution for the debts of the owner, and after his death it may be sold for this purpose by judicial decree.<sup>39</sup>

— Rights of user.

Even a tenant in fee simple cannot, as will hereafter appear,<sup>40</sup> so use his property as to create what is called a "nuisance," but otherwise he may, provided he has the right of possession, make any use whatever of the land, and may cut timber, open and work mines, and injure or destroy any parts of the property, as he may please.<sup>41</sup>

— Dower and curtesy.

The estate is subject to dower in favor of the wife, and to curtesy in favor of the husband, of the tenant in fee.<sup>42</sup>

— Eminent domain and escheat.

This estate, like all others, is subject to the exercise of the

<sup>37</sup> 1 Cruise's Dig. tit. 1, § 41; 1 Leake, 33; Challis, Real Prop. 64.

<sup>38</sup> 1 Cruise's Dig. tit. 1, § 50; Williams, Real Prop. 79; Challis, Real Prop. 50 et seq.

<sup>39</sup> See post, §§ 460, 462.

<sup>40</sup> See post, §§ 295-303.

<sup>41</sup> 1 Leake, 15; Williams, Real Prop. 79; Duke of Norfolk v. Arbutnot, 4 C. P. Div. 290, 306; Matthews v. Hudson, 31 Ga. 129, 12 Am. St. Rep. 305. See post, § 246.

<sup>42</sup> See post, §§ 179-212.

power of eminent domain; that is, it may be taken for public or *quasi* public purposes under authority of the state,<sup>43</sup> and it is liable to escheat to the state in certain cases, as when the tenant dies intestate and without heirs.<sup>44</sup>

#### I (B). ESTATE IN FEE TAIL.

An estate in fee tail or estate tail is an estate of inheritance which, if left to itself, will, after the death of the first owner, pass to his lawful issue, including children, grandchildren, and more remote descendants, so long as his posterity endures, in the regular order of descent from such owner, and will terminate on the failure of such posterity. The estate derives its existence from the statute *De Donis Conditionalibus*. It has been abolished or modified in many of the states of this country.

Estate tails are termed "estates tail general" or "estates tail special," accordingly as they may be limited to the heirs of the body of the donee generally, or to the issue by a particular marriage. They may also be limited to issue of a particular sex, in which case they are termed estates "in tail male" or "in tail female."

To create an estate in fee tail by deed it is necessary to use the word "heirs," with other words restricting the limitation to lineal descendants of the grantee. The estate can be created in lands and other inheritable interests of a real nature, but not in terms for years or other personal property.

The incidents of an estate tail are, apart from descent, the same as those of a fee simple, except that—

(1) At common law, the estate could not be aliened for a period longer than the tenant's life.

(2) It cannot be devised.

(3) It is liable for the tenant's debts only to the extent of his life interest.

Each tenant, after the first donee, takes as a substituted purchaser under the donor, rather than by descent.

<sup>43</sup> See post, §§ 471-474.

<sup>44</sup> See post, § 458.

## § 23. Origin and history.

In the time of Bracton, who wrote about the middle of the thirteenth century, if an estate was given to a man and the heirs of his body, or to a man and his sons, an estate was created which passed to the donee's descendants according to the terms of the gift, and if no such issue were born, then the property reverted to the donor. In case, however, the donee had heirs of the body, and then made an alienation of the land, the heirs named would be bound to warranty,—that is, to uphold the gift,—and consequently it came to be considered that, as stated by that writer, while the donee had a life estate only until the birth of issue, upon that occurring the donee could alienate and convey an estate in fee simple, might forfeit the property for treason, and could charge it with rents or other incumbrances, which would bind his heirs. It was thus in effect decided that a gift to one and the heirs of his body was the same as a gift to him and his heirs, if he had heirs of his body, and the estate was consequently called a conditional fee or fee simple conditional, as being for most purposes equivalent to a fee-simple estate, conditioned on the birth of issue. If, however, the donee named died without alienating the property, it passed to his heirs of the body, according to the terms of the gift, and on the failure of such heirs it reverted to the donor, in view of which latter contingency the donee of such an estate usually took care to alienate the property as soon as issue was born, afterwards repurchasing it to hold in fee simple absolute.<sup>45</sup> This construction placed upon gifts of such a character was calculated to materially injure the interests of the great land owners, partly because it tended to prevent the perpetuation of property in their own families, and partly because the feudal lord was thereby deprived of the reversionary interest in case of

<sup>45</sup> Co. Litt. 19a; 2 Bl. Comm. 110; Digby, *Hist. Real Prop.* 161, 220, et seq.; Challis, *Real Prop.* 209 et seq.

the death of the donee without heirs of the body; this reversion being obviously much more valuable in the case of a fee restricted to such heirs than in the case of an absolute fee simple.

It was to avoid these results that the statute *De Donis Conditionalibus*<sup>46</sup> was passed, it being thereby provided, after a recital of the evils sought to be avoided, that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from henceforth observed, so that they to whom the land was given should have no power to alienate the land, but that it should revert to the donor or his heirs if issue failed, either by an absolute default of issue, or, after the birth of issue, by its subsequent extinction.<sup>47</sup> The primary effect of this statute was to prevent the alienation of the property by the donee so as to bar his issue, or to affect the grantor's right of reverter, and it was given the following interpretation by the courts: The donee who, before the statute, had a conditional fee which became absolute on the birth of issue, now had a new kind of estate, which descended to such heirs as were named in the gift; and this estate being considered smaller than a fee simple, which descends to the heirs generally, was called an "estate in fee tail," or an "estate tail," it being a portion of an estate *taille*—cut off—from the fee. On the other hand, the donor, who, before the statute, had a mere possibility of reverter in case of the failure of the donee's issue before alienation by the donee, after the statute had an estate in fee simple in reversion expectant on the determination of the estate tail.<sup>48</sup>

<sup>46</sup> 13 Edw. I. c. 1 (1285), the whole statute being also known as that of Westminster II.

<sup>47</sup> Challis, Real Prop. 231; Digby, Hist. Real Prop. 228; Williams, Real Prop. 43.

<sup>48</sup> 2 Bl. Comm. 112; 4 Kent, Comm. 12; Digby, Hist. Real Prop. 228; Williams, Real Prop. 43 et seq.; 1 Leake, 37.

## § 23. Classification.

An estate tail may, by the terms of its creation, be an estate tail general or an estate tail special. An estate tail general arises when the estate is given to a man and the heirs of his body generally. An estate tail special arises where the estate is limited to the heirs of the donee's body by a certain wife, whether by a limitation to that effect on a gift to him, or by a gift to two persons married or capable of marriage, and the heirs of their bodies.<sup>49</sup> Moreover, either an estate tail general or an estate tail special may be restricted to male or female heirs, it being then termed an "estate tail male," or an "estate tail female," as the case may be. In the case of an estate tail male, not only are the female issue excluded, but also the male issue of female issue, it being necessary to trace the descent through males, and the same rule applies, *mutatis mutandis*, in the case of an estate tail female.<sup>50</sup>

## § 24. Statutory changes.

In many of the states of this country, an estate tail such as was formerly recognized no longer exists, it having in some states been changed by statute, and in others abolished.<sup>51</sup> In

<sup>49</sup> Litt. §§ 14, 16; 2 Bl. Comm. 113; Challin, Real Prop. 233.

<sup>50</sup> Litt. §§ 21-25; Co. Litt. 377a; 2 Bl. Comm. 114; 1 Leake, 163.

To this classification is sometimes added "quasi entail," which is an estate pur autre vie granted to a man and the heirs of his body. The interest so granted is not an estate tail, for the statute De Donis applies only where the subject of the entail is an estate of inheritance, but it partakes so far of the nature of an estate tail that it will go to the heirs of the body as special occupants during the life of the cestui que vie in jurisdictions where special occupancy is recognized. See post, § 33.

Estate tail after possibility of issue extinct is also sometimes added, but this is properly a life estate, and is so treated. See post, § 34.

<sup>51</sup> 4 Kent, Comm. 14; "Amson's Am. St. Law, § 1313: 1 Sharswood & B. Lead. Cas. Prop. 111 et seq. See for some ju- (56)

several states, as in New York, an estate tail is changed into a fee simple in the grantee, the first taker, as he is called.<sup>53</sup> In others, the first taker has an estate tail, but, after his death, the estate becomes one in fee simple in his issue,<sup>53</sup> and in other states the donee is given a life estate with remainder to his issue, or, sometimes, to his heir at common law.<sup>54</sup> But, whatever form such statutes abolishing or modifying estates tail as they formerly existed may take, in order that they may be properly applied, a knowledge of the character of the estate and the mode of its creation is absolutely necessary, and in few, if any, jurisdictions can the subject be regarded as one of purely historical importance.

### § 25. Words of limitation.

The most appropriate mode of creating a fee tail are by a

dicious remarks upon the legislation on this subject, 1 Dembits, Land Titles, 115-125.

In South Carolina, the statute *De Donis* has never been in force, and conditional fees exist there as at common law. *Burnett v. Burnett*, 17 S. C. 545, *Finch's Cas.* 551; *Powers v. Bullwinkle*, 33 S. C. 293. In Mississippi, likewise, the statute has never been in force. *Jordan v. Roach*, 32 Miss. 481, 617. In New Hampshire, it was repealed by implication at an early day, and there the words "heirs of the body" create neither a conditional fee nor an estate tail, but have no effect whatever. *Jewell v. Warner*, 35 N. H. 176. In *Pierson v. Lane*, 60 Iowa, 60, it was decided that the statute *De Donis* was not in force in Iowa, and the opinion, by implication, favors the view that a conditional estate at common law exists there.

<sup>53</sup> See, as to the effect of such statutes, *Smith v. Greer*, 88 Ala. 414; *Ewing v. Shropshire*, 80 Ga. 374; *Posey's Lessee v. Budd*, 21 Md. 477; *Wendell v. Crandall*, 1 N. Y. 491; *McIlhinny v. McIlhinny*, 137 Ind. 411, 45 Am. St. Rep. 186; *Nellis v. Nellis*, 99 N. Y. 505; *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30; *Parkhurst v. Harrower*, 142 Pa. St. 432, 24 Am. St. Rep. 507.

<sup>54</sup> See *St. John v. Dann*, 66 Conn. 401; *Phillipps v. Herron*, 55 Ohio St. 478; *Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 115.

<sup>55</sup> See *Horsley v. Hilburn*, 44 Ark. 458; *Doty v. Teller*, 54 N. J. Law, 163, 33 Am. St. Rep. 670; *Wood v. Kice*, 103 Mo. 329; *Lehn-dorf v. Cope*, 122 Ill. 317.

conveyance or devise "to A. and the heirs of his body." As the word "heirs" is necessary in a conveyance to create a fee simple, so it is necessary to create a fee tail, owing to the derivation of this estate from a conditional fee, and consequently a grant to a man and "the issue of his body," to him "and his seed," or to him "and his children," gives an estate for life only.<sup>55</sup> The words "of his body" may, however, be supplied by other words of procreation, restraining the general import of the word "heirs" to the lineal descendants of the grantee.<sup>56</sup>

In a will, as technical words are unnecessary to create a fee simple, so they are unnecessary to create a fee tail, and, accordingly, any words which indicate an intention to create an estate which shall pass to the lineal descendants of the grantee are sufficient.<sup>57</sup> Accordingly, a devise "to A. or the heirs of his body," or "to A. and the heir of his body" (in the singular), gives an estate tail to A.;<sup>58</sup> and the same effect has been given to a devise to one and "to his heirs lawfully

<sup>55</sup> Co. Litt. 20a; 2 Bl. Comm. 115; Challis, Real Prop. 235; 4 Kent, Comm. 6; Adams v. Ross, 30 N. J. Law, 505, Finch's Cas. 482.

An estate tail may be created by a limitation merely "to the heirs of the body of A.," provided A. be dead when the limitation takes effect. The heir then takes as first purchaser, and the estate passes, after the heir's death, to the next heirs of the body of A. as if the limitation had been to "A. and to the heirs of his body." Mandeville's Case, Co. Litt. 26b, 3 Gray's Cas. 399; Vernon v. Wright, 7 H. L. Cas. 35.

<sup>56</sup> Co. Litt. 20b; Challis, Real Prop. 236; 4 Cruise's Dig. tit. 32, c. 21, § 12 et seq.; Doe v. Smeddle, 2 Barn. & Ald. 126, 3 Gray's Cas. 399; Nightingale v. Burrell, 15 Pick. (Mass.) 104; Bundy v. Bundy, 33 N. Y. 410; 15 Am. & Eng. Enc. Law, 323.

<sup>57</sup> 2 Bl. Comm. 115; 2 Jarman, Wills, 1169; 6 Cruise's Dig. tit. 38, c. 12, § 1; Doty v. Teller, 54 N. J. Law, 163, 33 Am. St. Rep. 670; Cuffee v. Milk, 10 Metc. (Mass.) 366; Hall's Lessee v. Vandegrift, 3 Bin. (Pa.) 374.

<sup>58</sup> 1 Leake, 175.



begotten;"<sup>59</sup> and to a devise to a man and "his male heirs" or "heirs male."<sup>60</sup>

—— Use of word "children."

As stated in the preceding paragraph, a deed to A. "and his children" cannot, at common law, convey an estate tail, and the word "children" can have no effect as a word of limitation defining the interest A. is to take, and must take effect, if at all, as a word of purchase, generally giving the children of A. living at the time of the grant a joint interest with A. in the property.<sup>61</sup> But in the case of a devise to "A. and his

<sup>59</sup> Hall's Lessee v. Vandegrift, 3 Bin. (Pa.) 375; Co. Litt. 20b, Hargrave's note; 1 Leake, 175; 6 Cruise's Dig. tit. 38, c. 12, § 8.

<sup>60</sup> Co. Litt. 27a; Denn v. Slater, 5 Term R. 335; Den v. Fogg, 3 N. J. Law, 335; Cooper v. Cooper, 6 R. I. 261.

In a deed, on the other hand, a limitation to "A. and his heirs male" creates a fee simple, since a man "cannot institute a new kind of inheritance not allowed by law." Litt. § 31; Co. Litt. 13a, 27a; Challis, Real Prop. 210.

<sup>61</sup> Elphinstone, Interp. Deeds, 318; Moore v. Lee, 105 Ala. 435; Dean v. Long, 122 Ill. 447; Faloon v. Simshauser, 130 Ill. 649; Melshelmer v. Gross, 53 Pa. St. 412; Brenham v. Davidson, 51 Cal. 352; Loyless v. Blackshear, 43 Ga. 327; Bullock v. Caldwell, 81 Ky. 566; Allen v. Hoyt, 5 Metc. (Mass.) 324; Heath v. Heath, 114 N. C. 547; Livingston v. Livingston, 84 Tenn. 448.

In some cases the word "children" in a conveyance "to A. and his children" is construed as a word of purchase giving the children a remainder, and not joint interests with A. Blair v. Osborne, 84 N. C. 417; Wolford v. Morgenthal, 91 Pa. St. 30; Coursey v. Davis, 46 Pa. St. 25, 84 Am. Dec. 519; Hague v. Hague, 161 Pa. St. 643; Beacroft v. Strawn, 67 Ill. 28. But by the weight of authority, such a conveyance, without any indication of an intention to the contrary, gives joint interests to A. and the children then living. See cases in preceding paragraph of note. See, also, 2 Jarman, Wills, 1239; 2 Underhill, Wills, § 583. As to the Kentucky rule, see 1 Dembitz, Land Titles, 184.

Where the children take a joint estate with their parent, only those living at the date of the deed can take, and in order to provide for unborn children it is necessary to create a trust. King v. Rea, 56 Ind. 1, 15; Heath v. Heath, 114 N. C. 547. Contra, Mell-

children," as distinct from a deed, while there is a presumption that the word "children" is one of purchase, and not of limitation,<sup>62</sup> this presumption is not conclusive; and if the context shows that the word was used in the sense of heirs of the body, the devise will create an estate tail.<sup>63</sup> An intention that the word shall take effect as a word of limitation, and not as one of purchase, is presumed from the fact that A. has no children at the time of the devise, since otherwise his children would take nothing, and in such case, at common law, A. takes an estate tail, this being the "rule in Wild's Case," frequently referred to.<sup>64</sup>

*champ v. Mellichamp*, 28 S. C. 125. Compare *Dean v. Long*, 122 Ill. 447. If, however, the deed is construed as giving a remainder to the children, a child born after the date of the deed, but before the remainder vests, may take with the others. *Hague v. Hague*, 161 Pa. St. 643, 41 Am. St. Rep. 900; *Elmore v. Mustin*, 28 Ala. 309; *King v. Rea*, 56 Ind. 1, 15.

<sup>62</sup> 2 Jarman, Wills, 1240; 1 Leake, 187; *Byng v. Byng*, 10 H. L. Cas. 171; *Echols v. Jordan*, 39 Ala. 24; *Guthrie's Appeal*, 37 Pa. St. 10; *Kay v. Connor*, 8 Humph. (Tenn.) 624, 49 Am. Dec. 690; *Annable v. Patch*, 3 Pick. (Mass.) 360; *Chrystie v. Phyfe*, 19 N. Y. 344; *Moon v. Stone's Ex'r*, 19 Grat. (Va.) 130, 328; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *In re McIntosh's Estate*, 158 Pa. St. 528.

<sup>63</sup> 2 Jarman, Wills, 1235; *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763; *Annable v. Patch*, 3 Pick. (Mass.) 360; *Mason v. Ammon*, 117 Pa. St. 127; *Roper v. Roper*, L. R. 3 C. P. 32. See *Smith v. Fox's Adm'r*, 82 Va. 765.

<sup>64</sup> *Wild's Case*, 6 Coke, 16; *Clifford v. Koe*, 5 App. Cas. 447; *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763; *Vanzant v. Morris*, 25 Ala. 285; *Dean v. Long*, 122 Ill. 449; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Chrystie v. Phyfe*, 19 N. Y. 344; *Clark v. Baker*, 3 Serg. & R. (Pa.) 470; *Butler v. Ralston*, 69 Ga. 485; *Biggs v. McCarty*, 86 Ind. 352.

In some states, the decisions are adverse to the acceptance of the rule in *Wild's Case*. See *Carr v. Estill*, 16 B. Mon. (Ky.) 309; *Fales v. Currier*, 55 N. Y. 392; *Mosby v. Paul's Adm'r*, 88 Va. 533.

The rule is one of presumption merely, and does not apply if a different intention is apparent. 2 Jarman, Wills, 1235 et seq.

In those states where, by statute, a fee tail has been converted into a fee simple, or otherwise changed, the devisee will, in such case, take a fee simple or such other estate as the statute prescribes to take the place of a fee tail.<sup>65</sup>

— Use of word "issue."

The word "issue," though in its popular sense meaning children, is used technically as meaning lineal descendants to any degree, and is so construed except when restrained by the context.<sup>66</sup> Since the only way in which legal effect can be given to the word thus indefinitely extended in meaning is to regard it as equivalent to "heirs of the body," it will *prima facie* receive such construction, and a devise to A. and "his issue" will create an estate tail in A.<sup>67</sup> If, however, it appear from the context to be restricted to issue of a certain degree, as children, or to issue existing at a given time, or to have some other meaning inconsistent with an estate tail, it must be taken as a word of purchase, designating the particular devisees.<sup>68</sup>

According to the English authorities, in determining

<sup>65</sup> *Butler v. Ralston*, 69 Ga. 485; *Moore v. Gary*, 149 Ind. 51; *Silliman v. Whitaker*, 119 N. C. 89.

<sup>66</sup> 2 Jarman, Wills, 946; 17 Am. & Eng. Enc. Law (2d Ed.) 542; *In re Estate of Cavarly*, 119 Cal. 496; *Hills v. Barnard*, 152 Mass. 67; *Gaboury v. McGovern*, 74 Ga. 133; *Drake v. Drake*, 134 N. Y. 224; *Wistar v. Scott*, 105 Pa. St. 200, 214, 51 Am. Rep. 197; *Gammell v. Ernst*, 19 R. I. 292.

<sup>67</sup> 1 Leake, 180; 2 Jarman, Wills, 1258; 17 Am. & Eng. Enc. Law (2d Ed.) 543, 548; *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763; *Allen v. Craft*, 109 Ind. 476; *Wheatland v. Dodge*, 10 Metc. (Mass.) 502; *Thomas v. Higgins*, 47 Md. 439; *Drake v. Drake*, 134 N. Y. 224; *Robins v. Quinliven*, 79 Pa. St. 333; *Taylor v. Taylor*, 63 Pa. St. 431, 3 Am. Rep. 565.

<sup>68</sup> 1 Leake, 180; 2 Jarman, Wills, 1259; *Gaboury v. McGovern*, 74 Ga. 133; *Allen v. Craft*, 109 Ind. 482; *McPherson v. Snowden*, 19 Md. 197; *King v. Savage*, 121 Mass. 303; *Palmer v. Horn*, 84 N. Y. 516; *Carroll v. Burns*, 103 Pa. St. 386; *Gammell v. Ernst*, 19 R. I. 292.

whether the word "issue" is to be taken in the sense of heirs of the body, the fact that there are issue of the devisee living at the time of the devise is immaterial.<sup>69</sup> In this country a different view is sometimes suggested, to the effect that a joint estate will be created if there are issue actually in being.<sup>70</sup>

In the case of a deed, as distinguished from a devise, to "A. and his issue," according to the common-law rule, stated above, requiring the word "heirs" to create an estate tail, the deed cannot convey an estate tail, and consequently the word "issue," in order to have any effect, must be taken as a word of purchase giving to the issue of A. living at the time of the deed a joint interest in the property, or a remainder after a life estate in A.,<sup>71</sup> while, if there are no issue then living, the grantee would take a life estate merely, and the issue afterwards born would take nothing.<sup>72</sup> Under the modern statutes, however, dispensing with the word "heirs" in the creation of a fee simple, A. would apparently take a fee simple in the latter case.

— Failure of issue.

Where there is a devise to "A.," or to "A. and his heirs," with a devise over to other persons in case A. dies "without issue," or "on failure of issue," or equivalent expressions are used, if the failure of issue referred to is an "indefinite"

<sup>69</sup> In other words, according to these authorities, the rule which applies in the case of a devise to A. and his children (rule in *Wild's Case*) does not apply to a devise to A. and his issue. See 2 *Jarman, Wills*, 1258.

<sup>70</sup> 17 *Am. & Eng. Enc. Law* (2d Ed.) 550; *Clark v. Baker*, 3 *Serg. & R.* (Pa.) 470.

<sup>71</sup> *Elphinstone, Interp. Deeds*, 318; *Doe v. Collis*, 4 *Term R.* 299; *McIlhinny v. McIlhinny*, 137 *Ind.* 411, 45 *Am. St. Rep.* 136, 24 *L. R. A.* 489; *Price v. Sisson*, 13 *N. J. Eq.* 168; *Thomas v. Higgins*, 47 *Md.* 439.

<sup>72</sup> *Makepeace v. Fletcher*, 2 *Comyn*, 457; *Wheeler v. Duke*, 1 *Crompt. & M.* 216. See, also, *Bradford v. Griffin*, 40 *S. C.* 468.

failure of issue, then, by a rule of the common law, A. will take an estate tail, it being regarded as a limitation to A. and his issue. By an "indefinite" failure of issue is meant a failure of issue which may occur at any time in the future, and not a failure at the time of the death of the first taker, or at any other fixed time, and the presumption is that the failure of issue on which the devise over is to take effect is such an indefinite failure of issue.<sup>73</sup> Where, by statute, a

<sup>73</sup> 2 Jarman, Wills, 1320; 1 Leake, 181; 4 Kent, Comm. 276; 17 Am. & Eng. Enc. Law (2d Ed.) 575; 2 Sharswood & B. Lead. Cas. Real Prop. 98 et seq.; Chadock v. Cowley, Cro. Jac. 695, 5 Gray's Cas. 253; Brice v. Smith, Willes, 1; Barber v. Pittsburgh, Ft. W. & C. Ry. Co., 166 U. S. 83; Turrill v. Northrop, 51 Conn. 33; Richardson v. Richardson, 80 Me. 585; Allen v. Trustees of Ashley School Fund, 103 Mass. 262; Taylor v. Taylor, 63 Pa. St. 481; Nes v. Ramsay, 155 Pa. St. 628; Burrough v. Foster, 6 R. I. 534; Riggs v. Sally, 15 Me. 408; Morehouse v. Cotheal, 21 N. J. Law, 480; Michelberger v. Barnitz, 9 Watts (Pa.) 447. For a large number of citations to the same effect, see 17 Am. & Eng. Enc. Law, 558.

It has been held that a limitation over if the donee die "without leaving issue," while it presumptively means an indefinite failure of issue in the case of real property, in the case of personal property it presumptively means a definite failure of issue; and this, even when the two classes of property are disposed of by the same gift, so that the donee may take an estate tail in the real property, and a life interest merely in the personalty. Forth v. Chapman, 1 P. Wms. 663, 5 Gray's Cas. 256. The distinction as to the effect of the word "leaving" in gifts of realty and personalty, as stated in Forth v. Chapman, supra, was adopted in England in numerous cases (2 Jarman, Wills, 1324), and the rule of that case as to its effect in the case of personalty has been generally adopted in this country (2 Jarman, Wills, 1320, Bigelow's notes).

The courts will generally be more ready to construe the instrument as intending an indefinite failure of issue in the case of real property than in that of personal property. 2 Jarman, Wills, 1326; 4 Kent, Comm. 282, note a; 17 Am. & Eng. Enc. Law (2d Ed.) 561.

If a devise over is contingent upon the death of the first devisee "under the age of twenty-one and without issue," a definite, and not

fee tail is changed into a fee simple, or the first taker is given a life estate only, such a limitation will create a fee simple or life estate accordingly, unless the statute provides otherwise.<sup>74</sup> A devise over on failure of issue may, however, be shown by the context of the will to refer to a definite failure of issue, and in such a case the estate created will be, not an estate tail, but a fee simple or life estate, according to the form of the limitation to the first devisee, without reference to the devise over.<sup>75</sup> And generally, at the present day, the tendency seems to be to lay hold of any expression in the instrument to show that the failure of issue referred to is not indefinite, but rather such as may occur at the first taker's death.<sup>76</sup>

an indefinite, failure of issue is intended. 2 Jarman, Wills, 1327, 17 Am. & Eng. Enc. Law (2d Ed.) 566.

In a deed, a limitation over on failure of issue will not, it seems, reduce a fee simple to a fee tail, unless the intent otherwise appears. Doe v. Smeaddle, 2 Barn. & Ald. 126, 3 Gray's Cas. 402; Olivant v. Wright, 9 Ch. Div. 646; Idle v. Cook, 1 P. Wms. 70; Elphinstone, Interp. Deeds, 250. But see Morgan v. Morgan, L. R. 10 Eq. 99, 3 Gray's Cas. 399; Lewis, Perpetuity, 180.

<sup>74</sup> Morehouse v. Cotheal, 21 N. J. Law, 480, 22 N. J. Law, 430; Robinson's Estate, 149 Pa. St. 418; Hill v. Burrow, 3 Call (Va.) 342; Hertz v. Abrahams, 110 Ga. 707. Contra in Illinois, Kentucky, and New Hampshire. Summers v. Babb, 127 Ill. 645; Deboe v. Lowen, 8 B. Mon. 616; Sale v. Crutchfield, 8 Bush, 636; Dennett v. Dennett, 43 N. H. 499. See Hood v. Dawson, 98 Ky. 285.

That the general rule applies in the case of a devise to A. simply, or to A. for life, with a devise over on the indefinite failure of issue, so as to enlarge the estate to an estate tail, in the same way as it applies to diminish a fee simple to a fee tail, see Willis v. Bucher, 3 Wash. C. C. 369, Fed. Cas. No. 17,769; Albee v. Carpenter, 12 Cush. (Mass.) 382; Nes v. Ramsay, 155 Pa. St. 632; Tinsley v. Jones, 13 Grat. (Va.) 289.

<sup>75</sup> 2 Jarman, Wills, 428; Pells v. Brown, Cro. Jac. 590, 5 Gray's Cas. 563; Roe v. Jeffery, 7 Term R. 589, 5 Gray's Cas. 259; Parkhurst v. Harrower, 142 Pa. St. 432; Whitcomb v. Taylor, 122 Mass. 243; Burrough v. Foster, 6 R. I. 534; Rothwell v. Jamison, 147 Mo. 615.

<sup>76</sup> 17 Am. & Eng. Enc. Law (2d Ed.) 560 et seq.; 2 Jarman, Wills, (64)

In a few states, a definite failure of issue, as a failure at the time of the death of the first taker, is always presumed to be intended, unless the contrary appears.<sup>77</sup> And in England and a number of the states there is a statutory provision to that effect, sometimes applying, in terms, to wills only, and not to deeds.<sup>78</sup>

§ 26. Things in which the estate may exist.

The statute *De Donis* describes the things on which it may operate as "tenements," and, as a general rule, all "hereditaments which savour of the realty" are regarded as tenements for this purpose. This includes land and things "of a real nature," such as profits from the land, or rents issuing therefrom.<sup>79</sup> Terms for years and personal chattels cannot be entailed, and such an attempted limitation will vest an absolute interest in the donee.<sup>80</sup>

1320, Am. notes, where Mr. Bigelow says: "It is apprehended that at the present day the construction which refers the words in question prima facie to the death of the first taker will, not only in the case of personalty, but also of realty, be favored generally in this country and adopted upon slight indications of intention, in so far as the courts find themselves unfettered by binding authority."

<sup>77</sup> *St. John v. Darm*, 66 Conn. 401; *Sale v. Crutchfield*, 3 Bush (Ky.) 636; *Parish's Heirs v. Ferris*, 6 Ohio St. 563. See 17 Am. & Eng. Enc. Law (2d Ed.) 559, and note 74, ante.

<sup>78</sup> Wills Act (1 Vict. c. 26, § 29 [1837]). 1 Stimson's Am. St. Law, § 1415; 1 Dembitz, Land Titles, 192; 17 Am. & Eng. Enc. Law (2d Ed.) 572.

<sup>79</sup> Co. Litt. 19b, 20a, and Hargrave's note, 120; 2 Bl. Comm. 113; Challis, Real Prop. 38.

<sup>80</sup> Co. Litt. 20a, Hargrave's note, 120; Gray, Perpetuities, § 647 note; 2 Jarman, Wills, 1366, and note.

Terms for years and personal chattels may, however, be in effect entailed for a limited period by limitations to one for life, with an executory interest in his issue living at his death. See Co. Litt. 20a, Hargrave's note, 120.

## § 27. Barring the entail.

After the statute *De Donis* began to operate by fixing the land in perpetuity in the line of issue named in the grant, the inconveniences of the restriction imposed under the authority of the statute were strongly felt,—farmers were deprived of their leases, creditors were defrauded of their debts, and latent entails were frequently produced to overthrow titles, while treason, it is said, was encouraged by the fact that the estate could not be forfeited for a period longer than the tenant's life. All classes of the community, except the great land owners, were thus interested in securing a repeal or modification of the statute, but, though repeated attempts were made in parliament to this end, they were always defeated.<sup>81</sup> Finally the judges, in pursuance of the policy which the courts have always favored, of promoting and preserving freedom of alienation, decided that a common recovery suffered by the tenant in tail was an effectual method of conveying the land, the power of alienation being thus restored. Recoveries and fines, which latter were subsequently also adopted for the purpose, were collusive and fictitious proceedings, brought against the tenant in tail, in which he suffered judgment to go against him, or a compromise was effected. The legality of barring an estate tail by a recovery is said to have been first recognized in "Taltarum's Case" (12 Edw. IV., A. D. 1473), though the matter had probably for some time engaged the attention of the judges.<sup>82</sup>

These modes of barring entails were in general use in England till they were abolished by a statute which expressly

<sup>81</sup> *Mildmay's Case*, 6 Coke, 40a, quoted in Digby, *Hist. Real Prop.* 251.

<sup>82</sup> 2 Bl. Comm. 117; Digby, *Hist. Real Prop.* 250 et seq.; Challis, *Real Prop.* 244; Williams, *Real Prop.* 44; 4 Kent, Comm. 14.

The pleadings in *Taltarum's Case* (Year Book, 12 Edw. IV., pl 25, f. 19) are given by Mr. Digby (pages 253-255), and it is explained, so far as capable of explanation, by Mr. Challis.



authorized a tenant in tail to alienate the land in fee simple, or otherwise, and thus bar the expectations of his issue, and also of the owner of the reversion.<sup>83</sup> In this country, fines and recoveries were recognized as a mode of barring entails in several of the colonies and states.<sup>84</sup> But at an early date statutes were passed in several states authorizing the tenant in tail to bar the entail by deed; and wherever the estate still exists unchanged by statute, a deed by the tenant in tail is sufficient to convey an estate in fee simple.<sup>85</sup>

### § 28. Incidents of estate.

The gradual withdrawal of the restraints on the alienation of estates tail has been considered above, but the statutes do not generally, if ever, authorize the tenant to bar the entail by will, and consequently the disability in this respect remains as at common law, and the estate cannot be devised.<sup>86</sup> Neither is the property liable for the debts of the tenant in tail for a period longer than his life, unless it is otherwise provided by statute.<sup>87</sup> As hereafter stated, the tenant may use the property without regard to the interests of the owner

<sup>83</sup> 3 & 4 Wm. IV. c. 74 (1833); Digby, *Hist. Real Prop.* 252; Challis, *Real Prop.* 236.

<sup>84</sup> See *Carroll's Lessee v. Maydwell*, 3 Har. & J. (Md.) 292; *Hawley v. Inhabitants of Northampton*, 8 Mass. 3, 5 Am. Dec. 66; *Frost v. Cloutman*, 7 N. H. 9, 26 Am. Dec. 723; *Roseboom v. Van Vechten*, 5 Denio (N. Y.) 414; *Lyle v. Richards*, 9 Serg. & R. (Pa.) 322.

<sup>85</sup> 1 Stimson's *Am. St. Law*, § 1313(c); 1 Washburn, *Real Prop.* 84, and note; 1 Sharswood & B. *Lead. Cas. Real Prop.* 109 et seq. See *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Howard v. Moale*, 2 Har. & J. (Md.) 249; *Riggs v. Sally*, 15 Me. 408; *Collamore v. Collamore*, 158 Mass. 74; *Lawrence v. Lawrence*, 105 Pa. St. 335; *Jillson v. Wilcox*, 7 R. I. 515.

<sup>86</sup> *Theological Seminary v. Wall*, 44 Pa. St. 353; *Laidler v. Young's Lessee*, 2 Har. & J. (Md.) 69; *Williams*, *Real Prop.* 56; *Co. Litt.* 111a.

<sup>87</sup> *Williams*, *Real Prop.* 58; 1 Cruise's *Dig. tit. 2, c. 2, § 27*;

of the reversion, and is not liable for "waste" committed thereon.<sup>88</sup>

The doctrine of "merger," by which, if a greater estate and a lesser estate in the same land become the property of one person, the lesser estate is destroyed or "merged," does not apply so as to merge an estate tail in a fee-simple estate; this exception to the general rule being based on the fact that to apply the doctrine of merger in such a case would have, in effect, nullified the statute *De Donis*.<sup>89</sup>

The tenant in tail is not bound to pay off incumbrances on the property, nor generally even to pay interest thereon, though, if he does pay off an incumbrance, it is discharged.<sup>90</sup>

#### § 29. Succession on death of tenant.

On the death of a tenant in tail, the land passes to the next heir of the body of the original donee; but such heir, though he takes because he is the heir of the body, takes not by descent, but as a substituted purchaser from the original donor, *per formam doni*, as it is expressed.<sup>91</sup> As a result of this principle, the heir is not bound by contracts in regard to the property made by a previous tenant, whether the original donee or another, as he would be if he took by descent.<sup>92</sup>

*Phillips v. Rogers*, 12 Metc. (Mass.) 405; *Waters v. Magerum*, 60 Pa. St. 39.

<sup>88</sup> See post, § 246.

<sup>89</sup> *Challis*, Real Prop. 72; 3 Bl. Comm. 178.

<sup>90</sup> 1 Cruise's Dig. tit. 2, c. 1, §§ 40-42; 1 Sharswood & B. Lead. Cas. Real Prop. 103.

<sup>91</sup> The heir claims "by substitutional gift, and not by right of descent." 1 Leake, 63. See, also, *Challis*, Real Prop. 190, 212; 1 Cruise's Dig. tit. 2, c. 2, § 18; *Jones v. Jones*, 2 Har. & J. (Md.) 281.

Since the title of the heir must be traced from the original donee, and not from the last tenant, the common-law doctrine of *possessio fratris* did not apply. 1 Leake, 63; *Challis*, Real Prop. 190.

<sup>92</sup> 1 Cruise's Dig. tit. 2, c. 2, §§ 18-26; *Partridge v. Dorsey's Lessee*, 3 Har. & J. (Md.) 302; *Possey's Lessee v. Budd*, 21 Md. 477

Furthermore, since the estate does not pass by descent, it would seem that a general statutory change of the course of descent should not affect the succession to this particular estate, since it could only have such effect by altering the well-understood meaning of the term "heirs of the body," or similar expressions used to create the estate, and accordingly the statutory changes of the common-law rules of descent have been held not to apply to this estate.<sup>92</sup>

(C). LIFE ESTATE.

An estate for life is a freehold interest in land, the duration of which cannot extend beyond the life or lives of some particular person or persons, but which may possibly endure for the period of such life or lives.

The estate is generally for the tenant's own life, but may be for the life of another person or persons, in which case it is called an estate "pur autre vie."

An estate for the tenant's own life may be created by an express limitation, or by implication, but no particular words are necessary. An estate pur autre vie may be created by an express limitation, or by a conveyance by one of an estate for his own life.

An estate for life has the following incidents:

- (1) It may be aliened by the tenant in whole or in part.
- (2) It is liable for the tenant's debts.
- (3) The tenant has the right to the ordinary use and profits of the land, but cannot do or suffer any act calculated to injure the inheritance (waste).
- (4) The tenant is entitled to take a reasonable amount of timber from the land for fuel and repairs (estovers).
- (5) On the death of the tenant, or other termination of the tenancy, not by his own fault, the tenant or his personal representatives is entitled to any annual crops then planted (emblements).

<sup>92</sup> *Riggs v. Sally*, 15 Me. 408; *Davis v. Hayden*, 9 Mass. 514; *Corbin v. Healy*, 29 Pick. (Mass.) 514; *Collamore v. Collamore*.

(6) The tenant is bound to make ordinary repairs, but not improvements, nor can he recover from the owner of the inheritance any part of the cost of improvements made by him.

(7) The tenant must pay the interest on incumbrances and the ordinary taxes.

(8) The estate is liable to be merged in a greater estate, if they both come into the hands of the same person.

(9) The estate is subject to the power of eminent domain.

At common law, on the death of the owner of an estate *pur autre vie*, the residue of the estate belonged to the person who first occupied the land, called a "general occupant," unless the grant had been to the deceased owner "and his heirs," in which case the heir took as "special occupant." In this country, the right to the residue of the estate is generally fixed by statutes, not recognizing either general or special occupancy.

Upon the death of the appointed husband or wife of a donee in special tail, or of one of two donees in special tail, without issue living, the donee or survivor of the two donees becomes tenant in tail after possibility of issue extinct, and the estate is necessarily limited to his or her life.

### § 30. Nature of estate.

An estate for life or life estate created by deed or devise is sometimes termed a "conventional" life estate, as distinguished from such as may be created by the operation of some principle of law. The most important of the life estates created by operation of law are those arising out of the marital relation, and they will be considered elsewhere.<sup>94</sup>

A conventional estate for life is limited for the life of the tenant himself, the grantee, or for the life of another person or persons, in which latter case the estate is known as an estate

158 Mass. 74; *Sander's Lessee v. Morningstar*, 1 Yeates (Pa.) 313; *Guthrie's Appeal*, 37 Pa. St. 9; *Reinhart v. Lantz*, 31 Pa. St. 483.

<sup>94</sup> 2 Bl. Comm. 120; 4 Kent, Comm. 25; *Challis*, Real Prop. 273. As to life estates arising from the marital relation, comprising dower, curtesy, and husband's estate in wife's lands, see post, §§ 176-212.

*"pur autre vie."*<sup>95</sup> To these may be added an estate for the lives of the tenant himself and of another person or persons.<sup>96</sup>

In order to constitute a life estate, it is not necessary that the estate be such that it must continue during the life or lives named; it being sufficient that it may so continue, though liable to be cut off by the happening of a contingency before the termination of such life or lives. For example, an estate granted to a woman for her life or during her widowhood, or to a man so long as he shall live in a certain house, is an estate for life.<sup>97</sup> An estate for the tenant's own life is considered in law as of a higher character than an estate *pur autre vie*, and accordingly, since a grant is construed most strongly against the grantor, in case of doubt the grant will be construed as conveying the greater estate, i. e., one for the tenant's own life.<sup>98</sup>

### § 31. Creation of estate.

While the natural and appropriate mode of creating an

<sup>95</sup> Litt. § 56; 1 Cruise's Dig. tit. 3, c. 1, § 3; Challis, Real Prop. 273, 286.

<sup>96</sup> Co. Litt. 41b. See *Reynolds v. Collin*, 3 Hill (N. Y.) 441, Finch's Cas. 13.

The tenant has in such case an estate of freehold to continue till the death of the survivor, and not two estates, one for his own life, and another *pur autre vie*, and consequently the doctrine of the merger of an estate *pur autre vie* in an estate for the life of the tenant has no application. *Rosse's Case*, 5 Coke, 13a, 3 Gray's Cas. 406.

If such other person or persons die in the lifetime of the tenant, then the estate becomes one for the life of the tenant; while if the tenant dies first, then the estate assumes the characteristics of an estate *pur autre vie*. Challis, Real Prop. 273; 1 Leake, 191.

<sup>97</sup> Co. Litt. 42a; 2 Bl. Comm. 121; 4 Kent, Comm. 26; 1 Washburn, Real Prop. 88; *Mattocks v. Stearns*, 9 Vt. 326; *McArthur v. Scott*, 113 U. S. 340, 377; *Hayward v. Kinney*, 84 Mich. 591. In such case, the estate is one on condition or special limitation. See post, § 80.

<sup>98</sup> Co. Litt. 42a; 2 Bl. Comm. 121.

estate for the life of the tenant is by a limitation to him "for life," at common law, as was shown in the discussion of the methods of creating an estate in fee simple, an estate for life is created by a deed which omits the word "heirs," necessary for the creation of an estate of inheritance, and, even in the case of a will, the presumption is, at common law, that such a limitation creates an estate for life only.<sup>99</sup> Under the modern statutes dispensing with words of inheritance in creating an estate in fee, and providing that a conveyance or devise shall, unless a contrary intent appear, transfer the estate which the grantor or testator has, an estate for life will not be created unless this is plainly expressed or implied, or unless the grantor owns a life estate merely.<sup>100</sup>

An estate *pur autre vie* may be created by an express limitation, or by a transfer to another person of his estate by one who holds for his own life, the grantee thus becoming tenant for the life of the grantor.<sup>101</sup>

### § 32. Incidents of estate—Alienation by tenant.

The tenant, unless expressly restrained, may convey his life interest, or may create a lesser estate out of it, but he cannot, of course, convey any estate which will extend beyond the life which is named.<sup>102</sup> At common law, the estate was forfeited in case the tenant conveyed an estate greater than

<sup>99</sup> See ante, § 20. See, also, 2 Jarman, Wills, 1131, and Mr. Bigelow's notes thereto.

<sup>100</sup> See ante, § 20. See, also, 1 Sharswood & B. Lead. Cas. Real Prop. 195 et seq., for numerous cases involving the construction of particular phrases, as showing an intent to create a life estate *vel non*.

<sup>101</sup> Co. Litt. 41b; Challis, Real Prop. 286; 1 Cruise's Dig. tit. 3, c. 1, § 3. See Roseboom v. Van Vechten, 5 Denio (N. Y.) 414, Finch's Cas. 575.

<sup>102</sup> 1 Cruise's Dig. tit. 3, c. 1, § 32; Challis, Real Prop. 54; 4 Kent, Comm. 74; Criswell v. Grumblin, 107 Pa. St. 408; Stewart v. Clark, 13 Metc. (Mass.) 79; Jackson v. Van Hoesen, 4 Cow. (N. Y.) 325; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362.

that which he had, by feoffment, with livery of seisin, or by fine or recovery, since this divested the seisin, and turned the estate of the rightful owner into a mere right of entry.<sup>103</sup> This rule had no application to conveyances under the Statute of Uses, since these conveyed only what the grantor had,<sup>104</sup> and it has no application at the present day; a conveyance of an estate greater than that which the grantor has passing merely that which he has,—this sometimes by force of an express statutory provision.<sup>105</sup>

—— Liability for debts.

The liability of the estate to be sold for the tenant's debts is the same as exists in the case of a fee simple, unless there is some statutory limitation on this liability.<sup>106</sup>

—— Right to use and profits.

A tenant for life has a right to all the ordinary uses and profits of the land, but he cannot do or suffer any act calculated to injure the inheritance,—that is, the interest of the person who owns the remainder or reversion; such injury, known as "waste," being ground for the recovery of damages, or the interposition of a court of equity. Since the principles

<sup>103</sup> Litt. §§ 415, 416; 2 Bl. Comm. 274. See ante, § 16.

<sup>104</sup> 1 Cruise's Dig. tit. 3, c. 1, § 36; 4 Cruise's Dig. tit. 32, c. 10, § 32; 4 Kent, Comm. 84; Jackson v. Mancius, 2 Wend. (N. Y.) 357, Finch's Cas. 612.

<sup>105</sup> See 8 & 9 Vict. c. 106, § 4 (1845); 1 Stimson's Am. St. Law, § 1402(B); 4 Kent, Comm. 83; 1 Washburn, Real Prop. 92, note; 1 Sharswood & B. Lead. Cas. Real Prop. 212; Smith v. Cooper, 59 Ala. 494; Hurd v. Cushing, 7 Pick. (Mass.) 169; Foote v. Sanders, 72 Mo. 616; Quimby v. Dill, 40 Me. 528; Middleton v. Dougherty, 46 N. J. Law, 350; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

<sup>106</sup> McCormick Harvesting Machine Co. v. Gates, 75 Iowa, 343, Finch's Cas. 581; Bozeman v. Bishop, 94 Ga. 459; Thompson v. Murphy, 10 Ind. App. 464; Anderson v. Briscoe, 12 Bush (Ky.) 344; McClure v. Melendy, 44 N. H. 469.

applicable in determining questions of waste arise in connection with other estates, as well as those for life, discussion of waste, as well as that of "estovers," referred to in the summary above, will be reserved for another part of this work.<sup>107</sup>

— Emblements.

On the termination of a life estate by the death of the tenant, or by any other event, the time of the occurrence of which could not have been foreseen, the tenant or his representatives is entitled to reap crops, previously sown by him, of such products as are the result of annual planting and labor. This right exists whenever the estate for life is terminated by the act of God or the act of the law, and not when it is terminated by the voluntary act of the tenant himself. These products to which he is so entitled are called "emblements," and the right thereto exists in the case of other estates, the time of the termination of which cannot be foreseen.<sup>108</sup>

— Repairs and improvements.

A tenant for life must, according to some decisions, make, at his own expense, such ordinary repairs as are necessary to prevent the structures on the land from passing into a state of dilapidation; neglect to make such repairs being regarded as "permissive waste."<sup>109</sup> He is under no obliga-

<sup>107</sup> See post, §§ 246-256.

In some states, by statute, the estate is subject to forfeiture in case of the commission of waste by the tenant. 1 Stimson's Am. St. Law, § 1332(B).

<sup>108</sup> Co. Litt. 55b; 2 Bl. Comm. 122; 4 Kent, Comm. 73; 1 Washburn, Real Prop. 101 et seq. See, for a further consideration of the law of emblements, post, § 224.

<sup>109</sup> 1 Washburn, Real Prop. 115; Hackworth v. Louisville Artificial Stone Co., 20 Ky. Law Rep. 1789; Kearney v. Kearney, 17 N. J. Eq. 59, 504; Wilson v. Edmonds, 24 N. H. 517, 545; In re Steele, 19 N. J. Eq. 120; Brough v. Higgins, 2 Grat. (Va.) 408. This doctrine of permissive waste by either a life tenant or tenant for years is considered more fully, post, § 254.



tion to make improvements, and if he does so he cannot demand that the owner of the inheritance pay any part of the cost thereof, even though a statute provides for compensation for improvements made by occupying claimants of property.<sup>110</sup> But he may, it seems, complete improvements begun by the donor of the estate, and demand contribution therefor.<sup>111</sup> And, according to some authorities, he is entitled to compensation, under the betterment or occupying claimants' acts, if he make the improvements in the belief that he has title in fee simple; the fact that he has a life estate not affecting his right to compensation under the statute.<sup>112</sup>

— Incumbrances and taxes.

The life tenant is bound to pay the interest on incumbrances on the property, but is not under the obligation of paying any part of the principal, and if he does so he may claim contribution from the owner of the remainder or reversion.<sup>113</sup> The life tenant is also bound to pay the ordinary

<sup>110</sup> *Killmer v. Wuchner*, 79 Iowa, 722, 18 Am. St. Rep. 392; *Sohler v. Eldredge*, 103 Mass. 345; *Smalley v. Isaacson*, 40 Minn. 450; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538; *Hagan v. Varney*, 147 Ill. 281; *Falck v. Marsh*, 88 Wis. 680; *Williams, Real Prop.* 29. See, as to the occupying claimants' or betterment acts, post, § 241.

<sup>111</sup> *Sohler v. Eldredge*, 103 Mass. 345; *Corbett v. Laurens*, 5 Rich. Eq. (S. C.) 301, 316; *Broyles v. Waddel*, 11 Helsk. (Tenn.) 32.

<sup>112</sup> *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795. See, to the contrary, without reference to any statute, *Henry v. Brown*, 99 Ky. 13; *Taylor v. Kemp*, 86 Ga. 181. See, also, 16 Am. & Eng. Enc. Law (2d Ed.) 118.

<sup>113</sup> 1 Story, Eq. Jur. § 487; 4 Kent, Comm. 74; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231, *Finch's Cas.* 607; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Jones v. Sherrard*, 2 Dev. & B. Eq. (N. C.) 179; *Rowen v. Brogan*, 119 Mich. 218; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Parrish v. Ross*, 19 Ky. Law Rep. 1676.

taxes on the property;<sup>114</sup> but of assessments for permanent improvements he need pay only a proportionate share.<sup>115</sup> In case an incumbrance on the property is paid off, or the property is sold, the proportion in which the burden of the incumbrance or the proceeds of the sale shall be apportioned between the life tenant and the remainderman is dependent on the probable duration of the tenant's life, and this is ascertained generally by considering his health and habits, as well as his age, and using mortality tables to assist in the computation.<sup>116</sup>

— Merger of estate.

It is a well-settled rule of law that whenever "a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, it is said to be 'merged,'

<sup>114</sup> *Hagan v. Varney*, 147 Ill. 281; *Varney v. Stevens*, 22 Me. 331; *Jenks v. Horton*, 96 Mich. 13; *Bone v. Tyrrell*, 113 Mo. 175; *Roche v. Waters*, 72 Md. 264, 7 L. R. A. 533; *Johnson v. Smith*, 5 Bush (Ky.) 102; *Deraismes v. Deraismes*, 72 N. Y. 154; *Disher v. Disher*, 45 Neb. 100.

<sup>115</sup> *Plympton v. Boston Dispensary*, 106 Mass. 547; *Reyburn v. Wallace*, 93 Mo. 326; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519; *Outcalt v. Appleby*, 36 N. J. Eq. 73, 80; *Chambers v. Chambers*, 20 R. I. 370. Contra, as to an assessment for an improvement which will probably not outlast the tenant's life. *Wordin's Appeal*, 71 Conn. 531; *Hitner v. Ege*, 23 Pa. St. 305; *Reyburn v. Wallace*, 93 Mo. 326, *Finch's Cas.* 609.

<sup>116</sup> See 1 *Sharswood & B. Lead. Cas. Real Prop.* 215 et seq.; 1 *Story, Eq. Jur.* §§ 487, 488a; 1 *Washburn, Real Prop.* 96; 4 *Kent, Comm.* 74.

It was decided by *Story, J.*, that the duration of the life estate should be determined by such a calculation based upon probabilities, even though its actual duration be determined by the death of the life tenant before the making of the apportionment. *Foster v. Hilliard*, 1 *Story*, 77, *Fed. Cas. No. 4,972*. Contra, *Gunning v. Carman*, 3 *Redf. (N. Y.)* 69.

that is, sunk or drowned in the greater."<sup>117</sup> Reference will be made in other parts of this work to this doctrine of merger, which has at times results of some importance, and it is sufficient here to say that it applies with full force in the case of estates for life, which will accordingly be merged in the reversion, or estate expectant on the termination of the life estate, if the reversion or other expectant estate passes by purchase to the owner of the estate for life, or the estate for life is conveyed to the owner of the reversion.<sup>118</sup> Further, it may be stated that, according to the technical doctrine before referred to,—that, as between an estate for a man's own life and an estate *pur autre vie*, the latter is considered the less estate,—if an estate *pur autre vie* and a subsequent tenancy for one's own life come together in one person, the former is merged in the latter.<sup>119</sup>

— Taking for public use.

A life estate may be taken, like a fee simple, for public use under the power of eminent domain, this being a characteristic of all interests in property of whatever nature.<sup>120</sup>

§ 33. Estate *pur autre vie*—Succession on owner's death.

At common law, upon the death of a tenant *pur autre vie* during the life of the person for whose life the estate was limited, called the "*cestui que vie*," it was considered that the residue of the life estate still remaining could not pass to the heirs of the tenant, because it was not an estate of inheritance, nor could it pass to his executors, since it was freehold property. Accordingly, the property was re-

<sup>117</sup> 2 BL Comm. 177. See, also, 4 Kent, Comm. 99.

<sup>118</sup> 1 Washburn, Real Prop. 90; Webster v. Gilman, 1 Story, 499, Fed. Cas. No. 17,335; Boykin v. Ancrum, 28 S. C. 486, Finch's Cas. 615.

<sup>119</sup> 1 Leake, 190; 1 Washburn, Real Prop. 90; Boykin v. Ancrum, 28 S. C. 486, Finch's Cas. 615.

<sup>120</sup> Lewis. Em. Dom. (2d Ed.) §§ 262, 262a, 483, 637.

garded, during the balance of the life of the *cestui que vie*, as belonging to nobody, and as consequently becoming the property of the first person who took possession, called the "general occupant," unless the estate had been granted to the tenant and "his heirs" for the life of the *cestui que vie*, in which case the heir took as "special occupant," as it was called.<sup>121</sup> This state of things was, however, altered by the Statute of Frauds, and by subsequent English statutes, providing that an estate *pur autre vie* might be devised, and that, in default of a devise, and in the absence of a special occupant, it should pass to the executor or administrator, and should be assets in his hands, general occupancy being thus abolished.<sup>122</sup>

<sup>121</sup> Co. Litt. 41b; 2 Bl. Comm. 259.

The special occupant, though entitled by reason of the fact that he is heir, takes not by descent, but as the special occupant named in the limitation of the estate. 2 Bl. Comm. 260; Challis, Real Prop. 288. But nevertheless his rights may be entirely barred by an alienation by his ancestor. Challis, Real Prop. 290.

<sup>122</sup> Co. Litt. 41b; 2 Bl. Comm. 258; Challis, Real Prop. 288 et seq. See *Atkinson v. Baker*, 4 Term R. 229, Finch's Cas. 579. In England, the matter is now regulated by the Wills Act (1 Vict. c. 26 [1837]) repealing, but substantially re-enacting, 29 Car. II. c. 3, § 12 (1677), and 14 Geo. II. c. 20, § 9 (1741). See Challis, Real Prop. ut supra; 1 Leake, 194.

In England, two or three questions have arisen in connection with the theory of special occupancy upon which the law has perhaps never been positively settled. The most difficult question apparently was whether the right to take as special occupants extended to executors and administrators when named, as well as to heirs, and on this subject the authorities are in conflict, the negative theory being based on the ground that freehold property could not be limited to the personal representatives. See *Salter v. Boteler*, Moore, 664, 4 Gray's Cas. 37; Co. Litt. 41b, Hargrave's note, 240; 1 Cruise's Dig. tit. 8, c. 1, §§ 49-51; 3 Cruise's Dig. tit. 28, c. 2, § 7; *Ripley v. Waterworth*, 7 Ves. 425, 4 Gray's Cas. 42. The question became of comparatively little importance after the passage of the Statute of Frauds, referred to in the text, since thereafter the executors or administrators took by force of the statute if they did not take as special occupants. See Challis,

In many states of this country, the matter is regulated by statute, it sometimes being provided that, if not devised, the residue of the life estate shall pass to the heirs as realty, and sometimes that it shall pass to the personal representatives as personalty.<sup>123</sup> These statutes generally make no provision for special occupancy, and the fact that the estate is granted to one "and his heirs" will not give the right of special occupancy to the heirs when the statute expressly makes the estate personalty, since the character of property cannot be changed by the mode of its limitation. And even where the statute provides that the residue of the life estate shall pass to the heir when not devised, the heir will presumably take by descent, and not as special occupant, though there be a limitation to the grantee "and his heirs."<sup>124</sup>

In a state where there is no statute on the subject, special occupancy might possibly be recognized in case the property was limited to the heirs, though there seem to be no adjudi-

Real Prop. 289, 290. Another question in regard to which the decisions were in conflict was whether, if a devisee of the original tenant for life died intestate, the property passed as realty to his heirs, or as personalty to his executors or administrators. See 4 Gray's Cas. 52, 56, and note on page 58.

There might, it seems, be a special occupant of a rent or other incorporeal property. Co. Litt. 41b, Hargrave's note, 388a; Bowles v. Poore, Cro. Jac. 282, 4 Gray's Cas. 38; Challis, Real Prop. 290; 1 Leake, 193, note; Northern v. Carnegie, 4 Drew, 587, quoted 4 Gray's Cas. 54. Contra, Sugden, Powers (8th Ed.) 193-195, quoted 4 Gray's Cas. 55.

<sup>123</sup> 1 Stimson's Am. St. Law, § 1235; 1 Washburn, Real Prop. 94, note.

<sup>124</sup> Consequently, what is sometimes called a "quasi entail," arising when property was limited to a man and "the heirs of his body" for the life of another, in which case the heirs of the body took as special occupants (see 1 Leake, 194; 1 Washburn, Real Prop. 94; Low v. Burron, 3 P. Wms. 262, 4 Gray's Cas. 40) cannot now exist in any states in which the statute on the subject thus ignores the possibility of special occupancy.

In Maryland and South Carolina, the right of special occupancy is recognized by the statute. See 1 Stimson's Am. St. Law, § 1355.

cations on the subject in this country. In the absence of such a limitation, the residue of the estate would doubtless be regarded as within the statutes providing for the descent of real property, the fact that the estate is not technically one of inheritance being disregarded.

§ 34. Tenancy in tail after possibility of issue extinct.

A tenancy of this character occurs when the estate is limited to a man and the heirs of his body by a certain wife named, and she dies without issue. The husband then becomes tenant in tail after possibility of issue extinct, since there is then no possibility of the estate being carried on by his issue. It also arises in case of a gift in tail to a man and his wife, or to two persons who may become man and wife, if one of them dies without any issue of their marriage. This estate can arise only in the case of a limitation in special tail, and no one can be the tenant thereof except the original donee or one of the original donees. The duration of such an estate is for the life of the tenant only, and, like other life estates, it is liable to be merged in a greater estate. It differs, however, from other life estates in the fact that the tenant is not liable for waste.<sup>125</sup>

II (A). ESTATE FOR YEARS.

An estate for years is an estate limited for a certain definite time, and is regarded as personal property.

The estate is usually created by an instrument known as a "lease," which must, under the Statute of Frauds, or similar state statutes, be in writing, if the estate is to endure beyond a minimum period named in the statute, usually one or three years.

The lease must be followed by entry on the premises by the lessee, and until such entry he has not an estate, but merely

<sup>125</sup> Litt. §§ 32-34; 2 Bl. Comm. 125, and Chitty's note; Williams, Real Prop. 54; Challis, Real Prop. 232, 234.

an *interesse termini*. The effect of the lease and entry is to create the relation of landlord and tenant between the parties.

Since the tenant is the one entitled to possession of the premises during the existence of the estate, he alone may sue for injury to the possession, though the landlord may sue for injury to the reversion.

The lease generally contains covenants by the respective parties regulating their rights and liabilities, including a covenant by the lessee for the payment of rent. Furthermore, a covenant by the lessor for quiet enjoyment is generally implied from the relation of landlord and tenant.

There is no implied warranty by the lessor as to the condition of the property or its suitability for the lessee's purpose, but he must not conceal known defects.

The lessee, while entitled to estovers, cannot commit waste, and must make ordinary repairs, without calling on the lessor therefor.

The estate may be aliened or assigned, in the absence of a stipulation to the contrary in the lease, and such assignment transfers all the rights and liabilities growing out of the relation of landlord and tenant, and also such as are imposed by covenants of such a character as will "run with the land." The reversion also may be assigned, with the same effect on the rights and liabilities of the parties.

The tenant may alien a part of his interest by a "sublease."

The tenant is, by his acceptance of possession from the landlord, estopped to deny the validity of the latter's title at the time of the creation of the relation.

An eviction of the tenant may be either by the act of a third person in asserting a paramount title, or by the act of the landlord in intentionally depriving the tenant of the full enjoyment of the premises. An eviction gives to the tenant a right of recovery on the covenant for quiet enjoyment, and is generally ground for the nonpayment of rent.

An estate for years may be terminated by—

- (1) The expiration of the term named in the lease.
- (2) The happening of some event upon which the term is limited.

- (3) Its surrender to the owner of the reversion.
  - (4) Its merger in the reversion.
  - (5) Forfeiture for breach of a condition in the lease.
  - (6) Forfeiture for disclaimer of the landlord's title, and sometimes for an illegal use.
  - (7) Termination of the estate out of which it was created.
  - (8) Occasionally by the destruction of the premises.
- On the termination of the estate by expiration of the term, the tenant is not entitled to emblements.

### § 35. Nature of estate.

An estate for years is not, as its name might imply, necessarily an estate limited for a certain number of years, but the term is applied to any estate limited for a certain time, as for a year, for half a year, a quarter, or any greater or less period of a fixed duration.<sup>126</sup> An estate for years is frequently called a "term," from the Latin word "*terminus*," and this word is also used to describe the period of time during which the estate is to continue.<sup>127</sup> A term may exist not only in lands or objects legally constituting a part thereof, but also in incorporeal things real.<sup>128</sup> There is, in the absence of statute, no limit to the number of years over which the term may be made to extend.<sup>129</sup>

<sup>126</sup> Litt. §§ 58, 67; 2 Bl. Comm. 140; 1 Cruise's Dig. tit. 8, c. 1, § 3.

<sup>127</sup> Co. Litt. 45b; 1 Cruise's Dig. tit. 8, c. 1, § 6; Rector of Chedington's Case, 1 Coke, 153a.

<sup>128</sup> Fawcett, Landl. & Ten. (2d Ed.) 2; 1 Taylor, Landl. & Ten. § 17. See Somerset v. Fogwell, 5 Barn. & C. 875, 3 Gray's Cas. 230; Bird v. Higginson, 2 Adol. & El. 696, 3 Gray's Cas. 231; Smith v. Simons, 1 Root (Conn.) 318, 1 Am. Dec. 48; City of New York v. Mable, 13 N. Y. 151; Com. v. Weatherhead, 110 Mass. 175; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203.

<sup>129</sup> Co. Litt. 45b; 1 Taylor, Landl. & Ten. § 73.

In New York, agricultural leases are restricted to twelve years, and there are, in other states, restrictions as to the length of such leases. In Alabama, all leases are restricted to twenty years. See 2 Sharswood & B. Lead. Cas. Real Prop. 44.



## § 36. Origin and history.

Though terms for years probably existed as far back as the Norman Conquest, it came about, owing to decisions that the writ of novel disseisin, for the recovery of "free tenements," did not apply to such terms, that they were not regarded as estates in land, but the owner of such an estate was considered as merely having a right of action against the lessor in case of wrongful ejection by the latter, while, as against persons other than the lessor who ejected him, he had no remedy whatever. In other words, his rights were strictly *in personam*, and not *in rem*.<sup>180</sup>

Early in the thirteenth century, however, by the introduction of the writ of *quare ejecit infra terminum*, the lessee was given the right of recovery of the land against a grantee of the lessor, and later he was given the right to recover the land, when ejected, as against all the world, by the writ of *ejectione firmæ*, this latter writ being that on which the later action of ejectment was based.<sup>181</sup> It was thus that the interest of a grantee for years came gradually to be regarded, not as a mere right of action resting on a covenant by the lessor, but as a right of property enforceable against any wrongdoer by a remedy analogous to that to which the owner of a freehold is entitled. The interest of the lessee was, however, always regarded as a *quasi* chattel, and was accordingly susceptible of being disposed of by will even before freehold in-

<sup>180</sup> 2 Pollock & Maitland, Hist. Eng. Law, 106 et seq.; Digby, Hist. Real Prop. 175.

The writers first cited consider that the reason of the distinction thus made between leases for years and what are called freehold estates arose from the application by the judges of false analogies from the Roman law, and not from any idea that the holding of such a lease was unworthy of the dignity of a free man, or for any other reasons connected with the feudal relation, as is generally stated.

<sup>181</sup> 2 Pollock & Maitland, Hist. Eng. Law, 106 et seq.; 1 Washburn, Real Prop. 291.

terests could be so disposed of, and it became settled law that such an interest would not pass to the heir or devisee as real estate, but would always pass to the personal representative, to be administered with other chattels by the ecclesiastical tribunals.<sup>132</sup> Consequently such interests have always been classed as personal, and not real, property, even though the estate be limited to endure for a thousand years, and have, together with other similar estates of less duration, borne the generic name of "chattels real."<sup>133</sup>

**§ 37. Mode of creation—(a) Generally by lease.**

An estate for years is almost invariably created by an instrument or agreement called a "lease," or, less generally, a "demise"; the words "grant," "demise," and "let" being commonly used in the instrument, though any words expressing the intention to transfer the possession for a fixed time is sufficient.<sup>134</sup> The term "lease" is also applied to the grant of an estate for life.<sup>135</sup> Upon the making of a lease for years or for life, by one who owns a greater estate, the residue which remains in him is called a "reversion," since thereby the possession "reverts" to him after the termina-

<sup>132</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 115, 329; Digby, *Hist. Real Prop.* 176.

<sup>133</sup> Co. Litt. 118a; 2 Bl. Comm. 386; 1 Taylor, *Landl. & Ten.* § 14, note; *Brewster v. Hill*, 1 N. H. 350, *Finch's Cas.* 53; *Goodwin v. Goodwin*, 33 Conn. 314, *Finch's Cas.* 8.

In a few states in this country, however, statutes have been passed giving terms for a certain number of years named and the character of real property for certain purposes. 1 *Stimson's Am. St. Law*, § 1300; 2 *Sharswood & B. Lead. Cas. Real Prop.* 40. See *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 335, *Finch's Cas.* 10.

<sup>134</sup> Co. Litt. 45b; 1 Leake, 197; *Watson v. O'Hern*, 6 Watts (Pa.) 368; *Horner v. Leeds*, 25 N. J. Law, 112; *Dunklee v. Webber*, 151 Mass. 408; *Branch v. Doane*, 17 Conn. 402.

<sup>135</sup> Litt. § 57; *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517.

tion of the estate created by the lease.<sup>136</sup> There is considered to exist, between the owner of the estate for years or life and the owner of the reversion, even at the present day, a modified species of tenure, and the relation between the owners of the two estates is known as that of landlord and tenant; these terms being frequently, if not generally, used to designate the parties to the lease and their successors in interest.<sup>137</sup>

— (b) Requirements of Statute of Frauds.

At common law, an estate of this character could be created orally;<sup>138</sup> but by the Statute of Frauds,<sup>139</sup> all leases for a term of more than three years were required to be in writing, signed by the party making the same, and, if not so created, they were to be deemed mere tenancies at will. This provision of the statute has been adopted in some states without change, while in others there are different provisions of the same general tendency, as in New York, where a lease or contract for a lease, if for more than one year, must be in writing, signed by the party or his agent.<sup>140</sup> In some states there is a requirement that a lease for a certain number of years named shall be by deed,—that is, by a writing sealed as well as signed by the party.<sup>141</sup> In determining whether the lease is for the length of time named in the statute, the time is to be computed, in the case of a lease *in futuro*, from

<sup>136</sup> Co. Litt. 22b. See post, § 113.

<sup>137</sup> 1 Washburn, Real Prop. 315; 1 Taylor, Landl. & Ten. § 14.

<sup>138</sup> 1 Taylor, Landl. & Ten. § 27.

<sup>139</sup> 29 Car. II. c. 3, §§ 1-3 (1677). See Browne, St. Frauds, § 18 et seq.

<sup>140</sup> 2 Sharswood & B. Lead. Cas. Real Prop. 54 et seq.; 1 Stimson's Am. St. Law, § 4143; 1 Taylor, Landl. & Ten. §§ 29, 34.

<sup>141</sup> 1 Stimson's Am. St. Law, § 1471. A term in incorporeal things real can be created only by an instrument under seal. See post, § 315.

the time at which the term is to begin, and not from the time of the making thereof.<sup>142</sup>

In a number of states the courts hold that the provision of the Statute of Frauds, requiring any agreement not to be performed within the space of one year from the making thereof to be in writing, applies to agreements relating to land, and consequently invalidates an oral lease, or agreement for a lease, made for longer than a year,<sup>143</sup> or even a lease for a year, to commence *in futuro*.<sup>144</sup> In other states this provision of the statute is not considered to apply to leases or agreements therefor.<sup>145</sup> In some states where such provision of the statute is held to be applicable to a lease of lands, the case will be taken out of the statute if the tenant partly perform his contract by the payment of rent, or even by the expenditure of money for improvements on the premises, the lease being thereby validated.<sup>146</sup>

— — Tenancy under parol lease.

As will hereafter be shown, a tenancy at will may be converted into a tenancy from year to year by the entry of the lessee and payment of rent with reference to a yearly period,

<sup>142</sup> *Young v. Dake*, 5 N. Y. 463, Finch's Cas. 723, 55 Am. Dec. 356; *Whiting v. Ohlert*, 52 Mich. 462, 50 Am. Rep. 265; *Sobey v. Brisbee*, 20 Iowa, 105. Unless, of course, the statute expressly names the period as beginning at the time of making the lease. *Whiting v. Pittsburgh Opera House Co.*, 38 Pa. St. 100.

<sup>143</sup> *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Wheeler v. Frankenthal*, 78 Ill. 124; *Delano v. Montague*, 4 Cush. (Mass.) 42; *White v. Holland*, 17 Or. 3.

<sup>144</sup> *Wolf v. Dozer*, 22 Kan. 436; *Atwood v. Norton*, 31 Ga. 507; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Durbin v. Oregon R. & Nav. Co.*, 17 Or. 5.

<sup>145</sup> *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356; *Rallsback v. Walke*, 31 Ind. 409; *Sobey v. Brisbee*, 20 Iowa, 105.

<sup>146</sup> *Wallace v. Scoggins*, 18 Or. 502, 17 Am. St. Rep. 749; *Steele v. Payne*, 42 Ga. 207. Contra, *Warner v. Hale*, 65 Ill. 395. And see *Petsch v. Biggs*, 31 Minn. 392.

and consequently the effect of a noncompliance with the terms of the statute as to a lease in writing is frequently to create a tenancy from year to year, rather than one at will, even though the latter estate is named in the statute.<sup>147</sup> The mere taking of possession, however, without the payment of rent, or other circumstances indicative of a tenancy from year to year, is not sufficient to change into such tenancy the tenancy by will created under the statute by a void lease.<sup>148</sup>

In Maine and Massachusetts it has been held that, since the statute provides that parol leases for more than a certain period shall create estates at will, even possession by the lessee and regular payment of rent will not render the tenancy one from year to year.<sup>149</sup> On the other hand, sometimes, by reason of statutory provisions, the effect of an

<sup>147</sup> *Browne*, St. Frauds, § 38; *Clayton v. Blakey*, 8 Term R. 3, 3 Gray's Cas. 417; *Barlow v. Wainwright*, 22 Vt. 88, 3 Gray's Cas. 450, 52 Am. Dec. 79; *Reeder v. Sayre*, 70 N. Y. 180, Finch's Cas. 775; *Koplitz v. Gustavus*, 48 Wis. 48; *Warner v. Hale*, 65 Ill. 395; *Dunn v. Rothermel*, 112 Pa. St. 272; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Talamo v. Spitzmiller*, 120 N. Y. 37, 17 Am. St. Rep. 607; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Barlow v. Wainwright*, 22 Vt. 88, 3 Gray's Cas. 450, 52 Am. Dec. 79; *Leavitt v. Leavitt*, 47 N. H. 329.

To make a tenancy from year to year under such circumstances, the rent need not be paid yearly, but may be paid quarterly, monthly, or otherwise, the only question being whether it is a yearly rent. *Huntington v. Parkhurst*, 87 Mich. 38, 24 Am. St. Rep. 146; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Irving v. Thomas*, 18 Me. 418; *Koplitz v. Gustavus*, 48 Wis. 48. If the rent paid is a monthly rent, without reference to a yearly holding, the tenancy will be one from month to month. *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, 3 Gray's Cas. 446.

<sup>148</sup> *Talamo v. Spitzmiller*, 120 N. Y. 37, Finch's Cas. 741, 17 Am. St. Rep. 607.

<sup>149</sup> *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Kelly v. Waite*, 12 Metc. (Mass.) 300; *Davis v. Thompson*, 13 Me. 209; *Thomas v. Sanford Steamship Co.*, 71 Me. 548.

oral lease is to create a tenancy from year to year, independently of the fact or mode of payment of rent.<sup>150</sup>

Although the parol lease is void, yet if the tenant enters and occupies, the stipulations contained therein control the relations of the parties, so far as they are applicable to the tenancy by will or from year to year which arises between them,<sup>151</sup> it being presumed that the parties intended a tenancy on the terms of the original agreement, and the law implying a contract between the parties corresponding therewith, so far as it is not in conflict with the statute. And the void lease will control even as to the length of the term, provided the possession of the tenant continue so long, and consequently no notice to quit at the end of such term is necessary.<sup>152</sup> A holding under a void agreement for a lease will also, it seems, be regulated by the terms of the agreement.<sup>153</sup>

— (c) Acceptance of lease.

The lease, if not executed by the lessee as well as by the

<sup>150</sup> *Rallsback v. Walke*, 81 Ind. 409; *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229; *Stewart v. Apel*, 4 Houst. (Del.) 314.

<sup>151</sup> *Browne*, St. Frauds, § 39; *Doe v. Bell*, 5 Term R. 471, 3 Gray's Cas. 416; *Richardson v. Gifford*, 1 Adol. & E. 52, 3 Gray's Cas. 422; *Larkin v. Avery*, 23 Conn. 304; *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229; *Norris v. Morrill*, 40 N. H. 395; *Coudert v. Cohn*, 118 N. Y. 309, 16 Am. St. Rep. 761; *Huntington v. Parkhurst*, 87 Mich. 38, 24 Am. St. Rep. 146.

<sup>152</sup> *Doe v. Stratton*, 4 Bing. 446, 3 Gray's Cas. 421; *Tress v. Savage*, 4 El. & Bl. 36, 3 Gray's Cas. 435; *Elliott v. Stone*, 1 Gray (Mass.) 571; *Hollis v. Pool*, 3 Metc. (Mass.) 350. And see *Reeder v. Sayre*, 70 N. Y. 180, Finch's Cas. 775; *Coudert v. Cohn*, 118 N. Y. 309, Finch's Cas. 780. Contra, *Johnson v. Albertson*, 51 Minn. 333.

The end of the yearly holding involved in the tenancy from year to year, created by the payment of rent under the void lease, is not fixed by the time named in such lease for the end of the term. *Coudert v. Cohn*, 118 N. Y. 309, Finch's Cas. 780. Contra, *Doe v. Bell*, 5 Term R. 471, 3 Gray's Cas. 416.

<sup>153</sup> *Doe v. Amey*, 12 Adol. & E. 476, 3 Gray's Cas. 426; *Crommellin*

lessor, must be accepted by the latter, in order that he may be bound by any stipulations therein on his part to be performed.<sup>154</sup>

— (d) Lease and contract for lease.

A difficult question quite frequently arises as to whether a certain instrument constitutes a lease, or merely a contract for a lease to be made in the future. It is a question of the intent of the parties, to be determined by a construction of the instrument, taken as a whole.<sup>155</sup> Accordingly, if there is an agreement that certain things shall be done as preliminary to a lease, or the instrument fails to show clearly the beginning or duration of the term, or the amount of rent to be paid, it will be considered as merely a preliminary agreement.<sup>156</sup> The fact that the instrument evidently contemplates a future lease will not necessarily render it an agreement merely, though such will be the effect of an intention shown that such future lease shall be executed before the demise shall take effect.<sup>157</sup> The fact that possession is actually taken by the intending lessee is regarded as strong evidence that the instrument was intended as a lease, though not conclusive on the question.<sup>158</sup>

*v. Thless*, 31 Ala. 412, 70 Am. Dec. 499; *Larkin v. Avery*, 23 Conn. 304.

<sup>154</sup> 1 Washburn, Real Prop. 315; *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

<sup>155</sup> 1 Taylor, Landl. & Ten. § 38; *Fawcett, Landl. & Ten.* (2d Ed.) 79; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401.

<sup>156</sup> 1 Taylor, Landl. & Ten. §§ 40, 42; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392, *Finch's Cas.* 721.

<sup>157</sup> *Fawcett, Landl. & Ten.* (2d Ed.) 80; 1 Washburn, Real Prop. 301; *Poole v. Bentley*, 12 East, 168; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; *Griffin v. Knisely*, 75 Ill. 411; *Boisseau v. Fuller*, 96 Va. 45.

<sup>158</sup> *Jenkins v. Eldredge*, 3 Story, 325, Fed. Cas. No. 7,268; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; *Potter v. Mercer*, 53 Cal. 667; *McGrath v. City of Boston*, 103 Mass. 369; *Kimball v. Cross*, 136 Mass. 300.

The importance of the question lies in the fact, among others, that by a lease the intending lessee acquires an actual interest in the land which he may set up as against third persons, which he cannot do under a mere agreement, and furthermore, in the case of a lease, the parties are bound by the stipulations and covenants expressed and implied therein, and by no others, while, if it is a mere agreement, the covenants may be rectified or additional ones supplied before the execution of the lease.<sup>159</sup>

### § 38. Entry by lessee.

In order that the estate be actually created in the lessee, it is necessary, at common law, that he enter on the land, and until he makes such entry he is said to have a mere *interesse termini*, or interest in the term,<sup>160</sup> and the lessee under a lease to commence in the future is necessarily in the same position.<sup>161</sup> Before entry, neither the lessee nor his assignee can maintain trespass in respect to the demised premises,<sup>162</sup> but he may sue in ejectment after the time fixed for the beginning of the lease, since this action is based on the fictitious confession of entry by the defendant.<sup>163</sup> This *interesse termini* may be assigned by the lessee, and will pass to his personal representatives at his death, though it cannot, for the technical reason that the whole estate is considered to be in the lessor, be surrendered to the latter by the lessee. The entry may accordingly be made by his assignee or personal

<sup>159</sup> 1 Washburn, Real Prop. 302; 1 Taylor, Landl. & Ten. § 37; Potter v. Mercer, 53 Cal. 667; Weed v. Lindsay, 83 Ga. 686.

<sup>160</sup> Co. Litt. 46b; 2 Bl. Comm. 144; 1 Taylor, Landl. & Ten. § 15.

<sup>161</sup> Fawcett, Landl. & Ten. (2d Ed.) 185; Joyner v. Weeks [1891] 2 Q. B. 31; Young v. Dake, 5 N. Y. 463, Finch's Cas. 722, 55 Am. Dec. 356; Becar v. Flues, 64 N. Y. 518, Finch's Cas. 722.

<sup>162</sup> Fawcett, Landl. & Ten. (2d Ed.) 186; Wheeler v. Montefiore, 2 Q. B. 133; Brewer v. Stevens, 13 Allen (Mass.) 346, 350.

<sup>163</sup> 1 Washburn, Real Prop. 296; Doe v. Day, 2 Q. B. 147; Trull v. Granger, 8 N. Y. 115; Becar v. Flues, 64 N. Y. 518, Finch's Cas.



representative, and the death of the lessor before entry is immaterial.<sup>164</sup>

The lessor is bound to give possession to the lessee, and, if he fails so to do, he is liable to the latter in damages, generally to the amount of the difference between the actual value of the lease and the amount of the rent reserved, and also any other damage resulting from the breach of the contract, such as expenses incurred in preparing to occupy the premises.<sup>165</sup> On the other hand, the lessee is liable on his covenant to pay rent, even though, through his own fault, he fail to enter, since such liability arises from contract, and not from the relation of landlord and tenant.<sup>166</sup>

### § 39. Certainty of term.

It is a part of the very definition of an estate for years that the term of its duration be certain, but the actual length of the term need not be stated in the lease, provided it can be ascertained therefrom before the lease takes effect in interest or possession. So, the term may be named to continue "during the minority of" a person named, or to endure for a certain time from the happening of a certain contingency, as in the case of a lease for twenty years after payment of

722. *Contra*, *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381; *Sennett v. Bucher*, 8 Pen. & W. (Pa.) 392.

<sup>164</sup> Co. 14tt. 46b; *Fawcett, Landl. & Ten.* (2d Ed.) 185; 1 Washburn, *Real Prop.* 296; 4 Kent, *Comm.* 97; *Whitney v. Allaire*, 1 N. Y. 305.

<sup>165</sup> *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; *Green v. Williams*, 45 Ill. 206; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Yeager v. Weaver*, 64 Pa. St. 425; *Berrington v. Casey*, 78 Ill. 817; *Cohn v. Norton*, 57 Conn. 489.

<sup>166</sup> 1 *Taylor, Landl. & Ten.* 15; 1 Washburn, *Real Prop.* 297, 314; *Bellasis v. Burbriek*, 1 Salk. 209; *Tully v. Dunn*, 42 Ala. 262; *Marix v. Stevens*, 10 Colo. 261.

a certain sum by the lessee to the lessor.<sup>167</sup> Furthermore, a lease to one for a certain period, provided a person named live so long, or subject to be terminated upon some other contingency, creates an estate for years, since the period for which the term may last is certain, though it may not be reached.<sup>168</sup>

#### § 40. Future terms.

A tenant for years was not considered, at common law, as seised of the lands, but he was regarded, after entry, as "possessed," not properly of the land, but of the term of years, and consequently the rule of the common law, based upon the requirement of seisin, that an estate could not be created to begin *in futuro*, never applied to these estates.<sup>169</sup>

#### § 41. Right to possession during term.

The lessee has the right of exclusive possession and control of the premises, and this right is a distinctive and essential characteristic of the relation of landlord and tenant,<sup>170</sup> and rights of use and occupancy created by mere license, or by personal contracts, such as that of employment or the letting of lodgings, which do not give exclusive control, must be carefully distinguished.<sup>171</sup> The lessee may, however, it seems, enter for the purpose of discovering waste or making

<sup>167</sup> Co. Litt. 45b; Bishop of Bath's Case, 6 Coke, 34b; Murray v. Cherrington, 99 Mass. 229, Finch's Cas. 724; Western Transp. Co. v. Lansing, 49 N. Y. 499; Reed v. Lewis, 74 Ind. 433, 39 Am. Rep. 88; Bachelier v. Dean, 16 N. H. 265.

<sup>168</sup> Co. Litt. 45b; 1 Leake, 200. See post, § 80.

<sup>169</sup> 4 Kent, Comm. 94; 1 Cruise's Dig. tit. 8, c. 1, § 10; 1 Washburn, Real Prop. 293; Becar v. Flues, 64 N. Y. 518, Finch's Cas. 722; Whitney v. Allaire, 1 N. Y. 305; Young v. Dake, 5 N. Y. 463, Finch's Cas. 728, 55 Am. Dec. 356; Bacon v. Bowdoin, 23 Pick. (Mass.) 401; Elliott v. Stone, 1 Gray (Mass.) 571.

<sup>170</sup> Fawcett, Landl. & Ten. (2d Ed.) 84.

<sup>171</sup> See post, § 304.

repairs necessary to prevent injury to the premises, or in the course of compliance with police regulations.<sup>172</sup>

Since the right of possession is solely in the tenant, he alone has the right of action against third persons for injury thereto,<sup>173</sup> but the owner of the reversion may sue in an action on the case when an injury to his reversionary interest is committed.<sup>174</sup>

#### § 42. Express covenants.

A covenant is, properly speaking, any agreement under seal; but in the connection in which we are now using the term, it is usually applied to any stipulation in a lease, whether or not the instrument be under seal, by which one party agrees to do or refrain from doing certain things. The covenants which may be inserted in a lease are of very great variety. Thus, the lessor may covenant for quiet enjoyment, against incumbrances, to repair buildings on the premises, or to renew the lease;<sup>175</sup> while among the covenants into which the lessee more or less frequently enters are those to

<sup>172</sup> *Proud v. Hollis*, 1 Barn. & C. 8; *City of St. Louis v. Kalme*, 2 Mo. App. 66; *Sulzbacher v. Dickie*, 51 How. Pr. (N. Y.) 500; *Brewer v. Stevens*, 13 Allen (Mass.) 346; *Campbell v. Porter*, 61 N. Y. Supp. 712; *Dunn v. Mellon*, 147 Pa. St. 11, 30 Am. St. Rep. 706.

<sup>173</sup> *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204; *Torrence v. Irwin*, 2 Yeates (Pa.) 210, 1 Am. Dec. 340; *Cannon v. Hatcher*, 1 Hill (S. C.) 260, 26 Am. Dec. 177; *Simpson v. Savage*, 1 C. B. (N. S.) 347, 2 Gray's Cas. 34; *Hersey v. Chapin*, 162 Mass. 176.

<sup>174</sup> 4 Kent, Comm. 119; *Lienow v. Ritchie*, 8 Pick. (Mass.) 235; *Lachman v. Deisch*, 71 Ill. 59; *Brown v. Bridges*, 31 Iowa, 138; *Arneson v. Spawn*, 2 S. D. 269, 39 Am. St. Rep. 783; *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204.

<sup>175</sup> There may be a covenant by the lessor for perpetual renewal. As to what words are sufficient to create such a covenant, see article by L. H. Sweetser, in 13 Harv. Law Rev. 472. As to the question whether such a covenant violates the rule against perpetuities, see post, § 155.

pay rent, to repair, not to assign or underlet. To create an express covenant no technical language is necessary, and it may take the form of an exception, a recital, or a condition; and any language which, by a fair construction of the language of the instrument, clearly imposes an obligation on one of the parties, is equivalent to a covenant by such party to perform the obligation.<sup>176</sup>

Mutual covenants by the parties may be dependent on each other, so that the breach of a covenant by one party will be ground for the refusal of performance of another covenant by the other party, or will be ground for action without an allegation of such performance, or they may be independent. Whether they are dependent or independent is a question of intention, as shown by the instrument, and each case must be decided by a construction of the particular language used.<sup>177</sup> It is stated that, in case of doubt, the courts will incline to construe covenants as dependent, rather than independent,<sup>178</sup> but there are authorities to the contrary.<sup>179</sup>

§ 43. Implied covenants—(a) Distinguished from express covenants.

A covenant may be express, or “in deed,” as being created by agreement of the parties, whether it be framed in express terms, or is merely matter of inference from the language of the instrument, or it may be implied, or a covenant “in law,” as being an agreement which the law infers from the use of certain recognized terms in the creation of an es-

<sup>176</sup> Fawcett, Landl. & Ten. (2d Ed.) 149; 1 Taylor, Landl. & Ten. §§ 246, 251.

<sup>177</sup> 1 Taylor, Landl. & Ten. 265; 1 Woodfall, Landl. & Ten. (1st Am. Ed.) 166.

<sup>178</sup> 1 Taylor, Landl. & Ten. § 265, citing *Mecum v. Peoria & O. R. Co.*, 21 Ill. 533, *Clopton v. Bolton*, 23 Miss. 78, *Bangs v. Lowber*, 2 Cliff. 157, Fed. Cas. No. 840.

<sup>179</sup> *Newson v. Smythies*, 3 Hurl. & N. 343; *Butler v. Manny*, 52 Mo. 497. See Harriman, Contracts (2d Ed.) § 310.

tate,<sup>180</sup> or from the existence of a certain relation between parties.<sup>181</sup> This distinction between implied and express covenants is an important one, as will be seen when we consider the effects of the assignment of the lessee's interest, and it is desirable from the beginning to form a clear conception of the difference between them, in view of the frequent confusion in text books and decisions in the use of the terms. The term "implied" covenant is quite frequently extended to cover what is really an express covenant, because created by the agreement of the parties, as when it is said that, from the words "yielding and rendering" rent, there is "implied" a covenant to pay rent, such words in reality creating an express covenant to pay rent.<sup>182</sup>

— (b) Of quiet enjoyment and title.

Giving to the term "implied covenant" its proper meaning, as stated above, of such covenants as are inferred from the use of particular words in the creation of an estate, or from the existence of a particular relation, and excluding all

<sup>180</sup> *Williams v. Burrell*, 1 C. B. 402, 429; 1 Taylor, Landl. & Ten. § 252, note 3; *Lovering v. Lovering*, 13 N. H. 512, 519. And see *Consumers' Ice Co. v. Bixler*, 84 Md. 437.

<sup>181</sup> Rawle, Covenants, § 272.

<sup>182</sup> See 1 Taylor, Landl. & Ten. § 252, and note, and cases there cited. See, also, *Sims*, Covenants, 94, note; 2 Leake, 474.

Mr. Rawle says that the later cases have consistently held that the covenant created by the words "yielding and paying" is an implied, and not an express, covenant. See Rawle, Covenants (5th Ed.) § 272, note 5. Of the cases cited by this author, some do not bear on the question, one or two merely speak of the covenant to pay rent as being "implied" from the use of the terms reserving rent, and one only (*Kimpton v. Walker*, 9 Vt. 191) sustains his statement. In *Kunckle v. Wynick*, 1 Dall. 307, the remark of the judge was a mere dictum. This statement by Mr. Rawle is in direct contradiction to the definition of an implied covenant as given by Tindal, C. J., in *Williams v. Burrell*, 1 C. B. 402, referred to by him with approval (section 275, note 3), and quoted at length in the fourth edition of his work, at page 470.

covenants which, though in a certain sense "implied" or inferred from particular stipulations in the lease, are, because created by such stipulations, express covenants, there are, it seems, but two implied covenants on the part of the lessor in the case of a lease for years, these being the covenants for quiet enjoyment and power to demise.

These covenants for quiet enjoyment and for title have always been implied from the use of the word "demise," and generally of other words, such as "let" and "lease,"<sup>183</sup> and according to the trend of decisions in this country, such a covenant for quiet enjoyment is implied from the mere relation of landlord and tenant, independently of the presence of any particular words in the lease, and accordingly it exists even in the case of a parol lease.<sup>184</sup> Where the words of demise are not used, as in the case of a parol lease, while, as

<sup>183</sup> Rawle, Covenants, §§ 270, 272; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350; *Maeder v. Carondelet*, 26 Mo. 112; *Maule v. Ashmead*, 20 Pa. St. 432; *Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; *Stott v. Rutherford*, 92 U. S. 107; *Gano v. Vanderveer*, 34 N. J. Law, 293.

In some cases it is held that the word "demise" is necessary for the implication of a covenant of quiet enjoyment, and that "let" and "lease" are insufficient. *Lovering v. Lovering*, 13 N. H. 513; *Mershon v. Williams*, 63 N. J. Law, 398. And see *Baynes v. Lloyd* [1895] 2 Q. B. 610. These cases are contrary to the current of modern decisions in this country, as shown by the cases cited in the preceding and following notes.

<sup>184</sup> Rawle, Covenants, § 274; *Berrington v. Casey*, 73 Ill. 317; *Avery v. Dougherty*, 102 Ind. 443; *Mack v. Patchin*, 43 N. Y. 167, 1 Am. Rep. 506; *Dexter v. Manley*, 4 Cush. (Mass.) 14; *Baugh v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Duncklee v. Webber*, 151 Mass. 408; *Barns v. Willson*, 116 Pa. St. 303. Contra, *Baynes v. Lloyd* [1895] 2 Q. B. 610.

A statute providing that no covenant shall be implied in any conveyance of real estate has been held not to apply to a lease for years. *City of New York v. Mable*, 13 N. Y. 151, *Finch's Cas.* 758, 64 Am. Dec. 538; *Boreel v. Lawton*, 90 N. Y. 293, 1 *McAdams, Landl. & Ten.* 403.

above stated, there is, by the weight of authority in this country, a covenant of quiet enjoyment arising from the relation of landlord and tenant, there is no covenant that the lessor has power to demise.<sup>185</sup> An implied covenant will always be superseded by an express covenant of a more restricted character.<sup>186</sup>

The undertaking of the lessor for quiet enjoyment, whether arising from the particular words of demise, or from the relation itself, extends only to acts of the lessor himself, or to the acts of those having title to the premises, and does not protect the lessee against the acts of strangers or wrongdoers, not authorized by the lessor;<sup>187</sup> and to constitute a breach, there must be an eviction of the lessee, either actual or constructive, by the lessor, or by some person having paramount title.<sup>188</sup> It has been held that this implied covenant does not extend beyond the duration of the estate of the lessor, and that consequently, if one having an estate for life or for years makes a lease for years, his estate is not liable on

<sup>185</sup> Rawle, Covenants, § 274; *Gano v. Vanderveer*, 34 N. J. Law, 293; *Vernam v. Smith*, 15 N. Y. 327.

<sup>186</sup> Rawle, Covenants, § 275; *Nokes' Case*, 4 Coke, 80b; *Mostyn v. West Mostyn Coal & Iron Co.*, 1 Q. P. Div. 145; *O'Connor v. City of Memphis*, 7 Lea (Tenn.) 219; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350; *Burr v. Stenton*, 43 N. Y. 462; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Merritt v. Closson*, 36 Vt. 172.

<sup>187</sup> *Sigmund v. Howard Bank*, 29 Md. 324; *Moore v. Weber*, 71 Pa. St. 429, 10 Am. Rep. 708; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Surget v. Arighi*, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522.

<sup>188</sup> 1 Taylor, Landl. & Ten. §§ 306, 310; *McAlester v. Landers*, 70 Cal. 79; *Moore v. Frankenfield*, 25 Minn. 540; *Ware v. Lithgow*, 71 Me. 62; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *City of New York v. Mable*, 13 N. Y. 151, 64 Am. Dec. 538. As to what constitutes an eviction, see post, § 51.

the covenant in case the lessee is evicted by the remainderman or reversioner after the lessor's death or other termination of the latter's estate.<sup>189</sup>

In some states, upon a breach of the lessor's covenant of quiet enjoyment, the lessee is entitled to recover, in the absence of fault or bad faith on the part of the lessor, merely nominal damages, together with such meane profits as the tenant has been compelled to pay the true owner; it being considered that the tenant's relief from the payment of rent is sufficient compensation for his deprivation of the term.<sup>190</sup> In other states, as in England, the lessee is given the value of the lease at the time of the breach, or the total amount which the lessee has lost thereby.<sup>191</sup>

§ 44. Condition and use of premises—(a) Condition at commencement of term.

One taking a lease of property stands in the position of a purchaser, who can and is bound to inspect the property, and is consequently subject to the rule of *caveat emptor*. It

<sup>189</sup> Rawle, Covenants, § 275; Fawcett, Landl. & Ten. (2d Ed.) 370; Adams v. Gibney, 6 Bing. 656; Baynes v. Lloyd [1895] 2 Q. B. 610; City of Brookhaven v. Baggett, 61 Miss. 383; McClooney v. Croghan's Adm'r, 1 Grant, Cas. (Pa.) 307, 311. Compare Hamilton v. Wright's Adm'r, 28 Mo. 199.

<sup>190</sup> 1 Taylor, Landl. & Ten. § 317; Kelly v. Dutch Church, 2 Hill (N. Y.) 116; Lanigan v. Kille, 97 Pa. St. 120, 39 Am. Rep. 797. And see Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506. This rule is derived from the rule in regard to conveyances in fee, where the damages on breach of the covenant for quiet enjoyment and warranty are limited to the consideration paid by the grantor. See post, § 400.

<sup>191</sup> Fawcett, Landl. & Ten. (2d Ed.) 377; 1 Taylor, Landl. & Ten. § 317; Lock v. Furze, L. R. 1 C. P. 441, affirming 19 Q. B. (N. S.) 96; Dexter v. Manley, 4 Cush. (Mass.) 14; Park v. Bates, 12 Vt. 387; Snodgrass v. Reynolds, 79 Ala. 462, 58 Am. Rep. 601; Newbrough v. Walker, 8 Grat. (Va.) 16, 56 Am. Dec. 127; Dobbins v. Duquid, 65 Ill. 464; Cannon v. Willbur, 30 Neb. 777. And see Clarkson v. Skidmore, 46 N. Y. 297.



results that there is no implied warranty by the lessor as to the condition of the premises, and the lessee cannot complain that they were not, at the beginning of the tenancy, in a tenantable condition, or were not adapted for the purposes for which they were leased.<sup>192</sup> In England, however, an exception has been made in the case of the demise of a furnished house, it being held that a condition is implied in that case that the house shall be fit for immediate habitation,<sup>193</sup> but this exception to the general rule has been questioned, and has not generally been recognized in this country.<sup>194</sup> The freedom of the lessor from responsibility for the condition of the premises at the time of the letting does not, however, extend to cases where the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous element or defects the landlord knew, but which were not open to the view of the tenant, and were unknown to him.<sup>195</sup>

<sup>192</sup> *Hart v. Windsor*, 12 Mees. & W. 68; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Davidson v. Fischer*, 11 Colo. 583, 7 Am. St. Rep. 267; *Franklin v. Brown*, 118 N. Y. 110, 16 Am. St. Rep. 744; *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Clifton v. Montague*, 40 W. Va. 207, 52 Am. St. Rep. 872; *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. Rep. 431; *Moore v. Weber*, 71 Pa. St. 429, 10 Am. Rep. 708; *Clyne v. Helmes*, 61 N. J. Law, 358; *Davis v. George*, 67 N. H. 393.

<sup>193</sup> *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, 2 Exch. Div. 336; *Fawcett, Landl. & Ten.* (2d Ed.) 332.

<sup>194</sup> The English rule is repudiated in *Murray v. Albertson*, 50 N. J. Law, 167, 7 Am. St. Rep. 787; *Fisher v. Lighthall*, 4 Mackey (D. C.) 82, 54 Am. Rep. 258. See, also, *Franklin v. Brown*, 118 N. Y. 110, 16 Am. St. Rep. 744; *Daly v. Wise*, 132 N. Y. 306, *Finch's Cas.* 762. The rule has been adopted in Massachusetts. *Ingalls v. Hobbs*, 156 Mass. 348, 32 Am. St. Rep. 460. See, for discussions of the question, 6 Am. Law Rev. 618; also note in 38 Am. St. Rep. 479.

<sup>195</sup> *Daly v. Wise*, 132 N. Y. 306, *Finch's Cas.* 762; *Hamilton v.*

— (b) Mode of use by tenant.

The tenant of premises is in the position not only of a purchaser, but also of a bailee thereof, and he must accordingly use them in such a way as not to substantially injure them, and must return them at the end of the term in such condition as they were in when the tenancy commenced, allowance being made for ordinary wear and tear incident to the use contemplated in the making of the lease.<sup>196</sup> He is entitled, however, to estovers,—that is, timber needed for repairs and for use as fuel on the premises.<sup>197</sup> Any substantial injury done by him to the property demised, as by cultivating the ground in an improper manner, by destroying trees or buildings thereon, constitutes waste, which may frequently be restrained by injunction, and for which the tenant is liable in damages. The question of what constitutes waste is, however, not peculiar to tenancies for years, and will be more conveniently considered in a future part of this work.<sup>198</sup>

— (c) Repairs.

There is also imposed on the tenant the obligation to make repairs, the failure to do which is termed “permissive” waste. This obligation grows out of the duty of the tenant, above mentioned, to return the premises in the condition in which he received them, and consequently he is bound to keep them wind and water tight, so that further injury may not

Feary, 3 Ind. App. 615, 52 Am. St. Rep. 485; *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930; *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469; *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. Rep. 431.

<sup>196</sup> 1 Taylor, Landl. & Ten. § 242; *United States v. Bostwick*, 24 U. S. 53.

<sup>197</sup> See post, § 249.

<sup>198</sup> See post, §§ 246-256.

result.<sup>199</sup> He is not, however, bound to make repairs of a substantial nature, involving the substitution of new structures, or parts thereof, for old, though these latter be defective and worn out through age;<sup>200</sup> nor is he bound to restore what may be injured or destroyed by accident.<sup>201</sup>

Under an express covenant by the tenant to make repairs, or to surrender the premises at the end of the term in as good condition as at the beginning of the tenancy, it has always been held in England, as it is in some of the states in this country, that he is bound to make repairs in case of injury to the premises by third persons without his fault,<sup>202</sup> and that, even when the injury is purely the result of accident, as when a building is destroyed by fire, he must restore the premises to their former condition by rebuilding or otherwise, as the case may be.<sup>203</sup> In other states, however, the common-law rule has been departed from, and a covenant to repair or to restore the premises in the condition in which they were at the beginning of the tenancy does not require the tenant to rebuild in case of destruction of buildings without his fault.<sup>204</sup>

<sup>199</sup> Co. Litt. 53a; *Hitner v. Ege*, 23 Pa. St. 305; *Suydam v. Jackson*, 54 N. Y. 450; *Moore v. Townshend*, 33 N. J. Law, 234. See post, § 254.

<sup>200</sup> *Johnson v. Dixon*, 1 Daly (N. Y.) 178; *Long v. Fitzsimmons*, 1 Watts & S. (Pa.) 530.

<sup>201</sup> *United States v. Bostwick*, 94 U. S. 53; *Smith v. Kerr*, 103 N. Y. 31, 2 Am. St. Rep. 362; *Earle v. Arbogast*, 180 Pa. St. 409; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

<sup>202</sup> 1 Taylor, Landl. & Ten. § 360; *Beach v. Crain*, 2 N. Y. 87, 49 Am. Dec. 369; *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115.

<sup>203</sup> 2 Woodfall, Landl. & Ten. 592; *Phillips v. Stevens*, 16 Mass. 238, *Finch's Cas.* 765; *Ely v. Ely*, 80 Ill. 532; *Hoy v. Holt*, 91 Pa. St. 83, 36 Am. Rep. 659; *Armstrong v. Maybee*, 17 Wash. 24, 61 Am. St. Rep. 898.

<sup>204</sup> *Seevers v. Gabel*, 94 Iowa, 75, 58 Am. St. Rep. 381; *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 61 Am. St. Rep. 554, and note; *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec.

The landlord is under no obligation whatever to keep the premises in repair, in the absence of an express stipulation binding him so to do.<sup>205</sup>

— (d) Injuries from defective condition.

Since the tenant is bound to inspect beforehand, and is subject to the rule of *caveat emptor*, and the landlord owes no duty to repair, the latter is, in general, not liable for injuries to the tenant or his property resulting from the construction or condition of the demised premises.<sup>206</sup> This rule is, however, subject to the exception referred to above, in regard to hidden defects existing at the time of the lease, of which the lessor, knowing thereof, is bound to inform the lessee.<sup>207</sup> And in some cases the liability of the landlord is, on this principle, extended not only to injuries to the tenant from hidden defects of which he knew, but even to defects which he might have discovered, it being considered negligence on his part to fail to discover them,<sup>208</sup> while in

538; Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Pollard v. Shaffer, 1 Dall. (Pa.) 210, 1 Am. Dec. 239.

It is so provided by statute in several states. 1 Stimson's Am. St. Law, § 2045.

<sup>205</sup> Arden v. Pullen, 10 Mees. & W. 321; Gregor v. Cady, 82 Me. 131, 17 Am. St. Rep. 466; Ward v. Fagin, 101 Mo. 669, 20 Am. St. Rep. 651; Pets v. Voigt Brewery Co., 116 Mich. 418, 72 Am. St. Rep. 531; Witty v. Matthews, 52 N. Y. 513; Moore v. Weber, 71 Pa. St. 429, 10 Am. Rep. 708; Viterbo v. Friedlander, 120 U. S. 707; Cowell v. Lumley, 39 Cal. 151, 2 Am. Rep. 430; Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267; Foster v. Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223.

<sup>206</sup> McKenzie v. Cheetham, 83 Me. 543; Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267; Ward v. Fagin, 101 Mo. 669, 20 Am. St. Rep. 650; Metzger v. Schultz, 16 Ind. App. 454, 59 Am. St. Rep. 323.

<sup>207</sup> See authorities cited ante, note 192.

<sup>208</sup> Hines v. Willcox, 96 Tenn. 148, 54 Am. St. Rep. 823; Willcox v. Hines, 100 Tenn. 538, 66 Am. St. Rep. 770, and note; Albert (102)

other cases his liability is restricted to defects of which he actually knew.<sup>209</sup> The landlord is also, it seems, liable to the tenant for personal injuries caused by his failure to repair in compliance with a covenant by him in the lease, provided he knew of the need of repairs, on the theory, apparently, that failure to repair in such case constitutes negligence;<sup>210</sup> and also, though not bound by the lease to make repairs, he is liable if he undertakes to make them, and does the work negligently.<sup>211</sup>

The landlord is, as a rule, not liable for injuries caused to strangers by the condition of the premises, since the tenant is the person on whom alone is imposed the duty of making repairs and keeping the premises free from defects or nuisances injurious to others, and there is no relation of agency between them.<sup>212</sup> The landlord is, however, liable for injuries caused by defects in the premises for which he is himself responsible. Such defects are generally those which exist in the original construction of the building leased, or in the condition of the premises at the time the tenancy

v. State, 66 Md. 325, 59 Am. Rep. 159. And see *Lindsey v. Leighton*, 150 Mass. 285, 15 Am. St. Rep. 199.

<sup>209</sup> *Doyle v. Union Pacific Ry. Co.*, 147 U. S. 413; *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 64 Am. St. Rep. 229; *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485; *Bowe v. Hunking*, 125 Mass. 380, 46 Am. Rep. 471.

<sup>210</sup> 2 *Shearman & R. Neg.* (5th Ed.) § 708; *Sieber v. Blanc*, 76 Cal. 173; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169; *Frank v. Coaradi*, 50 N. J. Law, 23; *Hutchinson v. Cummings*, 156 Mass. 329.

<sup>211</sup> *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466; *Riley v. Lissner*, 160 Mass. 330.

<sup>212</sup> *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279; *Eyre v. Jordan*, 111 Mo. 424, 33 Am. St. Rep. 543; *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384; *Adams v. Fletcher*, 17 R. L. 137, 33 Am. St. Rep. 859; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 772.

begins,<sup>213</sup> and he is also liable to third persons, according to some authorities, for injuries resulting from his failure to comply with covenants to repair,<sup>214</sup> as he is for those resulting from the tenant's use of the premises, if he knew, when making the lease, that the only possible use thereof was liable to cause injury to third persons.<sup>215</sup> The tenant, on the other hand, is liable to third persons for any injuries resulting from his negligent use of the premises, or his failure to keep them in proper condition; and the fact that the defects resulting from his negligence should, by the terms of the lease, be repaired by the landlord, is no defense.<sup>216</sup>

<sup>213</sup> *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845; *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702; *Hannen v. Pence*, 40 Minn. 127, 12 Am. St. Rep. 717; *Tomle v. Hampton*, 129 Ill. 379.

<sup>214</sup> *Payne v. Rogers*, 2 H. Bl. 350; *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 50 Am. Dec. 775; *Inhabitants of Milford v. Holbrook*, 9 Allen (Mass.) 17; *Gridley v. City of Bloomington*, 68 Ill. 47.

The liability in such case has been stated to be in order to avoid circuity of action, since the landlord would be liable to the tenant for damages recovered by the person injured against the latter. See cases *supra*. It is, however, most ingeniously suggested that it would be preferable to base the liability in such case on the theory that, as regards the condition of the premises, the landlord is, in view of the covenant to repair, actually in control, and that he is consequently directly liable to the person injured, on the ground of negligence. See article by Joseph Willard, Esq., in 6 Am. Law Rev. 629.

In some states the landlord's covenant to repair has been held not to render him liable to persons injured by want of repair. *Odell v. Solomon*, 99 N. Y. 635; *Sterger v. Van Sicklen*, 132 N. Y. 499, 28 Am. St. Rep. 594; *Clyne v. Helmes*, 61 N. J. Law, 358; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767.

<sup>215</sup> *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159; *Edwards v. New York & M. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Brunswick-Balke-Clender Co. v. Rees*, 69 Wis. 442, 2 Am. St. Rep. 748.

<sup>216</sup> 2 *Shearman & R. Neg.* (5th Ed.) § 713. See *Fisher v. Thirkell*, (104)

Where control of a part of leased premises is retained by the landlord, as when part only of a building is leased to a single tenant, who uses staircases and entries in other parts of the building in common with the landlord or other tenants, the landlord is liable for any injuries caused by the defective or dangerous condition of such parts of which he retains control.<sup>217</sup>

#### § 45. Reservation of rent.

A stipulation for the payment of rent to the lessor by the lessee, as a consideration for the latter's enjoyment of the premises, is not necessary in the case of the creation of an estate for years, or lesser estate,<sup>218</sup> nor is it peculiar to such an estate, but it is such a usual incident thereto that it is proper to mention it here, though a full consideration is reserved for another part of the work.<sup>219</sup>

The obligation to pay rent, imposed by the terms of the lease, is, as a general rule, terminated, as will be seen later, only by the termination of the estate created by the lease, and the obligation is not terminated by the fact that the buildings on the land demised are accidentally destroyed, as by fire.<sup>220</sup>

<sup>217</sup> 1 Mich. 1, 4 Am. Rep. 422; *Hussey v. Ryan*, 64 Md. 426, 54 Am. Rep. 772; *Rosenfield v. Arrol*, 44 Minn. 395, 20 Am. St. Rep. 584; *Caldwell v. Slade*, 156 Mass. 84.

<sup>218</sup> 2 Shearman & R. Neg. (5th Ed.) § 710; *Sawyer v. McGilli Cuddy*, 81 Me. 318, 10 Am. St. Rep. 260; *Davis v. Pacific Power Co.*, 107 Cal. 563, 48 Am. St. Rep. 156; *Coupe v. Platt*, 172 Mass. 458, 70 Am. St. Rep. 293; *Olson v. Schultz*, 67 Minn. 494, 64 Am. St. Rep. 437; *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846.

<sup>219</sup> 1 Taylor, Landl. & Ten. § 14; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665; *Hooton v. Holt*, 139 Mass. 54; *Savings Bank v. Getchell*, 59 N. H. 281.

<sup>220</sup> See post, §§ 354-364.

See post, § 363.

## § 46. Assignment of term.

An estate for years may always be assigned by the owner thereof, unless this power is expressly restrained by a covenant or stipulation, and the absence of the word "assigns" in the lease is immaterial.<sup>221</sup> The lessor may, however, either by proviso or by covenant, restrain assignments by the lessee, this being done usually by inserting in the lease a condition that, on breach of such covenant, or on assignment, the lease shall be void, or that the lessor shall have a right of re-entry.<sup>222</sup> If the prohibition consists merely of a covenant against assignment, without any right of re-entry for breach, the assignment will be valid and effectual, and the only remedy of the lessor will be an action of damages for breach of covenant.<sup>223</sup> Covenants against assignment have generally been strictly construed by the courts,<sup>224</sup> and accordingly they have been held not to extend to assignments by operation of law, as on the bankruptcy of the lessee, or on execution against him,<sup>225</sup> though, by an express stipula-

<sup>221</sup> 1 Taylor, Landl. & Ten. § 402; Doe v. Carter, 8 Term R. 57; Nave v. Berry, 22 Ala. 382; Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527; Clarkson v. Skidmore, 46 N. Y. 297; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Cooney v. Hayes, 40 Vt. 478, 94 Am. Dec. 425.

<sup>222</sup> 1 Taylor, Landl. & Ten. § 402; Fawcett, Landl. & Ten. (2d Ed.) 392; 4 Kent, Comm. 96.

But though on "a lease for years, the lessor can impose a condition against alienation upon the lessee, the lessee, upon making an assignment, cannot impose such a condition upon his assignee, for the lessee is transferring his whole interest, which the lessor is not." Gray, Restraints Alien. Prop. § 27, citing Co. Litt. 223a; Potter v. Couch, 141 U. S. 296, 317. See post, § 466.

<sup>223</sup> Paul v. Nurse, 8 Barn. & C. 486; Williams v. Earle, L. R. 3 Q. B. 739, 2 Gray's Cas. 430; Shattuck v. Lovejoy, 8 Gray (Mass.) 204; Burnes v. McCubbin, 3 Kan. 221, 87 Am. Dec. 468. See 7 Am. Law Rev. 240, 255, a very able article by Mr. Joseph Willard.

<sup>224</sup> 1 Taylor, Landl. & Ten. § 403; Doe v. Carter, 8 Term R. 57.

<sup>225</sup> Fawcett, Landl. & Ten. (2d Ed.) 392; Doe v. Carter, 8 Term R. 57; Farnum v. Hefner, 79 Cal. 575, 13 Am. St. Rep. 174; Bemis (106)



tion that such an assignment shall be void, or that the property shall revert to the lessor, such effect of the operation of law may be defeated.<sup>226</sup> Nor will a stipulation against assignment be violated by a sublease.<sup>227</sup> An express assignment, as distinct from one by operation of law, must, under the Statute of Frauds,<sup>228</sup> be in writing, but the writing need not, in the absence of statute, be under seal.<sup>229</sup> Provided the assignee accept the assignment, an entry by him on the premises is generally not necessary to render it effective.<sup>230</sup>

— Effect of assignment.

A lease for years is both a contract and an instrument creating an estate, and consequently the lessee has two sets of rights and obligations,—one comprising those growing out of the relation of landlord and tenant, and said to be based

v. Wilder, 100 Mass. 446; Jackson v. Silvernail, 15 Johns. (N. Y.) 272.

<sup>226</sup> 1 Taylor, Landl. & Ten. § 409; Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174.

<sup>227</sup> Crusoe v. Bugby, 2 W. Bl. 766; Jackson v. Harrison, 17 Johns. (N. Y.) 66, Finch's Cas. 731; Hargrave v. King, 5 Ired. Eq. (N. C.) 430.

<sup>228</sup> 29 Car. II. c. 3, § 3.

<sup>229</sup> 2 Taylor, Landl. & Ten. § 428; Sanders v. Partridge, 108 Mass. 556, Finch's Cas. 746.

<sup>230</sup> An entry by the assignee, if he accepts the assignment, is not necessary to make it operative as against him, so as to bind him by stipulations therein. Williams v. Bosanquet, 1 Brod. & B. 238; Benedict v. Everard (Conn.) 46 Atl. 870; Babcock v. Scoville, 56 Ill. 461; 2 Taylor, Landl. & Ten. § 450.

In Sanders v. Partridge, 108 Mass. 556, it is said that the proposition that an actual entry upon the demised premises is not requisite in order to charge him with the performance of covenants running with the land "will hold good only in respect of assignments by deed recorded and delivered, which are usually regarded as effecting a transfer not only of title, but also of the legal possession," and that "an assignment without deed, as of a chattel interest only, requires some act of entry, or change of actual possession, to complete its operation." Citing 2 Taylor, Landl. &

on the "privity of estate," and the other comprising those growing out of the express stipulations of the lease, and so said to be based on "privity of contract."<sup>231</sup> Upon the assignment by the lessee of his estate, the term, he ceases to be the tenant of the landlord, and his assignee takes his place, and consequently the latter alone can assert against the landlord rights growing out of privity of estate.<sup>232</sup> The liabilities likewise growing out of privity of estate pass to the assignee, to the exclusion of the original lessee, provided the owner of the reversion consents to the assignment, either expressly or impliedly, as by receiving rent from the assignee.<sup>233</sup> Express stipulations in the lease, on the other hand, continue binding on the lessee in spite of the assignment, and its recognition by the landlord, and even though, as will presently be seen, the assignee may also be liable thereunder, since the privity of contract cannot be affected by an assignment by the person liable.<sup>234</sup> As examples of such contractual liabilities, which thus remain

Ten. §§ 449-451. This latter work, however, makes mention of no such distinction, but merely says (section 451) that, where the assignment is by deed, an assignee becomes liable as such by merely accepting the deed, while if a man becomes assignee only by operation of law, he is not, in general, chargeable until he actually enters, or does some other act showing his acceptance of the lease. No such distinction as that mentioned in *Sanders v. Partridge* prevails apparently in England or in any other state in this country.

<sup>231</sup> 1 Washburn, Real Prop. 315; 2 Taylor, Landl. & Ten. § 436; 7 Am. Law Rev. 240.

<sup>232</sup> 7 Am. Law Rev. 245.

<sup>233</sup> Walker's Case, 3 Coke, 22a, 2 Gray's Cas. 661; Marsh v. Brace, Cro. Jac. 334, 2 Gray's Cas. 669; Consumers' Ice Co. v. Bixler, 84 Md. 437; Lodge v. White, 30 Ohio St. 569, 27 Am. Rep. 492; Drake v. Lacoe, 157 Pa. St. 17, 38.

<sup>234</sup> Barnard v. Godscall, Cro. Jac. 309, 2 Gray's Cas. 411; Thursby v. Plant, 1 Lev. 259, 2 Gray's Cas. 671; Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 10 Am. St. Rep. 553; Garner v. Byard, 23 Ga. 389, 68 Am. Dec. 527; Barhydt v. Burgess, 46 Iowa (108)

binding on the lessee after assignment, may be mentioned covenants to pay rent or to pay taxes.<sup>235</sup>

— By operation of law.

An assignment of the lease may take place by operation of law, which will generally have the same effect as a voluntary assignment in substituting the assignee in place of the assignor, with all the rights and liabilities of any other assignee. Such an assignment occurs when the term is sold

476; *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Far-  
rington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680.

The original lessee will, of course, be discharged if a new tenancy is created by the landlord's acceptance of a surrender from the lessee, and the making of a new lease to one to whom the lessee has assigned his rights. 2 Taylor, Landl. & Ten. §§ 513, 514; 7 Am. Law Rev. 244; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Williams v. Vanderbilt*, 145 Ill. 233, 36 Am. St. Rep. 486; *Colton v. Gorham*, 72 Iowa, 324.

It is suggested by Mr. Sims that, on the principle of the continuance of the privity of contract, the lessee may, even after assignment, enforce express stipulations in his favor which are subsequently broken, though any recovery on his part on such a stipulation would probably be regarded as in trust for his assignee. Sims, Covenants, 92. But see *Blackmore v. Boardman*, 28 Mo. 420, *Finch's Cas.* 764; and there seems no reason why the assignor of a lease should be in any better position in this regard than the grantor of a fee-simple estate, who cannot thereafter sue upon covenants of title running with the land, unless he is bound to indemnify his grantee for the breach. See Rawle, Covenants, §§ 215, 320.

<sup>235</sup> *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Shaw v. Partridge*, 17 Vt. 626; *Harris v. Heackman*, 62 Iowa, 411; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233; *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Fisher v. Milliken*, 8 Pa. St. 111, 49 Am. Dec. 497.

But the lessee is not liable under his covenant to pay rent, if, according to the terms of the lease, the property was to be used for a certain purpose only, and an assignee of the lessee, without his consent, but with the lessor's consent, used it for a different purpose. *Fifty Associates v. Grace*, 125 Mass. 161, 28 Am. Rep. 218.

on execution against the lessee, or it passes under the bankruptcy or insolvency laws to the lessee's assignee.<sup>226</sup> In view, however, of the liabilities imposed upon an assignee of the tenant's interest, particularly those arising from the special stipulations in the lease, hereafter discussed, an assignee in bankruptcy or insolvency may refuse to accept the term as a part of the assets of the estate, and thus avoid the liability of an assignee, and his election in this regard may be shown by his acts, as well as by express words. The taking of possession of the premises is conclusive of his intention to accept the term, and renders him liable as assignee.<sup>227</sup> The trustee or assignee under a voluntary assignment for the benefit of creditors has likewise, in this country, the privilege of refusing to accept a leasehold estate belonging to his assignor, and may so avoid any liabilities as assignee thereof.<sup>228</sup> It has been held, however, that a receiver of an insolvent corporation is not in the position of an assignee of a lease belonging to the corporation, even though he takes possession thereof, and is consequently not liable on covenants in the lease.<sup>229</sup>

<sup>226</sup> 2 Taylor, Landl. & Ten. § 456; *McNeill v. Ames*, 120 Mass. 481, *Finch's Cas.* 749; *Evans v. Hamrick*, 61 Pa. St. 19, 100 Am. Dec. 595. Such involuntary assignment is not, however, a violation of a covenant against assignment. See ante, note 225.

<sup>227</sup> 2 Taylor, Landl. & Ten. § 456; 1 Washburn, Real Prop. 340; *Carter v. Warne*, 4 Car. & P. 191; *Hoyt v. Stoddard*, 2 Allen (Mass.) 442; *White v. Griffing*, 44 Conn. 437; *In re Commercial Bulletin Co.*, 2 Woods, 220, Fed. Cas. No. 3,060.

<sup>228</sup> 2 Taylor, Landl. & Ten. § 458; 1 Washburn, Real Prop. 340; *Dorrance v. Jones*, 27 Ala. 630; *Bagley v. Freeman*, 1 Hilt. (N. Y.) 196.

In England, the assignee for creditors cannot accept the conveyance, and yet refuse to accept leasehold property included therein. *Fawcett, Landl. & Ten.* (2d Ed.) 403; *White v. Hunt*, L. R. 6 Exch. 32.

<sup>229</sup> *Galther v. Stockbridge*, 67 Md. 222; *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481. Contra, *United States Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287.

— On death of tenant.

Upon the death of the tenant, his interest, the term, being personal property, passes to his personal representatives unless the statute otherwise provides,<sup>240</sup> and such representatives become subject to liabilities under the lease, as in the case of other assignees.<sup>241</sup>

§ 47. Assignment of reversion.

The lessor's reversion, expectant upon the end of the term, like any other estate, may be granted or assigned. Upon the making of the assignment, his assignee is substituted in his place as landlord, and becomes possessed of the rights, and subject to the liabilities, of that relation, to the exclusion of the original lessor, so far as these rights and liabilities arise from the relation itself, and not from express stipulations in the lease.<sup>242</sup> The assignment may be by operation of law, as well as by voluntary act of the owner.<sup>243</sup> The lessor, however, remains liable on his covenants in the lease, even though the assignee also becomes liable, since, as in

<sup>240</sup> 2 Bl. Comm. 386; Taylor, Landl. & Ten. §§ 14, note, 133, 434, 460; Fawcett, Landl. & Ten. (2d Ed.) 418; Allender's Lessee v. Sussan, 33 Md. 11, 3 Am. Rep. 171; Keating v. Condon, 68 Pa. St. 75; and see authorities cited ante, note 133.

<sup>241</sup> 2 Taylor, Landl. & Ten. §§ 460, 461; Fawcett, Landl. & Ten. (2d Ed.) 420; Schouler, Executors (3d Ed.) §§ 375, 376; Vyvyan v. Arthur, 1 Barn. & C. 410, 2 Gray's Cas. 425; Inches v. Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765; Becker v. Walworth, 45 Ohio St. 169.

<sup>242</sup> Woodfall, Landl. & Ten. 252; Fawcett, Landl. & Ten. (2d Ed.) 413; 2 Taylor, Landl. & Ten. § 439; Willard v. Tillman, 2 Hill (N. Y.) 274.

<sup>243</sup> Burton v. Smith, 13 Pet. (U. S.) 464; Evans v. Hamrick, 61 Pa. St. 19, 100 Am. Dec. 596; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Murrell v. Roberts, 11 Ired. (N. C.) 424, 53 Am. Dec. 419; Woodgate v. Fleet, 44 N. Y. 1.

the case of an assignment by the lessee, the privity of contract still remains.<sup>244</sup>

Formerly, in order to complete an assignment of the reversion so as to make the assignee the landlord of the lessee, and to give him a right of action on the latter's covenants, it was necessary that the latter should "attorn" to the assignee,—that is. should acknowledge that the latter was his landlord. This requirement was, however, dispensed with by St. 4 Anne, c. 16, § 9,<sup>245</sup> it being provided thereby, however, that the tenant should not be prejudiced by payment of rent to the assignor before receiving notice of the assignment. This statute, or the principle thereof, has been generally adopted in this country, and no attornment is necessary, though notice may be required in order to preserve certain rights of the assignee as landlord.<sup>246</sup> On a general grant of the reversion, without any reservation of the rent, this latter will pass as an incident,<sup>247</sup> but the reversion may

<sup>244</sup> *Jones v. Parker*, 163 Mass. 564. And see *Grey v. Cuthbertson*, 2 Chitty, 482, 2 Gray's Cas. 414.

It seems that the lessor cannot sue for a breach of a covenant running with the land which occurs after his assignment of the reversion. This is assumed in *Green v. James*, 6 Mees. & W. 656, and expressly decided in *Stoddard v. Emery*, 128 Pa. St. 436. And see *Vernon v. Smith*, 5 Barn. & Ald. 1, 2 Gray's Cas. 421, opinion of Best, J., and see remarks on lessee's right to sue after his assignment, ante, note 234. Mr. Sims, however, is of opinion that the lessor may sue for such a breach. See *Sims, Covenants*, 91.

<sup>245</sup> A. D. 1705. See *Fawcett, Landl. & Ten.* (2d Ed.) 413.

<sup>246</sup> 2 Taylor, Landl. & Ten. § 442 and notes; 1 Stimson's Am. St. Law, § 2009. See *Perrin v. Lepper*, 34 Mich. 292, 1 Gray's Cas. 449; *Burden v. Thayer*, 3 Metc. (Mass.) 76, 37 Am. Dec. 117; *Funk's Lessee v. Kincaid*, 5 Md. 404.

It was at one time held in Illinois that the statute of Anne was not in force there, and that consequently attornment was necessary. *Fisher v. Deering*, 60 Ill. 114, 1 Gray's Cas. 446, *Finch's Cas.* 751. This has, however, since been changed by statute. *Barnes v. Northern Trust Co.*, 169 Ill. 112.

<sup>247</sup> *Burden v. Thayer*, 3 Metc. (Mass.) 76; *Martin v. Martin*, 7 (112)

be granted, and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed in the words which they use.<sup>248</sup>

#### § 48. Sublease.

In the absence of a stipulation to the contrary, the tenant has the right at any time to make a sublease of the premises, or of a part thereof.<sup>249</sup> The power of the tenant to make a sublease may, however, be restrained by special stipulation, but such a stipulation against underletting does not, by the later authorities, preclude an assignment of the whole term.<sup>250</sup> A sublessee of the tenant is not in privity of contract or estate with the original landlord, since he merely holds possession for the tenant, as it were, and consequently no mutual rights or obligations arise between them, and neither can enforce any personal liability on the part of the other.<sup>251</sup>

*Md.* 363, 61 Am. Dec. 364; *Evans v. Hamrick*, 61 Pa. St. 19, 100 Am. Dec. 595; *Johnson v. Smith*, 3 Pen. & W. (Pa.) 496, 24 Am. Dec. 339; *Miller v. Stagner*, 3-B. Mon. (Ky.) 58, 38 Am. Dec. 178; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164.

<sup>249</sup> *Co. Litt.* 143a, 151b; *Moffatt v. Smith*, 4 N. Y. 126, *Finch's Cas.* 749; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Beal v. Boston Spring Car Co.*, 125 Mass. 157, 28 Am. Rep. 216, 2 *Gray's Cas.* 787.

<sup>249</sup> 1 *Taylor, Landl. & Ten.* § 108; *Fawcett, Landl. & Ten.* (2d Ed.) 384; 1 *Woodfall, Landl. & Ten.* 12; *Crommelin v. Thless*, 31 Ala. 412, 70 Am. Dec. 499.

<sup>250</sup> 1 *Taylor, Landl. & Ten.* § 403, and note 2; 5 *Am. Law Rev.* 243; *Field v. Mills*, 33 N. J. Law, 254; *Lynde v. Hough*, 27 Barb. (N. Y.) 415.

That a sublease is not precluded by a covenant against assignment, see ante, § 46.

<sup>251</sup> *Fawcett, Landl. & Ten.* 387; 1 *Taylor, Landl. & Ten.* § 109; *Holford v. Hatch*, 1 Douglas, 183, 2 *Gray's Cas.* 413; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 55 Am. Rep. 344; *Krider v. Ramsay*, 79 N. C. 354; *Harvey v. McGrew*, 44 Tex. 412.

— Distinguished from assignment.

The question whether a particular transaction is an assignment of the lessee's term, or a sublease by him, is frequently a question difficult to determine, and the cases are not in harmony as to the rule to be applied in its solution. According to the current of recent decisions, a grant of the entire interest remaining in the lessee in either the whole or a part of the premises will constitute an assignment to the grantee, so far as the landlord is concerned, even though the instrument purport to be a lease, or a different rent be reserved, but, as between the lessee and the other party to the transaction, though the whole interest of the lessee be thus disposed of, the relation of landlord and tenant will be created by a clear showing of an intention to that effect, except as regards rights which are strictly dependent on the existence of a reversion, such as the right of distress.<sup>252</sup>

<sup>252</sup> 1 Taylor, Landl. & Ten. §§ 16, 426; 1 Washburn, Real Prop. 233; Wood, Landl. & Ten. (2d Ed.) 180, note 4; 7 Am. Law Rev. 247; Fawcett, Landl. & Ten. (2d Ed.) 386; Field v. Mills, 33 N. J. Law, 254; Sexton v. Chicago Storage Co., 129 Ill. 318, 16 Am. St. Rep. 274; Stewart v. Long Island R. Co., 102 N. Y. 601, 55 Am. Rep. 844, distinguishing Collins v. Hasbrouck, 56 N. Y. 157, Finch's Cas. 743; Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Craig v. Summers, 47 Minn. 189; Beardman v. Wilson, L. R. 4 Q. P. 57.

So the transaction was held to be an assignment, and not an underlease, when lessees for ninety-nine years, after sixty years of the term had expired, made a lease for sixty-two years, thus disposing of more than remained of their term. Thorn v. Woollcombe, 3 Barn. & Adol. 586, 2 Gray's Cas. 723.

In Massachusetts, however, it is held that the insertion of new conditions with a right of entry for breach will render the transaction a sublease. Dunlap v. Bullard, 131 Mass. 161. But this seems to be, at least in part, a result of the peculiar doctrine of that state that the right of entry for breach of a condition is an estate capable of devise. See remarks in Sexton v. Chicago Storage Co., 129 Ill. 318, 16 Am. St. Rep. 274; and see post, § 75. In Ohio and Massachusetts it is considered that, if the assignment



## § 49. Covenants running with the land.

In treating above of the effect of the assignment of an estate for years, or of the reversion expectant thereon, we found that those rights and liabilities incident to the relation, and not growing out of stipulations in the lease, pass to an assignee to the exclusion of the assignor, while the liabilities, at least, dependent on express contract, still adhere to the assignor, whether he be the lessee or lessor. The question now arises whether the benefit of these contractual rights passes to the assignee, so as to entitle him to enforce them, and whether the burden of these contractual liabilities passes to him, so as to render them enforceable against him. These questions are part of the difficult and perplexing subject of "Covenants running with the land." The law on this subject, as affects lessor and lessee and their assigns, is generally regarded as determined primarily by the statute 32 Hen. VIII. c. 34 (A. D. 1540), and by a leading case entitled "Spencer's Case."<sup>253</sup> The statute referred to, which has been re-enacted or adopted in practically all the states of this country,<sup>254</sup> was passed after the dissolution of the monasteries by Henry VIII., and the forfeiture of their lands, for the purpose of enabling the crown, or those to whom the forfeited lands were granted, to enforce the covenants of the lessees of the lands. The statute, however, was broader than this in its terms, and gave to the lessors, and

be of only a part of the premises, the legal effect is that of a sublease merely. *Fulton v. Stuart*, 2 Ohio, 215, 15 Am. Dec. 542; *McNeill v. Kendall*, 123 Mass. 245, 35 Am. Rep. 373. In Pennsylvania it was held that "an assignment for an increased consideration, with wholly new stipulations, with right of re-entry for conditions broken, with an express assumption of continuing liability of the assignors to the owners under the original lease, and a manifest intention to sublet," constitutes a subletting. *Drake v. Lacos*, 157 Pa. St. 17.

<sup>253</sup> 5 Coke, 16a, 2 Gray's Cas. 406, 1 Smith's Lead. Cas. 63.

<sup>254</sup> See Sims, Covenants, 74-77; 1 Stimson's Am. St. Law, § 1352.

likewise to their assigns, the right to enforce covenants and conditions against the lessees or their assigns, and gave reciprocal rights to lessees or their assigns to enforce any covenant or condition against the lessors or their assigns. The statute thus in effect declared that both the benefit and the burden of any covenants or conditions should pass to the assigns of either a lessor or a lessee.<sup>255</sup>

By *Spencer's Case*, above referred to, however, certain limitations were imposed upon the passing of the burdens and benefits of covenants to assignees. The most important of these limitations is to the effect that the covenant will not run with the land "if it be merely collateral to the land, and doth not touch or concern the thing demised." There is no

<sup>255</sup> It has generally been stated that, at common law, before the passage of this statute, "covenants ran with the land, and not with the reversion,"—that is, the assignee of the lessee could sue on a covenant, and was liable thereon, but not the assignee of the lessor. 1 *Smith's Lead. Cas.* 150. A recent able writer is, however, of the opinion that the burden as well as the benefit of covenants ran at common law in favor of and against assigns, and that the statute of Henry VIII. was passed merely because the crown and its assigns having obtained the lands of the monasteries by forfeiture, were not in "privity of estate" with the previous lessors,—that is, they were not in the position of assigns, and that the effect of the statute was merely to dispense with the requirement of privity, it being in other respects but declaratory of the common law. *Sims, Covenants*, 66, 77, 80.

The operation of the statute of Henry VIII. is by its terms restricted to covenants in "indentures of lease," and consequently, unless the state statute has changed the requirement, a covenant will not run with the land if the lease is not under seal. See *Standen v. Christmas*, 10 Q. B. 135; 2 *Gray's Cas.* 403; *Bickford v. Parson*, 5 C. B. 921; *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 177; *Smith's Lead. Cas.* (9th Ed.) 181. A stipulation in a lease not under seal may, however, be enforced by the assignee as any other chose in action, and to the same extent. *Sims, Covenants*, 87; 1 *Smith's Lead. Cas.* (9th Ed.) 181; *Bickford v. Parson*, 5 C. B. 920. And in some states stipulations by the lessee in a lease sealed by the lessor would no doubt be regarded as covenants within the statute. See post, § 342.

positive rule, it appears, to be deduced from the decisions, by which to determine whether a particular covenant touches or concerns the thing demised,—that is, the land.<sup>256</sup> Among covenants by the lessee which have been held to thus touch or concern the land are covenants to repair,<sup>257</sup> not to carry on a particular trade on the premises,<sup>258</sup> not to assign without the assent of the lessor, assigns being named in the covenant,<sup>259</sup> to pay rent,<sup>260</sup> to pay taxes,<sup>261</sup> to surrender at the end of the term with improvements,<sup>262</sup> to allow the lessor to have a right of passage through the demised premises to rooms not demised,<sup>263</sup> to reside on the premises,<sup>264</sup> to insure, where the proceeds of the insurance, either by statute or agreement, must be laid out on the land,<sup>265</sup> and to grind corn grown on the premises at a mill belonging to the owner of the reversion.<sup>266</sup> A covenant by the lessor to renew the

<sup>256</sup> See Sims, Covenants, 109.

<sup>257</sup> Spencer's Case, 5 Coke, 16a; Minshull v. Oakes, 2 Hurl. & N. 793, 2 Gray's Cas. 428; Williams v. Earle, L. R. 3 Q. B. 739, 2 Gray's Cas. 430; Demarest v. Willard, 3 Cow. (N. Y.) 206; Crawford v. Wetherbee, 77 Wis. 419.

<sup>258</sup> Wertheimer v. Wayne Circuit Judge, 33 Mich. 56; Stees v. Krans, 32 Minn. 313.

<sup>259</sup> Williams v. Earle, L. R. 3 Q. B. 739, 2 Gray's Cas. 430.

<sup>260</sup> Salisbury v. Shirley, 66 Cal. 223; Webster v. Nichols, 104 Ill. 160; Stewart v. Long Island R. Co., 102 N. Y. 601, 55 Am. Rep. 844; Hunt v. Thompson, 2 Allen (Mass.) 341; Hannen v. Ewalt, 13 Pa. St. 9; Childs v. Clark, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164. See, further, as to the rights and liabilities of assignees on covenants to pay rent, post, § 360.

<sup>261</sup> State v. Martin, 14 Lea (Tenn.) 92, 52 Am. Rep. 167; Post v. Kearney, 3 N. Y. 394, 51 Am. Dec. 303.

<sup>262</sup> Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75.

<sup>263</sup> Cole's Case, 1 Salk. 196, 2 Gray's Cas. 413.

<sup>264</sup> Tatem v. Chaplin, 2 H. Bl. 132, 2 Gray's Cas. 415.

<sup>265</sup> Vernon v. Smith, 5 Barn. & Ald. 1, 2 Gray's Cas. 421; Northern Trust Co. v. Snyder's Adm'r, 46 U. S. App. 179, 587; Thomas' Adm'r v. Vonkapf's Ex'rs, 6 Gill & J. (Md.) 372.

<sup>266</sup> Vyvyan v. Arthur, 1 Barn. & C. 410, 2 Gray's Cas. 425.

lease likewise runs with the land.<sup>267</sup> As to covenants of title by the lessor, it has always been held that, until breach, the benefit of the covenant passes to an assignee of the lessee, this being the same rule which applies in the case of such covenants in a conveyance in fee,<sup>268</sup> and the burden likewise passes to the assignee of the lessor.<sup>269</sup> The implied covenant of quiet enjoyment runs with the land in favor of the lessee, who may sue for its breach.<sup>270</sup> Among covenants which have been held not to run with the land are covenants to pay a certain sum to a stranger,<sup>271</sup> and not to maintain a competing business within a certain distance of the premises.<sup>272</sup>

The mere intention of the parties to the covenant that the covenant shall run with the land, as shown by the use of the word "assigns," or otherwise, will not cause it to so run if it does not touch or concern the land.<sup>273</sup>

The other important qualification imposed by Spencer's Case upon the running of covenants is that, even though the covenant touch or concern the land, if it concerns likewise a thing which is not *in esse* at the time of the demise, but which is to be built or created thereafter, the covenant will not bind assigns unless they are expressly mentioned. So, in that case, it was decided that a covenant by the lessee to

<sup>267</sup> *Blackmore v. Boardman*, 28 Mo. 420, *Finch's Cas.* 764; *Letter v. Pike*, 127 Ill. 287; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455.

<sup>268</sup> *Rawle, Covenants* (5th Ed.) § 204.

<sup>269</sup> *Rawle, Covenants* (5th Ed.) § 313.

<sup>270</sup> *Spencer's Case*, 5 Coke, 16a, 1 *Smith's Lead. Cas.* 68, 2 *Gray's Cas.* 406.

<sup>271</sup> *Mayho v. Buckhurst*, Cro. Jac. 438, 2 *Gray's Cas.* 411; *Dolph v. White*, 12 N. Y. 296.

<sup>272</sup> *Thomas v. Hayward*, L. R. 4 Exch. 311, 2 *Gray's Cas.* 432.

<sup>273</sup> *Spencer's Case*, 5 Coke, 16; *Mayor, etc., of Congleton v. Pat-tison*, 10 East, 120, 2 *Gray's Cas.* 416; *Gibson v. Holden*, 115 Ill. 199; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Masury v. Southworth*, 9 Ohio St. 340.

build a wall on the premises did not bind his assigns because he covenanted only for himself, his executors and administrators, without including assigns. This distinction between covenants as to things *in esse* and those as to things not *in esse*, with its requirement of the mention of assigns in the latter case, while it has been questioned by high authority,<sup>274</sup> and has been occasionally ignored in this country,<sup>275</sup> has been generally adhered to.<sup>276</sup>

The liability of an assignee on a covenant running with the land is based on his ownership of an estate in the land, and does not continue after the assignment by him of this estate to another, and the effect of an assignment by him in discontinuing his liability is not affected by the fact that this is the purpose of his assignment, or that he makes it to an insolvent or person who could not be made liable.<sup>277</sup>

As before stated, a sublessee of the tenant is not in privity of estate or of contract with the original lessor, and consequently neither the benefit nor the burden of covenants in the original lease run to him.<sup>278</sup> But while the subtenant is

<sup>274</sup> *Minshull v. Oakes*, 2 Hurl. & N. 793, 2 Gray's Cas. 428. See 1 Smith's Lead. Cas. 155; *Sims, Covenants*, 105 et seq.

<sup>275</sup> See 1 Smith's Lead. Cas. (9th Ed.) 208; *Sims, Covenants*, 108.

<sup>276</sup> *Fawcett, Landl. & Ten.* (2d Ed.) 406; *Grey v. Cuthbertson*, 2 Chitty, 482, 2 Gray's Cas. 414; *Thompson v. Rose*, 8 Cow. (N. Y.) 266, 2 Gray's Cas. 434; *Hansen v. Meyer*, 81 Ill. 321, 2 Gray's Cas. 437, 25 Am. Rep. 282; *Tallman v. Coffin*, 4 N. Y. 134; *Emerson v. Simpson*, 43 N. H. 475, 80 Am. Dec. 184. See the cases collected in *Sims, Covenants*, 108.

<sup>277</sup> *Woodfall, Landl. & Ten.* 262; 2 Taylor, *Landl. & Ten.* §§ 449, 452; *Fawcett, Landl. & Ten.* (2d Ed.) 409; *Sanders v. Partridge*, 108 Mass. 556, *Finch's Cas.* 746; *Valliant v. Dodemede*, 2 Atk. 546; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Hintze v. Thomas*, 7 Md. 346; *Bell v. American Protective League*, 163 Mass. 553, 47 Am. St. Rep. 481; *Mason v. Smith*, 131 Mass. 510; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 10 Am. St. Rep. 553.

<sup>278</sup> *Holford v. Hatch*, 1 Doug. 183, 2 Gray's Cas. 413; *Mayhew v. Hardesty*, 8 Md. 479; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844; *Sims, Covenants*, 99, and cases cited.

not personally liable to the original lessor upon any covenants, express or implied, the existence of the sublease does not in any way affect the lessor's rights, and consequently the subtenant may be liable to dispossession on the nonpayment of rent by the lessee, or for other breach of condition,<sup>279</sup> or his property may be subject to a lien for rent under a stipulation in the original lease,<sup>280</sup> and if the lease provides that the tenant shall not use the premises for an unlawful purpose, such use by a subtenant is a breach of the stipulation.<sup>281</sup>

The creation of a less interest out of the reversion by the owner thereof, as by the making of a second lease for life or years, stands, however, on a different footing from the making of a sublease by the tenant, and in such case the covenants run to the second lessee,<sup>282</sup> and they likewise run when either the lessor or lessee, instead of assigning his interest in the entire premises, assigns it in a part thereof only.<sup>283</sup>

While the liability of the original lessor or lessee on his covenant, as stated above,<sup>284</sup> continues after an assignment of his estate to another, it is considered that he is in effect but a surety for the performance of the covenant by his assignee, whether immediate or remote, and that the latter

<sup>279</sup> Fawcett, *Landl. & Ten.* (2d Ed.) 388; Woodfall, *Landl. & Ten.* 265; Peck v. Ingersoll, 7 N. Y. 528; Finch's Cas. 745; Arnsby v. Woodward, 6 Barn. & C. 519; Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41.

<sup>280</sup> Foster v. Reid, 78 Iowa, 205, 16 Am. St. Rep. 437.

<sup>281</sup> Miller v. Prescott, 163 Mass. 12, 47 Am. St. Rep. 434; Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41.

<sup>282</sup> Co. Litt. 215a; Sims, *Covenants*, 99; Wright v. Burroughes, 3 C. B. 635.

<sup>283</sup> Congham v. King, Cro. Car. 221, 2 Gray's Cas. 412; Twynam v. Pickard, 2 Barn. & Ald. 105, 2 Gray's Cas. 418; Harris v. Frank, 52 Miss. 155; Leiter v. Pike, 127 Ill. 287; Sims, *Covenants*, 98.

<sup>284</sup> See ante, § 46.

is bound to reimburse any expenditures by the lessor or lessee resulting from the assignee's breach of covenant.<sup>285</sup>

§ 50. Estoppel to deny landlord's title.

A tenant, whatever be the nature of his tenancy, cannot, so long as he retains possession which he has acquired under a lease, deny that at the time of making the lease the landlord had title to the property.<sup>286</sup> At the time at which Lord Coke wrote, the only estoppel applicable to the relation of landlord and tenant was that by deed, which was effective only against the party sealing the lease, and lasted during the term of the demise, and no longer.<sup>287</sup> The modern rule that the tenant is estopped to deny his landlord's title is, however, as generally applied, entirely different from any known in Lord Coke's time, and is strictly an estoppel *in pais*, being based on the possession of the tenant by permission of the landlord, and being entirely independent of the instrument creating the relation, or the length of the term created.<sup>288</sup> This doctrine dates back no further than the early part of the eighteenth century, and probably orig-

<sup>285</sup> Sims, Covenants, 34; *Humble v. Langston*, 7 Mees. & W. 517; *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680; *Moule v. Garrett*, L. R. 5 Exch. 132, L. R. 7 Exch. 101; *Brinkley v. Hambleton*, 67 Md. 169; *Bender v. George*, 92 Pa. St. 36.

<sup>286</sup> 2 Taylor, Landl. & Ten. § 705; *Fawcett, Landl. & Ten.* (2d Ed.) 75; 1 Washburn, Real Prop. 356 et seq.; *Tillotson v. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330; *Winston v. Franklin Academy*, 28 Miss. 118, 61 Am. Dec. 540; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Givens v. Mullinax*, 4 Rich. Law (S. C.) 590, 55 Am. Dec. 706; *Bailey v. Kilburn*, 10 Metc. (Mass.) 176, 43 Am. Dec. 423.

<sup>287</sup> See Co. Litt. 47b.

<sup>288</sup> 1 Taylor, Landl. & Ten. § 89; *Bigelow, Estoppel* (5th Ed.) 506, 510; *Vernam v. Smith*, 15 N. Y. 327, *Finch's Cas.* 756. See particularly, on the history and theory of the tenant's estoppel to deny his landlord's title, the exceedingly learned and suggestive article by Mr. Joseph Willard, in 6 Am. Law Rev. 1 et seq.

inated in the action of assumpsit for use and occupation, which was based on a permissive enjoyment of possession.<sup>289</sup>

The estoppel arises from the fact that after one has obtained possession of land by admitting the title of another, who permits him to take possession, it is inequitable to allow him to deny the title of such other, and thereby retain possession owing to the latter's inability to prove title. Accordingly this estoppel is based upon a "permissive possession,"<sup>290</sup> and, by bearing this in mind, the application and limits of the rule may be quite readily understood. Since the estoppel depends on the permissive possession, and not on the lease, the tenant may at any time, upon surrendering his lease, deny the landlord's title, while, until such surrender, he cannot do so, even though the term has expired.<sup>291</sup> For the same reason, the tenant cannot avoid the estoppel by showing that the lease was improperly executed or otherwise void.<sup>292</sup> On the other hand, after surrendering possession, the tenant may set up, as against his former landlord, a paramount title, which was acquired by him while he was tenant.<sup>293</sup>

<sup>289</sup> 6 Am. Law Rev. 1, 9; Bigelow, Estoppel (5th Ed.) 508; Vernam v. Smith, 15 N. Y. 327, Finch's Cas. 756.

<sup>290</sup> 6 Am. Law Rev. 19; Bigelow, Estoppel (5th Ed.) 509.

<sup>291</sup> Bigelow, Estoppel (5th Ed.) 507; Brown v. Keller, 32 Ill. 151, 33 Am. Dec. 258; Rogers v. Boynton, 57 Ala. 501; Hilbourn v. Fogg, 99 Mass. 11; Binney v. Chapman, 5 Pick. (Mass.) 124; Vernam v. Smith, 15 N. Y. 327, Finch's Cas. 756; 6 Am. Law Rev. 21, and cases cited; Campbell v. Campbell, 21 Mich. 438.

A New Hampshire case (Page v. Kinsman, 43 N. H. 328), holding that the estoppel does not continue after the end of the term, is based on a misunderstanding of the distinction between the ancient estoppel of the tenant by deed and the modern estoppel in pais. See 2 Taylor, Landl. & Ten. § 706, note 4; Bigelow, Estoppel (5th Ed.) 510; 6 Am. Law Rev. 20.

<sup>292</sup> 2 Taylor, Landl. & Ten. § 705; Ripley v. Cross, 111 Mass. 41; Crawford v. Jones, 54 Ala. 459.

<sup>293</sup> Gable v. Wetherholt, 116 Ill. 313, 56 Am. Rep. 774; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.



— Persons affected by estoppel.

This estoppel is effective as against the assignee of the lessee, or a subtenant, or any other person claiming under the lessee,<sup>294</sup> and it exists in favor of an assignee of the lessor,<sup>295</sup> as well as of his heirs.<sup>296</sup>

— Termination of landlord's title.

The title which the tenant is estopped to dispute is that which the landlord had at the beginning of the tenancy, and which the tenant impliedly recognized by the acceptance of the position of tenant under him, and he may consequently show that, since the beginning of the tenancy, the landlord's title has expired, by its own limitation, by the landlord's conveyance, or otherwise.<sup>297</sup> So if the landlord's title has

<sup>294</sup> 2 Taylor, Landl. & Ten. § 205; London & N. W. Ry. Co. v. West, L. R. 2 Q. P. 553; Earle's Adm'r v. Hale's Adm'r, 31 Ark. 470; Burnett v. Rich, 45 Ga. 211; Tilghman v. Little, 13 Ill. 239; Blake v. Sanderson, 1 Gray (Mass.) 332; Stewart v. Roderick, 4 Watts & S. (Pa.) 188; Woodruff v. Erie Ry. Co., 33 N. Y. 609.

The rule applies to the assigns of the tenant, even though the assignment be by what purports to be a conveyance in fee. Emerick v. Tavenor, 9 Grat. (Va.) 220, 53 Am. Dec. 217; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

No such estoppel can, of course, arise as against one who is not in the relation of tenant to the party claiming the estoppel, as the wife of a lessee. Shew v. Call, 119 N. C. 450, 56 Am. St. Rep. 678; Nims v. Sherman, 43 Mich. 45.

<sup>295</sup> McKune v. Montgomery, 9 Cal. 575; Whalin v. White, 25 N. Y. 462; Steen v. Wardsworth, 17 Vt. 297; Ball v. Chadwick, 46 Ill. 28; Bergman v. Roberts, 61 Pa. St. 497.

The tenant may, however, show that one claiming as assignee of the lessor was not really such, owing to the invalidity of the assignment, or otherwise. 1 Taylor, Landl. & Ten. § 708; Hilbourn v. Fogg, 99 Mass. 11; Doe v. Barton, 11 Adol. & E. 307; Gillett v. Mathews, 45 Mo. 307; 6 Am. Law Rev. 24 et seq.

<sup>296</sup> Doe v. Sherman, 5 Ired. (N. C.) 711; Syme v. Sanders, 4 Strobb. (S. C.) 196; Blantire v. Whitaker, 11 Humph. (Tenn.) 313.

<sup>297</sup> 2 Taylor, Landl. & Ten. § 708; Bigelow, Estoppel (5th Ed.) 517; England v. Slade, 4 Term R. 682; Hilbourn v. Fogg, 99 Mass.

been adjudged to be invalid by a competent tribunal, or has been disposed of at judicial sale, the tenant may show that fact as against the landlord's claim of rent or possession.<sup>298</sup> The tenant may himself buy the landlord's title at execution or judicial sale, and, after so doing, he may set it up against the landlord without first surrendering possession.<sup>299</sup>

If the lessee was not originally let into possession by the person claiming as landlord, but was already in possession, he may show that his acceptance of the lease or other acknowledgment of the lessor's title, as by payment of rent, was the result of fraud or mistake.<sup>300</sup> The mere fact alone

11; *Grundin v. Carter*, 99 Mass. 15; *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498; *Tilghman v. Little*, 13 Ill. 239; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Ryder v. Mansell*, 66 Me. 167; *Presstman v. Silljacks*, 52 Md. 647; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95.

The ground of this rule is that the tenant may be protected by being allowed "to show that he still acknowledges the old title in the hands of the new owner." 6 Am. Law Rev. 32.

So far as the estoppel of the tenant may in any particular case be regarded as an estoppel by deed, rather than in pais, it does not prevent his showing what the duration of the landlord's interest was, and that it has expired. *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498, and cases there cited.

<sup>298</sup> *Hodges v. Shields*, 18 B. Mon. (Ky.) 828; *Lancashire v. Mason*, 75 N. C. 455; *Elliott v. Smith*, 23 Pa. St. 131; *Hardin v. Foraythe*, 99 Ill. 312.

<sup>299</sup> *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Casey v. Gregory*, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581; *McPherson v. McPherson*, 11 Ired. (N. C.) 391, 53 Am. Dec. 416; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204; *Elliott v. Smith*, 23 Pa. St. 131; *Pierce v. Brown*, 24 Vt. 165; *Camley v. Stanfield*, 10 Tex. 546, 60 Am. Dec. 219.

<sup>300</sup> 2 Taylor, Landl. & Ten. § 707; *Fawcett, Landl. & Ten.* (2d Ed.) 78; 6 Am. Law. Rev. 28; *Doe v. Brown*, 7 Adol. & E. 447; *Anderson v. Smith*, 63 Ill. 126; *Ingraham v. Baldwin*, 9 N. Y. 45; *Givens v. Mullinax*, 4 Rich. Law (S. C.) 590, 55 Am. Dec. 706; *Locke v. Frasher's Adm'r*, 79 Va. 409; *Evans v. Bidwell*, 76 Pa. St. 497; (124)

that the tenant was already in possession of the premises when he accepted the lease, or paid rent, or otherwise acknowledged the other's title, will not, by the weight of authority, in the absence of fraud or mistake, prevent the application of the estoppel, since, in such case, he is regarded as having constructively surrendered possession, and accepted it again at the hands of his lessor.<sup>301</sup>

— Effect of eviction.

Upon an eviction of the tenant by the holder of a paramount title, whether the eviction be by an actual ouster, or by an assertion of such title, and a compulsory yielding thereto by the tenant, the permissive enjoyment of possession on which the estoppel is based no longer exists, and consequently he may set up such paramount title as against his lessor.<sup>302</sup>

§ 51. Eviction of tenant.

An eviction of the tenant from the premises may be either

*Swift v. Dean*, 11 Vt. 323, 34 Am. Dec. 693; *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Williams v. Wait*, 2 S. D. 210, 39 Am. St. Rep. 768.

<sup>301</sup> *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Thayer v. United Brethren Society*, 20 Pa. St. 60; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *Williams v. Wait*, 2 S. D. 210, 39 Am. St. Rep. 768; *Patterson v. Hansel*, 4 Bush (Ky.) 654; *Cobb v. Arnold*, 8 Metc. (Mass.) 398; *Prevot v. Lawrence*, 51 N. Y. 219. Contra, *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129; *Davidson v. Ellmaker*, 84 Cal. 21. The English decisions on which the California cases purport to be based are examined and distinguished in 6 Am. Law Rev. 26 et seq. See, also, 1 Washburn, Real Prop. (5th Ed.) 600; Bigelow, Estoppel (5th Ed.) 527 et seq.

<sup>302</sup> 2 Taylor, Landl. & Ten. § 708; Bigelow, Estoppel (5th Ed.) 522; 6 Am. Law Rev. 34 et seq.; *Morse v. Goddard*, 13 Metc. (Mass.) 177; *George v. Putney*, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; *Lunsford v. Turner*, 5 J. J. Marsh. (Ky.) 104, 20 Am. Dec. 248; *Chambers v. Pleak*, 6 Dana (Ky.) 426, 32 Am. Dec. 78; *Foss v. Van Driele*, 47 Mich. 201. See, also, cases to the effect that an eviction is a defense to a claim for rent, post, § 363.

by a third person, asserting a title paramount to that of the landlord, or it may be by the landlord himself. There can be no eviction resulting from acts of a stranger to the title, interfering with the use of the premises without the cognizance of the landlord.<sup>303</sup> Accordingly a condemnation of part of the premises for a public use does not amount to an eviction relieving the tenant from the covenants in his lease, and it will not even relieve him from liability for a part of the rent, since the tenant is compensated by the state or party taking the property for any loss of the use of the premises.<sup>304</sup>

— Under paramount title.

To constitute an eviction under paramount title, the tenant need not be actually dispossessed by the claimant under such title, but a judgment in favor of the claimant, followed by a yielding to him of possession by the tenant, is sufficient,<sup>305</sup> and the tenant may even yield possession without any judicial determination of the claimant's title, but in so doing he acts at his peril, and has the burden of showing that the claimant's title actually is paramount.<sup>306</sup>

<sup>303</sup> *De Witt v. Pierson*, 112 Mass. 8, 2 Gray's Cas. 778; *Johnson v. Oppenheim*, 55 N. Y. 280; *Hazlett v. Powell*, 30 Pa. St. 293; *Hilliard v. New York & C. Gas Coal Co.*, 41 Ohio St. 662, 52 Am. Rep. 99.

<sup>304</sup> *Parks v. City of Boston*, 15 Pick. (Mass.) 198; *Stubbings v. Village of Evanston*, 136 Ill. 37, 29 Am. St. Rep. 300; *Workman v. Miffin*, 30 Pa. St. 362; *Gluck v. City of Baltimore*, 81 Md. 315, 48 Am. St. Rep. 515; *Folts v. Huntley*, 7 Wend. (N. Y.) 210, 2 Gray's Cas. 751.

In Mississippi, Missouri, and Pennsylvania, a different rule prevails, and the relation of landlord and tenant is regarded as dissolved pro tanto by a condemnation of part of the land. *Commissioners v. Johnson*, 66 Miss. 248; *Biddle v. Hussman*, 23 Mo. 597; *Uhler v. Cowen*, 192 Pa. St. 443.

<sup>305</sup> *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *McAlester v. Landera*, 70 Cal. 79.

<sup>306</sup> *Morse v. Goddard*, 13 Metc. (Mass.) 177, 2 Gray's Cas. 760 (196)

## — By landlord.

An eviction by the landlord may be either by actual dispossession of the tenant or the sublessee,<sup>307</sup> or it may be what is usually called a "constructive" eviction. To constitute such a constructive eviction,—that is, an eviction not involving an actual ejection of the tenant,—there must be some act of a permanent character done by the landlord with the intention and effect of depriving the tenant of the full enjoyment of the premises, to which the tenant yields.<sup>308</sup> If this intention is absent, then the act, even though involving an entry on the premises, can at most be but a trespass, which will give the tenant a right of recovery in damages against the landlord.<sup>309</sup> Accordingly it was held in an early case that, where the lessor "separated, pulled down, and carried away a pent house fixed and annexed to the premises demised," this act constituted a trespass merely, and not an eviction.<sup>310</sup> This intention, constituting the act an eviction, is, however, but seldom directly shown, and is inferred from the character of the act itself.<sup>311</sup> Quite generally the

*Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Marsh v. Butterworth*, 4 Mich. 575; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Smith v. Shepard*, 15 Pick. (Mass.) 147, 25 Am. Dec. 432; *Sweetman v. Prince*, 26 N. Y. 224.

<sup>307</sup> *Burn v. Phelps*, 1 Starkie, 94, 2 Gray's Cas. 722; *Levitsky v. Canning*, 33 Cal. 299; *Briggs v. Thompson*, 9 Pa. St. 333. See *Agar v. Winslow*, 128 Cal. 587, 69 Am. St. Rep. 84.

<sup>308</sup> *Upton v. Townend*, 17 C. B. 30; *Royce v. Guggenheim*, 106 Mass. 201, 2 Gray's Cas. 774, 3 Am. Rep. 322; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124.

<sup>309</sup> *Upton v. Townend*, 17 C. B. 30, 68; *Skally v. Shute*, 132 Mass. 367; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *McFadin v. Rippey*, 8 Mo. 738; *Lounsbery v. Snyder*, 31 N. Y. 514; *Lynch v. Baldwin*, 69 Ill. 210.

<sup>310</sup> *Roper v. Lloyd*, T. Jones, 148, 2 Gray's Cas. 714.

<sup>311</sup> *Upton v. Townend*, 17 C. B. 30; *Skally v. Shute*, 132 Mass. 367.

act of the landlord is of such an ambiguous character that it is proper to leave to the jury the question of intention.<sup>312</sup>

The tendency of the modern decisions is to hold that any act or default by the landlord which deprives the tenant of the beneficial enjoyment of the premises, followed by the tenant's abandonment thereof, will constitute an eviction.<sup>313</sup> So there was held to be an eviction of the tenant from premises let for the purpose of a store, when the landlord, by placing and keeping lumber in the street, materially interfered with the access of customers to the store;<sup>314</sup> where a nuisance, consisting of a sewer under the premises, was rendered a menace to life and health by the use made thereof by the landlord on the adjoining premises;<sup>315</sup> where the lessor habitually brought persons of bad character into another part of the same building of which the demised premises formed a part, and created such a disturbance, and drew such odium on the building, that the lessee and his family felt compelled to leave;<sup>316</sup> and where property was rented for a distillery, and the lessors refused to give their assent in writing to the use of the property for that purpose, as is necessary under the internal revenue act, this, in effect, depriving the lessee of

<sup>312</sup> *Hunt v. Cope*, Cowp. 242; *Upton v. Townend*, 17 C. B. 30; *Henderson v. Mears*, 1 Fost. & F. 636, 28 Law J. Q. B. (N. S.) 305; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Skally v. Shute*, 132 Mass. 367; *Tallman v. Murphy*, 120 N. Y. 345.

<sup>313</sup> *Upton v. Townend*, 17 C. B. 30; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 103; *Hoeweler v. Fleming*, 91 Pa. St. 322; *Skally v. Shute*, 132 Mass. 367; *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117.

<sup>314</sup> *Edmison v. Lowry*, 3 S. D. 77, 44 Am. St. Rep. 775.

<sup>315</sup> *Sully v. Schmitt*, 147 N. Y. 248, 49 Am. St. Rep. 659.

<sup>316</sup> *Dyett v. Pendleton*, 3 Cow. (N. Y.) 727, reversing 4 Cow. 531, 2 Gray's Cas. 738, and note. This case has been criticised as carrying the doctrine of constructive eviction to extremes. See *Royce v. Guggenheim*, 106 Mass. 201, 2 Gray's Cas. 774, 3 Am. Rep. 322.

the use of the property.<sup>317</sup> Likewise, acts resulting in a change in the premises, as where the landlord, in reconstructing buildings destroyed by fire, changed the size and plans thereof, have been held to be an eviction.<sup>318</sup> On the other hand, an act on the part of the landlord which is perfectly lawful, and not done for the purpose of disturbing the tenant, as when he builds on adjoining land, which belongs to him, and thereby interferes with the tenant's light and air, does not constitute an eviction,<sup>319</sup> and his action in attempting to lease the premises to another during the term, and posting of a "to let" notice on the premises, has been held not to have this effect.<sup>320</sup> Nor will a breach by the landlord of his covenant to repair constitute an eviction authorizing the tenant to abandon the premises, or to refuse to pay rent, and the tenant's only redress is an action for damages.<sup>321</sup>

In all cases, in order to constitute an eviction, no matter of what acts the landlord may be guilty, the tenant must actually be forced from or withdraw in part from the premises, and he cannot remain in possession of the whole, and at the same time claim that he has been evicted.<sup>322</sup>

<sup>317</sup> *Grabenhorst v. Nicodemus*, 42 Md. 236, 2 Gray's Cas. 730.

<sup>318</sup> *Upton v. Townend*, 17 C. B. 30.

<sup>319</sup> *Royce v. Guggenheim*, 106 Mass. 201, 2 Gray's Cas. 774, 8 Am. Rep. 322.

<sup>320</sup> *Ogilvie v. Hull*, 5 Hill (N. Y.) 52, 2 Gray's Cas. 757.

<sup>321</sup> *Surplice v. Farnsworth*, 7 Man. & G. 576; *Royce v. Guggenheim*, 106 Mass. 201, 2 Gray's Cas. 774, 8 Am. Rep. 322.

<sup>322</sup> *Edgerton v. Page*, 20 N. Y. 281, 2 Gray's Cas. 765; *Warren v. Wagner*, 75 Ala. 133, 51 Am. Rep. 446; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Dewitt v. Pierson*, 112 Mass. 3, 2 Gray's Cas. 778, 17 Am. Rep. 58; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175; *Barrett v. Boddie*, 158 Ill. 479, 49 Am. St. Rep. 172. Compare *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473.

— Effect of eviction.

As we have before seen, an eviction of the tenant gives him a right of action on the covenant for quiet enjoyment,<sup>323</sup> and it also puts an end to the tenant's disability to deny the landlord's title,<sup>324</sup> but the most important effect of an eviction is upon the tenant's liability for rent. A wrongful eviction by the landlord, whether total or partial, has the effect of terminating the tenant's liability for rent,<sup>325</sup> and the result of a total eviction under title paramount is the same.<sup>326</sup> But in the case of a merely partial eviction by title paramount, the rent is apportioned, and is suspended merely to the extent of the eviction.<sup>327</sup> A partial eviction by the landlord, though, as just stated, it suspends the rent, does not, it seems, terminate the lease, so as to relieve the tenant from liability upon his obligations thereunder, such as that to repair.<sup>328</sup>

§ 52. Termination of estate—(a) Expiration of term.

An estate for years is terminated by the expiration of the term for which the estate is granted, and the tenant, if he remains in possession without any recognition by the landlord of a continuance of his rights, is considered to do

<sup>323</sup> See ante, § 43(b).

<sup>324</sup> See ante, § 50.

<sup>325</sup> *Royce v. Guggenheim*, 106 Mass. 201, 2 Gray's Cas. 774, 8 Am. Rep. 323; *Christopher v. Austin*, 11 N. Y. 216, 2 Gray's Cas. 763. And see cases cited post, § 364.

<sup>326</sup> 1 Washburn, Real Prop. 341; *Fawcett, Landl. & Ten.* (2d Ed.) 209; 1 Taylor, Landl. & Ten. § 377.

<sup>327</sup> *Neale v. Mackenzie*, 1 Mees. & W. 747, 2 Gray's Cas. 727; *Lawrence v. French*, 25 Wend. (N. Y.) 443, 2 Gray's Cas. 755; *Christopher v. Austin*, 11 N. Y. 216, 2 Gray's Cas. 763; *Fillebrown v. Hoar*, 124 Mass. 580; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108.

<sup>328</sup> *Carrel v. Read*, Cro. Eliz. 374, 2 Gray's Cas. 711; *Morrison v. Chadwick*, 7 C. B. 266, 2 Gray's Cas. 732; *Newton v. Allin*, 1 Q. B. 513; *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272. See note in 38 Am. St. Rep., at page 491.



so merely by the "sufferance" of the landlord.<sup>320</sup> In the case of a lease made for fixed term, whether for one or more years, or for a less time, the tenancy is, in the absence of a statutory provision to the contrary, terminated by the expiration of the time named, without any previous notice by the landlord to the tenant, or by the tenant to the landlord, since the lease itself supplies sufficient notice to both parties of the ending of the term.<sup>321</sup>

— (b) Happening of contingency.

As stated above,<sup>321</sup> an estate for years may be created to terminate, before the total number of years has elapsed, upon the happening of some contingency, as upon the death of a certain person, or upon the lessee's insolvency. Limitations of this character, in the case of estates for years, as well as other estates, are considered elsewhere,<sup>322</sup> and it is sufficient here to state that, on the happening of the contingency, the estate terminates without any notice by the landlord.<sup>323</sup>

— (c) Surrender.

An estate for years may be terminated by a surrender or yielding up of such estate to the owner of the reversion or the remainder expectant thereon.<sup>324</sup> A surrender may be the

<sup>320</sup> See post, § 60.

<sup>321</sup> *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 413; *Doe v. Stratton*, 4 Bing. 446, 3 Gray's Cas. 421; *Hauxhurst v. Lobree*, 38 Cal. 563; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 3 Gray's Cas. 441; *Secor v. Pestana*, 37 Ill. 525; *Preble v. Hay*, 32 Me. 456; *Snideman v. Snideman*, 118 Ind. 162; *Shuver v. Klinkenberg*, 67 Iowa, 544; *Young v. Smith*, 28 Mo. 65, 75 Am. Dec. 109; *Teft v. Hinchman*, 76 Mich. 672.

<sup>322</sup> See ante, § 29.

<sup>323</sup> See post, § 80.

<sup>324</sup> *Doe v. Bluck*, 8 Car. & P. 464; *Horner v. Leeds*, 25 N. J. Law, 106; *Guthmann v. Vallery*, 51 Neb. 324, 66 Am. St. Rep. 475; *Hollis v. Pool*, 3 Metc. (Mass.) 350.

<sup>325</sup> Co. Litt. 237a, 237b; 1 Woodfall, Landl. & Ten. 296 et seq.;

effect of an express agreement of the parties, or by implication of law from their acts. The nature of a surrender, and the mode of its accomplishment, being a question not peculiar to an estate for years, will be more conveniently considered in a future part of this work.<sup>325</sup> It is proper, however, here to state that a tenant who has underlet has no right to surrender his lease to the prejudice of his subtenant, and the latter is not affected by such a surrender.<sup>326</sup>

By the English cases, if a lessee for years, who had sublet for a less term, reserving rent with a clause of re-entry on nonpayment, surrendered his term to the original lessor, the reversion on the sublease being extinguished in the greater estate in the original lessor, and being thus destroyed, it was considered that the rights to rent and of re-entry, which were incident to this reversion, were also destroyed.<sup>327</sup> This rule, however, has been changed in England by a statute which in effect makes the person to whom the surrender is made the assignee of the reversion expectant on the sublease.<sup>328</sup> In this country, the question seems never to have been determined, but probably the courts would not, at the present day, permit the rent to be thus destroyed in favor of the sublessee.<sup>329</sup> And the extinction of the rent incident to the lesser reversion may be prevented by an express decla-

*Snowhill v. Reed*, 49 N. J. Law, 292, 60 Am. Rep. 615; *Deane v. Caldwell*, 127 Mass. 242; *Terstegge v. First German Mutual Benevolent Soc.*, 92 Ind. 82, 47 Am. Rep. 135.

<sup>325</sup> See post, § 375.

<sup>326</sup> 1 Taylor, Landl. & Ten. § 111; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Hessel v. Johnson*, 129 Pa. St. 173, 15 Am. St. Rep. 716; *Krider v. Ramsay*, 79 N. C. 354.

<sup>327</sup> 1 Woodfall, Landl. & Ten. 306; *Thre'r v. Barton*, Moore, 94, 2 Gray's Cas. 709; *Webb v. Russell*, 3 Term R. 393, 2 Gray's Cas. 719. And see *Thorn v. Woolcombe*, 3 Barn. & Adol. 586, 2 Gray's Cas. 723.

<sup>328</sup> See 1 Woodfall, Landl. & Ten. 306.

<sup>329</sup> *Hessel v. Johnson*, 129 Pa. St. 173, 15 Am. St. Rep. 716. But see *Krider v. Ramsay*, 79 N. C. 354.

ration in the instrument of surrender of an intention to the contrary.<sup>340</sup>

— (d) Merger.

An estate for years will be destroyed by its "merger" in the reversion or other expectant estate, in case the two estates become vested in one person.<sup>341</sup> And the term may be merged in the reversion, even when the term is for a longer period than the reversion, as when the reversion is expectant on a lease for twenty years, and the reversion is granted to another for one year, who grants it to the lessee, and in such case the twenty-years term is merged in the term for one year.<sup>342</sup> An estate for years will always merge in an estate for life, even though the former estate be one for a thousand years, since a life estate is invariably regarded as a greater interest than one for years.<sup>343</sup>

— (e) Breach of express condition.

An estate for years is frequently subject to a condition that, upon a breach by the lessee of certain covenants or stipulations in the lease, the lessor shall have the right to terminate the estate. Conditions of this character, however, are not peculiar to estates for years, and consequently their operation and effect will be more properly considered elsewhere.<sup>344</sup>

The lease may, however, provide that the enforcement of the forfeiture by the landlord for breach of condition shall

<sup>340</sup> *Beal v. Boston Spring Car Co.*, 125 Mass. 157, 28 Am. Rep. 216, 2 Gray's Cas. 786.

<sup>341</sup> 3 Preston, Conveyancing, 219; 4 Kent, Comm. 99.

<sup>342</sup> 1 Woodfall, Landl. & Ten. 308; Fawcett, Landl. & Ten. (2d Ed.) 452; *Stephens v. Bridges*, 6 Madd. 66; *Carroll v. Ballance*, 26 Ill. 9, 20; *Logan v. Green*, 4 Ired. Eq. (N. C.) 370.

<sup>343</sup> 3 Preston, Conveyancing, 220; 6 Cruise's Dig. tit. 39, § 31 et seq.

<sup>344</sup> See post, §§ 64-77.

not terminate the lessee's liabilities under the lease, such as that for the payment of rent, and in such case the tenant's liability therefor may continue, although his estate itself is terminated.<sup>345</sup>

If there is no provision for forfeiture for breach of a covenant, the mere fact of such breach, as by failure to pay the stipulated rent, gives the landlord no right to terminate the lease.<sup>346</sup>

— (f) Disclaimer of landlord's title.

In this country, a term for years is, according to numerous decisions, forfeited by the tenant if he in any way disclaims the landlord's title, and asserts title in himself, even though this be by words only.<sup>347</sup> But in some jurisdictions a mere parol disclaimer by the tenant of a term for years will not have this effect, but the disclaimer must be by matter of record, in the absence, perhaps, of actual fraud.<sup>348</sup>

<sup>345</sup> *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Hall v. Gould*, 13 N. Y. 127.

<sup>346</sup> *Brown's Adm'rs v. Bragg*, 22 Ind. 122, *Finch's Cas.* 726; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66, *Finch's Cas.* 731; *Vanatta v. Brewer*, 32 N. J. Eq. 268; *De Lancey v. Ganong*, 9 N. Y. 9. And see authorities cited ante, note 223.

In some states, however, the landlord is given by statute the right to re-enter on the nonpayment of rent, after giving a certain number of days' notice, thereby terminating the tenant's estate. 1 *Stimson's Am. St. Law*, § 2054.

<sup>347</sup> *Brown v. Keller*, 32 Ill. 151, 33 Am. Dec. 253; *Springs v. Schenck*, 99 N. C. 551, 6 Am. St. Rep. 552; *Tillotson v. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330; *Bates v. Austin*, 2 A. K. Marsh. (Ky.) 270, 12 Am. Dec. 395; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Wells v. Sheerer*, 78 Ala. 142; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162, 177.

<sup>348</sup> *Fawcett, Landl. & Ten.* (2d Ed.) 462; 1 *Woodfall, Landl. & Ten.* 360; *Doe v. Wells*, 10 Adol. & E. 427; *De Lancey v. Ganong*, 9 N. Y. 9.

— (g) Forfeiture for illegal use.

In a number of states, the use of the premises by the tenant for an illegal purpose, as for a house of ill fame, or as a gaming house, is made a cause for forfeiture of the lease.<sup>349</sup>

— (h) Termination of lessor's estate.

The lease is terminated by the expiration of the estate of the lessor, as when a tenant for life makes a lease for years, in such case the lease being terminated by the death of the lessor, since one cannot, unless empowered by statute or otherwise to do so, create a term of years which will extend beyond the termination of his estate.<sup>350</sup> On the same principle, when the entire premises are taken in the exercise of the power of eminent domain, the lessee's estate is terminated.<sup>351</sup> Since the termination of the lessor's estate terminates that of the tenant, the same result follows, *a fortiori*, upon the eviction of the tenant under title paramount to that of the lessor.<sup>352</sup>

— (i) Destruction of premises.

It is a well-settled rule of the English law, generally recog-

<sup>349</sup> See 1 Stimson's Am. St. Law, § 2059; 2 Sharswood & B. Lead. Cas. Real Prop. 119.

<sup>350</sup> 1 Taylor, Landl. & Ten. § 112; Guthmann v. Vallery, 51 Neb. 324, 66 Am. St. Rep. 475; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424; Shufflin v. House, 45 W. Va. 731, 72 Am. St. Rep. 351.

<sup>351</sup> 2 Taylor, Landl. & Ten. § 519; Barclay v. Picker, 38 Mo. 143; Corrigan v. City of Chicago, 144 Ill. 537; O'Brien v. Ball, 119 Mass. 23; Dyer v. Wightman, 66 Pa. St. 425. And see Edmonds v. City of Boston, 108 Mass. 538.

<sup>352</sup> Wheelock v. Warschauer, 34 Cal. 265; Fitzgerald v. Beebe, 7 Ark. 310; Gartside v. Outley, 58 Ill. 210; Fitchburg Cotton Manufactory Corp. v. Melven, 15 Mass. 268; Stubbings v. Village of Evanston, 136 Ill. 37, 29 Am. St. Rep. 300; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Friend v. Oil Well Supply Co., 165 Pa. St. 652.

nized in this country, that the destruction of the buildings on the premises demised, though they are the chief consideration for the payment of rent, does not terminate the lease or the lessee's liability thereunder for the payment of rent.<sup>353</sup> In some states, however, the rule has been changed by a statutory provision to the effect that, upon the accidental destruction of a building on the premises without the tenant's fault, he may abandon or surrender the lease.<sup>354</sup> And an exception to the rule is made in the case of a lease of a floor or apartment only in a building, and the destruction of the building will in that case have the effect of relieving the tenant from the rent; the theory being that it is not the intention of the lease to grant any interest in the land, and, after the destruction of the building, nothing remains on which the lease can operate.<sup>355</sup>

### § 53. Emblements.

Since the time at which an estate for years will terminate is fixed and known to the tenant, it is generally held that he has no right to take emblements,—that is, the annual crops sown before the termination of the estate,—except when the estate is terminated by some contingency which he could

<sup>353</sup> *Fowler v. Bott*, 6 Mass. 63, Finch's Cas. 725; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Barrett v. Boddie*, 158 Ill. 479, 49 Am. St. Rep. 172; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Linn v. Ross*, 10 Ohio, 412, 36 Am. Dec. 95; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430. Contra, *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659; *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277.

<sup>354</sup> 1 Stimson's Am. St. Law, § 2062. See *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; *Taylor v. Hart*, 73 Miss. 22.

<sup>355</sup> *Graves v. Berdan*, 26 N. Y. 498, Finch's Cas. 733; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465; *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, 45 Am. Dec. 220; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654.

not have foreseen, or unless there is a stipulation or custom to the contrary.<sup>556</sup>

## II (B). TENANCY AT WILL.

A tenancy at will is a tenancy which is terminable at the will of either the lessor or lessee.

The tenancy is created by an express agreement or by a letting, express or implied, for an indefinite time without any definite rent.

The interest of the tenant cannot be assigned.

The tenant is liable for voluntary, but not permissive, waste.

The tenancy may, at common law, be determined by either party by any act indicating an intention to that effect, or which is inconsistent with the continuance of the tenancy, and it is terminated if either party dies or alienates his interest. By statute, in some states, a prior notice is required in order to terminate the tenancy.

If the estate is terminated otherwise than by his own act, the tenant is entitled to emblements, and he may enter in order to remove his chattels.

### § 54. Nature and mode of creation.

A tenancy at will is where a person is in possession of land let to him to hold at the will of the lessor. "In this case, the lessee is called tenant at will, because he has no certain or sure estate, for the lessor may put him out at what time it pleaseth him."<sup>557</sup> But a lease at will is at the will of both parties, and either the lessor or lessee may terminate it at his pleasure.<sup>558</sup> If a lease or grant purport to limit an estate to hold at the will of the lessee only,—that is, for so long as the lessee pleases to continue tenant,—the estate created is a freehold or estate for life, determi-

<sup>556</sup> 4 Kent. Comm. 109. See post, § 224.

<sup>557</sup> Litt. § 68; 1 Leake, 206.

<sup>558</sup> Co. Litt. 55a, 270b, Butler's note; 2 Bl. Comm. 145; Cheever v. Pearson, 16 Pick. (Mass.) 266; Withers v. Larrabee, 48 Me. 570.

nable at the will of the lessee, and it can be conveyed only by the formalities proper in the case of freehold estates.<sup>559</sup>

As will be shown in discussing tenancies from year to year, this latter estate has to a great extent displaced tenancies at will, but a tenancy at will may, in most states, still exist, by express agreement of the parties, or by a letting for an indefinite term without the reservation of any regular rent.<sup>560</sup>

<sup>559</sup> 1 Leake, 207; Doe v. Browne, 8 East, 165; Beeson v. Burton, 12 C. B. 647, 3 Gray's Cas. 406; Davis v. Waddington, 7 Man. & G. 37, and note, p. 47; Effinger v. Lewis, 32 Pa. St. 367. And see Myers v. Kingston Coal Co., 126 Pa. St. 582. That such is the effect of a grant of land to be held at the will of the tenant only would seem manifest, but it must be confessed that there are a number of decisions in this country that a lease at the will of the tenant creates a tenancy at will. These decisions are all based, directly or indirectly, it would appear, on the dictum by Lord Coke (Co. Litt. 55a) that, "when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor," in which case he no doubt referred to a lease without livery of seisin, or otherwise insufficient to convey a freehold estate. See Knight v. Indiana Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; weakened, however, apparently, by Gilmore v. Hamilton, 83 Ind. 196; Cheever v. Pearson, 16 Pick. (Mass.) 266; Cowan v. Radford Iron Co., 83 Va. 547; Eclipse Oil Co. v. South Penn Oil Co. (W. Va.) 34 S. E. 923; Corby v. McSpadden, 63 Mo. App. 648; Reese v. Zinn, 103 Fed. 97.

Where a lease states that it is to hold at the will of the lessor, the law implies that it is to be at the will of the lessee also. Co. Litt. 55a; Doe v. Richards, 4 Ind. 374; Cheever v. Pearson, 16 Pick. (Mass.) 266.

<sup>560</sup> Richardson v. Langridge, 4 Taunt. 123, 3 Gray's Cas. 417; Doe v. Cox, 11 Q. B. 122, 3 Gray's Cas. 432, Finch's Cas. 767; Burns v. Bryant, 31 N. Y. 453, Finch's Cas. 768; Rich v. Bolton, 46 Vt. 84, 14 Am. Rep. 615; Jackson v. Bryan, 1 Johns. (N. Y.) 322, 3 Gray's Cas. 437; Harris v. Frink, 49 N. Y. 24, Finch's Cas. 769; Humphries v. Humphries, 3 Ired. (N. C.) 363.

In Massachusetts and Maine, where tenancies from year to year are not recognized, the payment of a periodical rent will not affect the character of a tenancy as one at will. Sprague v. Quinn, 108 Mass. 553; Withers v. Larrabee, 48 Me. 570.

In Taylor, Landl. & Ten. §§ 60, 61, a distinction is taken between



Nor need the indefinite letting be in express terms, but the tenancy will generally arise when the premises are in the occupation of a person holding them for an indefinite time, with the affirmative consent of the owner, and there is no reservation or payment of a regular rent.<sup>361</sup> Accordingly it has, in some jurisdictions, been held to arise in case a purchaser of land is let into possession before the completion of the sale, and the transaction fails of consummation.<sup>362</sup> And where one enters into premises under an agreement for a lease, and he afterwards refuses to accept the lease, a tenancy of this character will generally be created, which is, however, changed into a tenancy from year to year by the periodical payment and acceptance of rent.<sup>363</sup> But such a tenancy is not created by the mere fact of possession or occupancy of land without the permission of the owner, since an agree-

"strict" and "general" tenancies at will. By the phrase "strict" tenancy at will, the author evidently refers to such a tenancy as is described in the text. By a "general" tenancy at will, he apparently refers to what is commonly known as a "tenancy from year to year." The expressions seem to be unfortunately chosen, and liable to mislead.

<sup>361</sup> Fawcett, *Landl. & Ten.* (2d Ed.) 90; *Larned v. Hudson*, 60 N. Y. 102; *Goodenow v. Allen*, 68 Me. 308; *Herrell v. Sizeland*, 31 Ill. 457. And see cases cited ante, note 360.

<sup>362</sup> 1 Washburn, *Real Prop.* 376; 1 Taylor, *Landl. & Ten.* § 60; *Doe v. Chamberlaine*, 5 Mees. & W. 14, 3 Gray's Cas. 425; *Right v. Beard*, 13 East, 210; *Hall v. Wallace*, 88 Cal. 434; *Gould v. Thompson*, 4 Metc. (Mass.) 224; *Patterson v. Stoddard*, 47 Me. 355. And see *Harris v. Frink*, 49 N. Y. 24, *Finch's Cas.* 769. There are, however, numerous decisions to the effect that no tenancy is created in such case. See 1 Taylor, *Landl. & Ten.* § 25, note; 2 Sharswood & B. *Lead. Cas. Real Prop.* 255 et seq. And even where the purchaser is regarded as a tenant at will, he is not so for all purposes. *Lyon v. Cunningham*, 136 Mass. 532.

<sup>363</sup> 1 Washburn, *Real Prop.* 376; *Huntington v. Parkhurst*, 37 Mich. 32, 24 Am. St. Rep. 146; *Dunne v. Trustees of Schools*, 39 Ill. 578; *Weed v. Lindsay*, 88 Ga. 686. See *Lyon v. Cunningham*, 136 Mass. 532.

ment of both parties is necessary to create any tenancy whatever.<sup>364</sup>

### § 55. Incidents of tenancy.

The interest of the tenant is not, properly speaking, an estate, but is a mere scintilla of interest, and his relation to the landlord is merely personal. Consequently, the interest of the latter is not a reversion,<sup>365</sup> and no tenure was considered to exist in the case of such a tenancy, even at common law.<sup>366</sup> For the same reason, the tenant cannot assign his interest.<sup>367</sup> And it has been held that such a tenant is in possession merely in behalf of the landlord, and that consequently the latter may sue a third person in trespass for injury to the property.<sup>368</sup>

A tenant at will, like any other tenant, is estopped to deny the title which his landlord had at the beginning of the tenancy.<sup>369</sup>

The tenant is liable in trespass for voluntary waste committed by him, since he thereby terminates the tenancy.<sup>370</sup> He is not liable for permissive waste, not being regarded

<sup>364</sup> 1 Leake, 208; *Doe v. Rock*, 4 Man. & G. 30; *Lay v. Peter*, 3 Hurl. & N. 101.

<sup>365</sup> 1 Leake, 207; 1 Washburn, Real Prop. 371.

<sup>366</sup> Litt. § 132; Co Litt. 63, 93b.

<sup>367</sup> *Cooper v. Adams*, 6 Cush. (Mass.) 87; *Austin v. Thomson*, 45 N. H. 117; *Dean v. Comstock*, 32 Ill. 173, 180; *Reckhow v. Schanck*, 43 N. Y. 448; *Dingley v. Buffum*, 57 Me. 381. See, also, citations post, note 375.

The landlord may, however, recognize the assignee as his tenant, thus in effect affirming the assignment. *Cunningham v. Holton*, 55 Me. 33, 38.

<sup>368</sup> *Starr v. Jackson*, 11 Mass. 519; *Davis v. Nash*, 32 Me. 411.

<sup>369</sup> *Towne v. Butterfield*, 97 Mass. 105; *Ezelle v. Parker*, 41 Miss. 520; *Love v. Edmonston*, 1 Ired. (N. C.) 152.

<sup>370</sup> Litt. § 71; 2 Woodfall, Landl. & Ten. 61; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Perry v. Carr*, 44 N. H. 118; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Chalmers v. Smith*, 152 Mass. 561.

as within the purview of the statute giving a remedy therefor.<sup>371</sup>

§ 56. Termination.

A tenancy at will, as it exists at common law, may be determined by the lessor by giving notice to the lessee to that effect, or by any acts of ownership inconsistent with the continuance of the tenancy, as entering and cutting down trees or carrying away stone without the consent of the lessee.<sup>372</sup> It is likewise terminated by a conveyance or written lease by the lessor to a third person, even though this is merely colorable, and made for the purpose of terminating the tenancy.<sup>373</sup>

The tenancy may be determined by the lessee by express notice to the lessor to that effect, provided the notice be accompanied by relinquishment of possession,<sup>374</sup> and it is likewise determined by an alienation by the lessee to a third person as soon as this is known to the lessor,<sup>375</sup> by any other acts of ownership inconsistent with the tenancy, as by destroying houses or timber,<sup>376</sup> or by an express denial that he holds under the lessor.<sup>377</sup> The tenancy is also determined by the death of either the lessor or the lessee.<sup>378</sup>

<sup>371</sup> Co. Litt. 57a; *Moore v. Townshend*, 33 N. J. Law, 284. See post, § 254.

<sup>372</sup> Co. Litt. 55b; 2 Bl. Comm. 146.

<sup>373</sup> *Curtis v. Galvin*, 1 Allen (Mass.) 215, 3 Gray's Cas. 455; *Clark v. Wheelock*, 99 Mass. 14, 3 Gray's Cas. 456; *McFarland v. Chase*, 7 Gray (Mass.) 462; *Davis v. Brocklebank*, 9 N. H. 73; *Robinson v. Deering*, 56 Me. 357.

<sup>374</sup> Co. Litt. 55b, Hargrave's note.

<sup>375</sup> Co. Litt. 57a, and Hargrave's note; *Pinhorn v. Souster*, 8 Exch. 763; *Clark v. Wheelock*, 99 Mass. 14, 3 Gray's Cas. 456; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Reckhow v. Schanck*, 43 N. Y. 448, *Finch's Cas.* 772; *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 81. See, also, cases cited ante, note 367.

<sup>376</sup> Co. Litt. 57b; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616. And see cases cited ante, note 370.

<sup>377</sup> *Love v. Edmonston*, 1 Ired. (N. C.) 152; *Campbell v. Procter*, 6 Me. 12; *Willison v. Watkins*, 3 Pet. (U. S.) 43.

<sup>378</sup> Co. Litt. 57b, 62b; 2 Bl. Comm. 146; *Reed v. Reed*, 48 Me.

—Necessity of previous notice.

According to the English cases, and some authorities in this country, no previous notice is, in the absence of a statutory requirement, necessary for the termination of the tenancy.<sup>379</sup> But in some decisions in this country the courts have regarded a previous notice as necessary, to an extent at least sufficient to protect the tenant's right to his crops.<sup>380</sup> In a number of states, the statute now requires a previous notice to be given in order to determine such a tenancy, the notice required varying from one to three months.<sup>381</sup> The statutory requirement of notice may, however, be dispensed

§88; *Rising v. Stannard*, 17 Mass. 282; *Say v. Stoddard*, 27 Ohio St. 478. But not by the death of one of two or more joint lessors. Co. Litt. 55b.

<sup>379</sup> *Doe v. Chamberlaine*, 5 Mees. & W. 14, 3 Gray's Cas. 425; *Doe v. Cox*, 11 Q. B. 122, 3 Gray's Cas. 432, *Finch's Cas.* 767; *Doe v. Wood*, 14 Mees. & W. 682; *Doe v. Price*, 9 Bing. 356; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 3 Gray's Cas. 441; *Herrell v. Sizeland*, 81 Ill. 457; *Sullivan v. Enders*, 8 Dana (Ky.) 66; *Moore v. Boyd*, 14 Me. 242.

<sup>380</sup> *Larkin v. Avery*, 23 Conn. 304; *Cody v. Quarterman*, 12 Ga. 386; *Blum v. Robertson*, 24 Cal. 127. See *Leavitt v. Leavitt*, 47 N. H. 329.

In *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615, it is said (per Redfield, J.) that, though six months' notice is not necessary, as in the case of tenancies from year to year, a reasonable notice is necessary, and, "where emblements are in question, such notice as shall protect the tenant in his rights."

The rule in this regard in New York before the passage of a statute requiring notice was unsettled. See the cases considered in 2 Sharswood & B. Lead. Cas. Real Prop. 175. See, also, *Jackson & Bryan*, 1 Johns. (N. Y.) 322, 3 Gray's Cas. 437.

<sup>381</sup> 1 Stimson's Am. St. Law, § 2051. See *Thomas v. Sanford Steamship Co.*, 71 Me. 548; *Davis v. Murphy*, 126 Mass. 143; *Burns v. Bryant*, 31 N. Y. 453, *Finch's Cas.* 768; *Huntington v. Parkhurst*, 87 Mich. 38, 24 Am. St. Rep. 146.

Under such a statute, the tenant as well as the landlord must give the prescribed notice. *Walker v. Furbush*, 11 Cush. (Mass.) 366, 59 Am. Dec. 148; *Batchelder v. Batchelder*, 2 Allen (Mass.) 106 (142)

with by agreement of the parties.<sup>383</sup> And it has been held that the notice is unnecessary when, at the time of making the lease, it is provided that the tenancy shall expire at a certain time, or on the happening of some contingency.<sup>383</sup> Furthermore, such statutes have been construed to apply only to the termination of the tenancy by the direct act of the landlord, as by entry or notice, and not to change the rule which previously existed, that the tenancy will terminate by operation of law upon the conveyance or lease of the premises by either the landlord or the tenant, or upon any act of the tenant hostile to the landlord's title, or on the death of either party.<sup>384</sup>

Upon the termination of a tenancy at will by the lessor, or by his death, the tenant is, at common law, entitled to the emblements, or annual crops sown by him, and, upon its termination by the lessee's death, his representative has the same right; but the lessee has no such right if he himself terminates the tenancy.<sup>385</sup> And on the termination of the tenancy by the lessor, the tenant has a reasonable time within which he may enter for the removal of his goods.<sup>386</sup>

<sup>383</sup> *Faxon v. Goodale*, 8 Allen (Mass.) 202; *Davis v. Murphy*, 126 Mass. 147.

<sup>384</sup> *Ashley v. Warner*, 11 Gray (Mass.) 43; *Hollis v. Pool*, 3 Metc. (Mass.) 360; *Thurber v. Dwyer*, 10 R. L. 355; *Creech v. Crockett* 5 Cush. (Mass.) 133.

<sup>385</sup> *Howard v. Merriam*, 5 Cush. (Mass.) 563; *Clark v. Wheelock*, 99 Mass. 14, 3 Gray's Cas. 456; *Curtis v. Galvin*, 1 Allen (Mass.) 215, 3 Gray's Cas. 455; *Seavey v. Cloudman*, 90 Me. 536; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Reed v. Reed*, 48 Me. 388; *Simpson v. Applegate*, 75 Cal. 342; *Amick v. Brubaker*, 101 Mo. 473.

<sup>386</sup> Litt. § 68; Co. Litt. 55b, 56a, 63a; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 3 Gray's Cas. 441; *Davis v. Brocklebank*, 9 N. H. 73; *Brown v. Thurston*, 56 Me. 126; *Harris v. Frink*, 49 N. Y. 24.

<sup>387</sup> Litt. § 69; *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Moore v. Boyd*, 24 Me. 242; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 3 Gray's Cas. 441; *Clark v. Wheelock*, 99 Mass. 14, 3 Gray's Cas. 456; *Leavitt v. Leavitt*, 47 N. H. 329.

## II. (C). TENANCY FROM YEAR TO YEAR.

A tenancy from year to year is a term for one year certain, continuing for successive years, unless due notice be given to determine it at the end of the first or any subsequent year.

The tenancy may be created either expressly or by a letting for an indefinite time, subject to the payment of an annual rent.

The tenant may assign his interest, and on his death it passes to his personal representative.

The tenant is estopped to deny his landlord's title, and is liable for waste.

The tenancy is, at common law, terminable only by a half year's notice to quit, expiring at the end of any current year. The length of notice is now generally fixed by statute.

Tenancies from quarter to quarter, from month to month, or from week to week are similar in character to tenancies from year to year, and are terminable by notices of a quarter, a month, and a week, respectively.

## § 57. Nature and creation.

Tenancies at will were early found to be oppressive and unjust to the tenant, since he might be turned out of possession before his crop was fit for harvesting; and though he had the right to enter and carry off the crop when ripe, he was subjected to great inconvenience. Furthermore, such tenancies were hostile to the policy of the state, which seeks to cherish the proper cultivation of the soil. Consequently, as early as the reign of Henry VIII., it was held that a general occupation, without any express limitation as to time, but with the reservation of annual rent, was to be regarded as a tenancy from year to year, terminable only at the end of any year of the holding by the giving of proper notice.<sup>387</sup> Accordingly, in the absence of a statutory provision to the

<sup>387</sup> *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 413; *Doe v. Porter*, 3 Term R. 13; *Leavitt v. Leavitt*, 47 N. H. 329.

contrary, a tenancy from year to year generally arises in the case of a general letting without limitation as to time, accompanied by the reservation or payment of an annual rent.<sup>288</sup> As a result of these principles, the tenancy at will which, by the Statute of Frauds, is created by a parol lease, is frequently, as stated above, by occupancy and payment of rent thereunder, changed into a tenancy from year to year.<sup>289</sup> On the other hand, if no rent is reserved or paid, and no time for the termination of the occupancy is named, the tenancy is one at will.<sup>290</sup> A tenancy from year to year may also be created by express agreement of the parties, as when the lease is in terms "from year to year," or it is "for one year, and an indefinite period thereafter."<sup>291</sup>

If rent is reserved or paid with reference to a quarterly, monthly, or weekly holding, the tenancy is one from quarter to quarter, month to month, or week to week, as the case may be, and the conditions of the holding are the same as in the case of a tenancy from year to year, except as regards the length of the term, and the notice required for its termina-

<sup>288</sup> 4 Kent, Comm. 114; *Richardson v. Langridge*, 4 Taunt. 128, 3 Gray's Cas. 417; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Ridgely v. Stillwell*, 25 Mo. 570; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, 3 Gray's Cas. 446; *Dunne v. Trustees of Schools*, 39 Ill. 578; *Williams v. Derlar*, 31 Mo. 13.

<sup>289</sup> See ante, § 37(b), and authorities cited.

<sup>290</sup> *Richardson v. Langridge*, 4 Taunt. 128, 3 Gray's Cas. 417; *Herrell v. Sizeland*, 81 Ill. 457; *Williams v. Derlar*, 31 Mo. 13; *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 413; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615.

Sometimes it is stated, as in 4 Kent, Comm. 112, that a general holding creates a tenancy from year to year, without regard to whether the reservation of annual rent or other circumstances indicate a yearly tenancy. The incorrectness of such statements is shown in the learned note to the later editions of *Taylor, Landl. & Ten.*, at section 55.

<sup>291</sup> 1 Woodfall, *Landl. & Ten.* 220; *Fawcett, Landl. & Ten.* (2d Ed.) 144; *Doe v. Green*, 9 Adol. & E. 658; *Pugsley v. Aikin*, 11 N. Y. 494, *Finch's Cas.* 773.

tior, and such tenancies are generally regarded, for the purpose of classification, as tenancies from year to year.<sup>392</sup>

A tenancy from year to year does not determine and recommence with every year, but the tenant has a lease for one year certain, with a growing interest during every year thereafter, springing out of the original contract,<sup>393</sup> and the same principle applies to a similar letting measured by a less term, as from week to week.<sup>394</sup> This matter is important, since, if the tenancy were regarded as recommencing every year, the landlord would, under the rule referred to above,<sup>395</sup> be liable for injuries to third persons resulting from defects existing at the beginning of any year.<sup>396</sup>

§ 58. Incidents of tenancy.

A tenancy from year to year is in reality a species of estate for years, the chief difference being that, since the term of its duration is not fixed, a notice is necessary for its termination. Consequently, the incidents of the tenancy are generally similar to those of an estate for years.<sup>397</sup> The

<sup>392</sup> 1 Taylor, Landl. & Ten. § 57; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, 3 Gray's Cas. 446; *Prickett v. Ritter*, 16 Ill. 96; *Hollis v. Burns*, 100 Pa. St. 206.

<sup>393</sup> *Cattley v. Arnold*, 1 Johns. & H. 651; *Gandy v. Jubber*, 9 Best & S. 15. See *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724.

<sup>394</sup> *Bowen v. Anderson* [1894] 1 Q. B. 164, overruling *Sandford v. Clarke*, 21 Q. B. Div. 398. Contra, *Borman v. Sandgren*, 37 Ill. App. 160; *Griffith v. Lewis*, 17 Mo. App. 605. The two cases last cited are based on *Gandy v. Jubber*, 5 Best & S. 78, and make no reference to the opinion on appeal in that case (9 Best & S. 15), in which a contrary view was taken, in accordance with the statement in the text.

<sup>395</sup> See ante, § 44(d).

<sup>396</sup> See *Gandy v. Jubber*, 9 Best & S. 15; *Bowen v. Anderson* [1894] 1 Q. B. 164.

<sup>397</sup> 1 Washburn, Real Prop. 384; *Oxley v. James*, 13 Mees. & W. 209; *Kitchen v. Pridgen*, 3 Jones (N. C.) 43.



interest of the tenant may be assigned,<sup>398</sup> and passes on his death to his personal representative.<sup>399</sup>

A tenant from year to year is liable for voluntary waste committed by him, and also, by some decisions, for permissive waste;<sup>400</sup> and he is, like any other tenant, estopped to deny his landlord's title.<sup>401</sup>

### § 59. Termination.

A tenancy from year to year is terminable by proper notice at the end of the first, as well as of any subsequent, year, unless, in creating such tenancy, the parties use words showing an intention to create a tenancy for two years at least.<sup>402</sup>

The notice necessary to terminate a tenancy from year to year was, in the case of agricultural tenancies, required to be given half a year before the termination of any year, in order that the tenant might be enabled to reap, before he was dispossessed, the crops sown by him, and this requirement of six months' notice was extended to similar tenancies of other property not used for agricultural purposes.<sup>403</sup> This early doctrine that a notice is necessary in order to terminate a tenancy from year to year has been adhered to in numerous cases in England and this country,<sup>404</sup> but the length of

<sup>398</sup> 1 Washburn, Real Prop. 384; *Cody v. Quarterman*, 12 Ga. 386; *Pleasant v. Benson*, 14 East, 234.

<sup>399</sup> *Doe v. Carter*, 8 Term R. 60; *Cody v. Quarterman*, 12 Ga. 386; *Pugsley v. Aikin*, 11 N. Y. 494, *Finch's Cas.* 773; *Kitchen v. Pridgen*, 3 Jones (N. C.) 49.

<sup>400</sup> See post, § 254.

<sup>401</sup> *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

<sup>402</sup> 1 Woodfall, Landl. & Ten. 154; *Doe v. Smaridge*, 7 Q. B. 957, 3 Gray's Cas. 428; *Lesley v. Randolph*, 4 Rawle (Pa.) 123; *Fox v. Nathans*, 32 Conn. 348; *Reeder v. Sayre*, 70 N. Y. 180, *Finch's Cas.* 775.

<sup>403</sup> *Doe v. Porter*, 3 Term R. 13; *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724; *Prickett v. Ritter*, 16 Ill. 96.

<sup>404</sup> *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 413; *Barlow v. Wainwright*, 22 Vt. 89, 3 Gray's Cas. 450; *Stedman v. McIntosh*,

the notice required is in this country generally fixed by statute; in some states the requirement of a half year or six months' notice being adhered to, and in others a less period—as three months—being named.<sup>405</sup> The requirement of notice applies also to the tenant, and he must give the legal notice to the landlord in order to terminate the tenancy.<sup>406</sup> This requirement of notice applies generally to a tenancy from year to year created by occupation and payment of rent under a void lease for years, and consequently notice is necessary to terminate the lease at the end of any year, though the tenancy will terminate without notice at the end of the term named in the lease.<sup>407</sup>

In the case of a lease from quarter to quarter, month to month, or week to week, a notice of a quarter, a month, or a week, respectively, is necessary to terminate it.<sup>408</sup>

4 Ired. (N. C.) 291, 42 Am. Dec. 122; *Ridgely v. Stillwell*, 25 Mo. 570; *Den v. Drake*, 14 N. J. Law, 523; *Bradley v. Covel*, 4 Cow. (N. Y.) 350; *Lesley v. Randolph*, 4 Rawle (Pa.) 123. See cases cited in 42 Am. Dec. 126, note.

<sup>405</sup> 1 Stimson's Am. St. Law, § 2052; 2 Sharswood & B. Lead. Cas. Real Prop. 200.

<sup>406</sup> *Morehead v. Watkyns*, 5 B. Mon. (Ky.) 228; *Currier v. Perley*, 24 N. H. 219; *Hall v. Wadsworth*, 28 Vt. 410.

<sup>407</sup> 2 Taylor, Landl. & Ten. § 469; *Doe v. Browne*, 3 East, 165; *Tress v. Savage*, 4 Bl. & Bl. 36, 3 Gray's Cas. 435; *Barlow v. Wainwright*, 22 Vt. 33, 3 Gray's Cas. 450; *Morehead v. Watkyns*, 5 B. Mon. (Ky.) 228; *Garrett v. Clark*, 5 Or. 464; *Thurber v. Dwyer*, 10 R. I. 355. And see ante, § 37(b). But see, to the contrary, *Adams v. City of Cohoes*, 127 N. Y. 175, *Finch's Cas.* 733.

<sup>408</sup> *Steffens v. Earl*, 40 N. J. Law, 123, 3 Gray's Cas. 457, *Finch's Cas.* 777; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, 3 Gray's Cas. 446; *McDevitt v. Lambert*, 30 Ala. 536; *Gunn v. Sinclair*, 52 Mo. 327; *Prickett v. Ritter*, 16 Ill. 96.

In England the rule as to notice in the case of such short tenancies is said to be uncertain. *Fawcett, Landl. & Ten.* (3d Ed.) 495. And see *Jones v. Mills*, 10 C. B. (N. S.) 788, 3 Gray's Cas. 463, note; *Bowen v. Anderson* [1894] 1 Q. B. 144, and note on page 163.

## II (D). TENANCY BY SUFFERANCE—TENANT HOLDING OVER.

A tenancy by sufferance arises when one who entered as a tenant under a lawful demise by the owner of the land continues in possession after the end of his estate or interest, without the landlord's permission.

The tenancy has none of the incidents of any other tenancy, except that the tenant cannot be treated as a trespasser until the landlord enters on the land.

The tenancy by sufferance may be terminated at the option of the landlord either—

(1) By his recognition of the tenant as being rightfully in possession, in which case the latter becomes a tenant at will, from year to year, or for another year, or

(2) By entry and expulsion of the tenant as a trespasser.

## § 60. Nature of tenancy.

"A tenant by sufferance is he that at first came in by lawful demise, and, after his estate ended, continueth in possession and wrongfully holdeth over. As where tenant *pur terme d'autre vie* continueth in possession after the decease of *cestui que vie*, or tenant for years holdeth over his term;" and so, if tenant at will continueth in possession after the death of the lessor, or other determination of the term, he is tenant at sufferance.<sup>400</sup> Accordingly, this tenancy, so called, arises whenever a tenant "holds over" after the termination of his tenancy, but frequently a tenant holding over, though he is necessarily a tenant at sufferance, is not referred to by that designation, and the use of the term "tenancy by

<sup>400</sup> Co. Litt. 57b; 1 Cruise's Dig. tit. 9, c. 2, § 1. See *Roe v. Ward*, 1 H. Bl. 97, 3 Gray's Cas. 414; *Doe v. Maisey*, 8 Barn. & C. 767; *Hauxhurt v. Lobree*, 38 Cal. 563; *Williams v. Ladew*, 171 Pa. St. 369; *Howard v. Carpenter*, 22 Md. 10; *Russell v. Fabyan*, 34 N. H. 218; *Reed v. Reed*, 48 Me. 388; *Flood v. Flood*, 1 Allen (Mass.) 217; *Kinsley v. Ames*, 2 Metc. (Mass.) 29; *Esty v. Baker*, 50 Me. 325; *Evans v. Reed*, 5 Gray (Mass.) 308; *Hemphill v. Flynn*, 2 Pa. St. 144.

sufferance" no doubt tends to confusion, as implying that there is a permissive holding on the part of the tenant, as in the case of the other tenancies previously discussed, while the possession of a tenant by sufferance is in reality tortious, though not originating in tort.<sup>410</sup>

In order that this tenancy exist, the possession of the tenant must have had its inception in the act of the landlord, or of one in privity with him;<sup>411</sup> and if he originally came into possession by act of the law, as in the case of a guardian, or a husband who comes into possession of his wife's property, he is not a tenant by sufferance if he holds over after his right to do so is gone, but merely a trespasser.<sup>412</sup>

In one respect only does the position of this so-called tenant differ from that of one who has actually disseised the owner of the land (the landlord), and this difference lies in the fact that he cannot be sued in trespass by the owner unless the latter first enters.<sup>413</sup> He has no rights as a tenant, and has "only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by release for he stands in no privity to his landlord."<sup>414</sup> He is not entitled to emblements,<sup>415</sup> nor, at common law,

<sup>410</sup> 2 Bl. Comm. 150; *Dorrell v. Johnson*, 17 Pick. (Mass.) 263; *Den v. Adams*, 12 N. J. Law, 99; *Russell v. Fabyan*, 34 N. H. 213.

"The fiction of a tenancy was resorted to for the purpose of avoiding a disseisin of the owner in cases where a possession, lawful in its commencement, became unlawful after the possessor's interest had expired." Lightwood, *Possession of Land*, 161.

<sup>411</sup> *Cook v. Norton*, 48 Ill. 20; *Hogsett v. Ellis*, 17 Mich. 351.

<sup>412</sup> Co. Litt. 57b; 1 Washburn, *Real Prop.* 393; *Livingston v. Tanner*, 14 N. Y. 64.

<sup>413</sup> Co. Litt. 57b; 2 Bl. Comm. 150; *Rising v. Stannard*, 17 Mass. 282; *Russell v. Fabyan*, 34 N. H. 213, 2 Sharswood & B. Lead. Cas. *Real Prop.* 129.

<sup>414</sup> 4 Kent, *Comm.* 116. And see Co. Litt. 57b, 270b; 1 Cruise's *Dig.* tit. 9, c. 2.

<sup>415</sup> *Doe v. Turner*, 7 Mees. & W. 226; *Miller v. Cheney*, 33 Ind. 470

was he liable for rent.<sup>416</sup> He is, however, liable, even apart from statute, according to some decisions, in an action for use and occupation.<sup>417</sup>

In England, a tenant by sufferance is by St. 4 Geo. II. c. 28, liable for double rent if he holds over after notice by the landlord to quit;<sup>418</sup> and in some of the states of this country there are similar provisions, imposing a penalty of double or treble rent in case of holding over.<sup>419</sup>

#### § 61. Landlord's option as to tenant.

The tenancy at sufferance exists only so long as the landlord fails to indicate whether he will treat the tenant holding over as a tenant or as a trespasser. The landlord has an option in this respect, and, upon his indicating an intention that the tenancy shall continue, the tenant is thenceforth no longer a tenant by sufferance, but becomes, in most states, even against his will, a tenant from year to year on the terms of the previous tenancy, so far as such terms are applicable to a tenancy from year to year.<sup>420</sup> So, if the

<sup>416</sup> 1 Cruise's Dig. tit. 9, c. 2, § 5; *Delano v. Montague*, 4 Cush. (Mass.) 42.

<sup>417</sup> 1 Washburn, Real Prop. 394; *ibbs v. Richardson*, 9 Adol. & El. 349; *National Oil Refining Co. v. Bush*, 88 Pa. St. 385; *Hogsett v. Ellis*, 17 Mich. 351. See *Merrill v. Bullock*, 105 Mass. 486.

<sup>418</sup> 2 Woodfall, Landl. & Ten. 745.

<sup>419</sup> 2 Sharswood & B. Lead. Cas. Real Prop. 123; 1 Stimson's Am. St. Law, § 2060.

It is said in 2 Bl. Comm. 151, and 4 Kent, Comm. 117, that the effect of such statutes is to render a holding over without consent so hazardous that a tenancy or estate at sufferance is unusual. To the same effect, see Bouv. Law Dict., "Estate at Sufferance." Whether the tenancy is so rare as these writers would imply is doubtful, and it would seem that expressions of this sort may have had an unfortunate effect in giving a wrong view of this tenancy, and dissociating it, in the minds of many, from the familiar idea of a tenant holding over without permission, which, as shown in the text, is what this so-called tenancy is.

<sup>420</sup> *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161; *Tolle v. Orth*,

tenancy was one by the month or quarter, the holding over, when consented to by the landlord, will create a tenancy from month to month, or from quarter to quarter, since the implication of renewal is merely of the form of tenancy under which the tenant previously held.<sup>421</sup>

The effect of the holding over by the tenant as giving the landlord the privilege of regarding the tenancy as continued for another year is not changed by the fact that the tenant, before the end of the original tenancy, notified the landlord that he would not occupy for another year;<sup>422</sup> and it has been decided that the fact that, owing to some accidental cause, the tenant could not vacate at the end of the term, would not affect the application of the rule.<sup>423</sup> But in New York there has been a contrary decision to the effect that a tenant could not be held for the rent of an additional year, where his removal was prevented by illness in his family.<sup>424</sup>

This option of the landlord to continue the lease or not does not, however, exist when the circumstances are such as

75 Ind. 298, 39 Am. Rep. 147; *Hall v. Myers*, 43 Md. 446; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Williams v. Ladew*, 171 Pa. St. 369; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Conway v. Starkweather*, 1 Denio (N. Y.) 113, 3 Gray's Cas. 448; *Providence County Sav. Bank v. Hall*, 16 R. I. 154.

The same principle applies in case of a receipt of rent by the remainderman after the death of a life tenant who made a demise for years, such action creating a tenancy from year to year between the remainderman and the tenant. *Roe v. Ward*, 1 H. Bl. 97, 3 Gray's Cas. 414.

<sup>421</sup> *Hollis v. Burns*, 100 Pa. St. 206, 45 Am. Rep. 379; *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 564; *Ballenbacker v. Fritts*, 98 Ind. 50; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147.

<sup>422</sup> *Smith v. Bell*, 44 Minn. 524; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Cavanaugh v. Clinch*, 88 Ga. 610; *Graham v. Dempsey*, 169 Pa. St. 460.

<sup>423</sup> *Mason v. Wierengo*, 113 Mich. 151, 67 Am. St. Rep. 461.

<sup>424</sup> *Herter v. Mullen*, 159 N. Y. 28, 70 Am. St. Rep. 517. In which case, however, three judges dissented. See dissenting opinion of Gray, J., and also note, 70 Am. St. Rep. 535.

to raise an implication of an agreement on his part that this shall not be the effect of a holding over, as when the parties are in treaty for a new lease;<sup>425</sup> and it cannot arise when there is an express agreement for a new lease.<sup>426</sup>

In England and a few states in this country, while it is recognized that a new tenancy is to be implied from the payment of rent by the tenant holding over,<sup>427</sup> the right of the landlord to hold the tenant for another term merely because the latter holds over is not admitted, it being considered that, in order to thus create a new tenancy, there must be a new contract, either express or inferable from the dealings of the parties.<sup>428</sup>

The mere fact that the landlord demands rent of the tenant holding over does not show an election to have the tenancy continue as one from year to year,<sup>429</sup> but the receipt:

<sup>425</sup> *Montgomery v. Willis*, 45 Neb. 434; *Smith v. Allt*, 7 Daly (N. Y.) 492; *Wilcox v. Raddin*, 7 Ill. App. 594; *Shipman v. Mitchell*, 64 Tex. 174.

<sup>426</sup> *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560; *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499.

<sup>427</sup> *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 413; *Hyatt v. Griffiths*, 17 Q. B. 505, 3 Gray's Cas. 433; *Bishop v. Howard*, 2 Barn. & C. 100, 3 Gray's Cas. 420; *Doe v. Smaridge*, 7 Q. B. 957, 3 Gray's Cas. 957; *Miller v. Shackelford*, 4 Dana (Ky.) 278; *Moshier v. Reding*, 12 Me. 478; *Edwards v. Hale*, 9 Allen (Mass.) 462.

In Maine and Massachusetts, where tenancies from year to year are not recognized, the new tenancy created in place of the tenancy by sufferance, by receipt of rent, or otherwise, is a tenancy at will. *Edwards v. Hale*, 9 Allen (Mass.) 462; *Emmons v. Scudder*, 115 Mass. 367; *Bennock v. Whipple*, 12 Me. 346, 28 Am. Dec. 186.

<sup>428</sup> *Jones v. Shears*, 4 Adol. & E. 832; *Waring v. King*, 8 Mees. & W. 571; *Edwards v. Hale*, 9 Allen (Mass.) 462; *Emmons v. Scudder*, 115 Mass. 367; *Grant v. White*, 42 Mo. 285; *Skaggs v. Elkus*, 45 Cal. 154; *Mendel v. Hall*, 13 Bush (Ky.) 232; *Kendall v. Moore*, 30 Me. 327.

<sup>429</sup> *Bishop v. Howard*, 2 Barn. & C. 100, 3 Gray's Cas. 420; *Condon v. Barr*, 47 N. J. Law, 118, 54 Am. Rep. 121.

of rent by him will have that effect.<sup>420</sup> That the tenant is to continue to hold on the terms of the former tenancy is an inference of fact, rather than of law, and it may be shown that the terms of the holding are to be different, as regards the amount of rent, or otherwise.<sup>421</sup>

§ 62. Notice to terminate tenancy.

The possession of a tenant holding over being tortious in its nature, he would not, in the nature of things, be entitled to a notice to quit before he can be put out, and so it has always been stated, apart from statute, that a tenant by sufferance is not entitled to notice.<sup>422</sup> But in some states, probably through legislative ignorance of what constitutes a tenancy by sufferance, it is provided by statute that a previous notice of one month or more shall be necessary in order to terminate the tenancy.<sup>423</sup> The effect of these statutes, strictly construed, would be that a tenant, by wrongfully holding over, acquires a right to notice which previously he did not possess. This result has, however, been avoided by a construction of these statutes as not applying to a tenancy by sufferance, properly so called.<sup>424</sup>

<sup>420</sup> *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 561; *Hall v. Myers*, 43 Md. 446; *Allen v. Bartlett*, 20 W. Va. 46.

<sup>421</sup> *Mayor, etc., of Thetford v. Tyler*, 8 Q. B. 95, 3 Gray's Cas. 429; *Hunt v. Bailey*, 39 Mo. 257; *Despard v. Walbridge*, 15 N. Y. 374.

<sup>422</sup> 1 Washburn, Real Prop. 397; Fawcett, Landl. & Ten. (2d Ed.) 430; *Hollis v. Pool*, 3 Metc. (Mass.) 350; *Young v. Smith*, 28 Mo. 65; *Reed v. Reed*, 48 Me. 388; *Howard v. Carpenter*, 22 Md. 10, 25; *Russell v. Fabyan*, 34 N. H. 218; *Rich v. Keyser*, 54 Pa. St. 86; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217.

<sup>423</sup> 1 Stimson's Am. St. Law, § 2050(B); 2 Sharswood & B. Lead. Cas. Real Prop. 146.

<sup>424</sup> In *Rowan v. Lytle*, 11 Wend. (N. Y.) 616, the court seized hold of the expression to be found in the books, that a tenancy by sufferance arises from the laches of the landlord, and from that argued that it does not begin immediately at the end of the original tenancy, but only after such a time has intervened as to  
(154)



Since the tenant holding over generally becomes, by the landlord's assent thereto, a tenant from year to year, the notice necessary to terminate a tenancy of the latter character would thereafter, it would seem, be necessary in order to terminate this new tenancy at the end of any subsequent year, and it has generally been so held.<sup>435</sup> But a notice has recently been held to be unnecessary to terminate a tenancy from year to year so created by a holding over by consent, the tenancy being regarded as terminable without notice at the end of the first year of holding over.<sup>436</sup>

raise an implication of assent on the part of the landlord. A like decision was rendered in *Smith v. Littlefield*, 51 N. Y. 539, *Finch's Cas.* 738; and see *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609. A similar construction of the term "tenancy by sufferance" in statutes requiring notice for the termination of such tenancy has been adopted in other states, thus in effect rendering the provision entirely nugatory. See *Meno v. Hoeffel*, 46 Wis. 282; *Moore v. Morrow*, 28 Cal. 551; *Allen v. Carpenter*, 15 Mich. 25.

In regard to these decisions it may be said that, however beneficial they may have been, as avoiding the absurdity which would be involved in requiring a literal compliance with the statutes, there is no authority whatever for the view that a tenancy by sufferance at common law does not begin immediately upon the end of the original tenancy, and that there is an intervening period in which the tenant is a mere trespasser, which is followed by the tenancy by sufferance. Furthermore, the statements that the holding over must have existed for such a length of time as to raise an implication of assent on the part of the landlord involve a violation of the cardinal principle of a tenancy by sufferance at common law, namely, the absence of the landlord's assent.

In Massachusetts there was at one time a similar statute requiring a notice to terminate a tenancy by sufferance, but there the difficulty was obviated by the repeal of the statute. *Kinsley v. Ames*, 3 Metc. (Mass.) 29.

<sup>435</sup> *Right v. Darby*, 1 Term R. 159, 3 Gray's Cas. 418; *Hall v. Myers*, 48 Md. 446; *Allen v. Bartlett*, 20 W. Va. 46; *Grant v. White*, 42 Mo. 285; *Miller v. Shackelford*, 4 Dana (Ky.) 264.

<sup>436</sup> *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724; *Adams v. City of Cohoes*, 127 N. Y. 175, *Finch's Cas.* 783.

In some cases, the courts speak of the tenant holding over by consent, not as becoming a tenant from year to year, but as becoming

## § 63. Expulsion of tenant.

If the landlord elects to treat the tenant holding over,—the so-called tenant at sufferance,—not as a tenant, but merely as a trespasser, he may immediately enter and expel him, or bring proceedings for that purpose.<sup>437</sup>

As to whether the landlord may forcibly enter and expel a tenant holding over without consent, the cases are in conflict. According to some authorities, he may use such force as is necessary in order to enter and expel the tenant, without making himself liable to a civil action for so doing, though he may be liable to a criminal prosecution for the forcible entry or breach of the peace;<sup>438</sup> while by other authorities it is considered that the statute of Richard II., and similar statutes in the United States, forbidding forcible entry and detainer, render the owner of land liable in damages to the tenant holding over for the forcible entry and expulsion of the latter, and that he must resort to legal proceedings to recover possession of the land.<sup>439</sup>

a tenant for another year or another term, and, so regarded, a notice would not be necessary to terminate the tenancy at the end of such year or term. *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, *Finch's Cas.* 735; *Wolfe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *Cavanaugh v. Clinch*, 88 Ga. 610.

<sup>437</sup> *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Brown v. Keller*, 33 Ill. 151, 33 Am. Dec. 258; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Hemphill v. Flynn*, 2 Pa. St. 144; *Benfey v. Congdon*, 40 Mich. 283.

<sup>438</sup> 2 *Taylor, Landl. & Ten.* §§ 531, 532; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Jackson v. Farmer*, 9 Wend. (N. Y.) 201; *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364; *Allen v. Kelly*, 17 R. I. 781, 33 Am. St. Rep. 905; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80. See, also, *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442, and the exhaustive discussion of the subject by Joseph Willard, Esq., in 4 Am. Law Rev. 429.

<sup>439</sup> *Dustin v. Cowdry*, 23 Vt. 631; *Mosseller v. Deaver*, 106 N. C. 494, 19 Am. St. Rep. 540; *Reeder v. Purdy*, 41 Ill. 279; *Dilworth v. Fee*, 52 Mo. 130. And see *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608.

## III (A). ESTATES ON CONDITION.

An estate on condition is one which, by the terms of the instrument by which it is created, is subject to a contingency not forming a part of the limitation of the estate, it being an estate on "condition precedent" if it is to begin or "vest" on the happening of a contingency, and an estate on "condition subsequent" if it is to terminate thereon, at the option of the creator of the estate or his successor in interest, before its natural time for termination. Estates on condition precedent are future estates, and as such are considered in a subsequent chapter.

No particular words are necessary for the creation of an estate on condition, it being a question of intention as determined from the whole instrument, but, to create a condition, the intention must clearly appear.

Where the condition is impossible, illegal, or repugnant to the nature of the estate, if it is precedent, the estate does not arise, except, perhaps, when impossible by act of the grantor, while, if it is subsequent, the estate is absolute in the grantee.

The breach of a condition subsequent terminates the estate only if a forfeiture be enforced by the grantor or his heirs, or, in the case of a leasehold estate, by his assigns.

Compliance with a condition may be waived, as may the right to take advantage of a breach thereof.

Equity will generally relieve against a forfeiture for breach of a condition subsequent, if the injury caused by such breach is susceptible of compensation in damages.

## § 64. Conditions in general.

In discussing estates for years, we adverted to the possibility of the determination of such an estate before its natural expiration for breach of a condition by the tenant,<sup>440</sup> but, generally speaking, we have thus far considered estates in fee simple, in fee tail, for life, and for years, on the supposition that they will endure until their regular termination, as fixed by the character of the estate,—that is, until the

<sup>440</sup> See ante, § 52.

failure of heirs or heirs of the body, the death of the tenant or *cestui que vie*, or the lapse of the number of years named, respectively. We now consider such estates on the supposition that they may possibly, upon the happening of some contingency, be terminated before the time which the natural character of the estate, as being one in fee simple, fee tail, for life, or for years, would fix for its termination. An estate so liable to termination is, as we shall find, either an estate on condition, or an estate "on special limitation."

Estates on condition we have defined in the summary above. The definition of an estate on condition there given, however, includes not only estates subject to termination on a contingency (estates on condition subsequent), but also those liable to arise on a contingency (estates on condition precedent). These two classes of estates on condition are materially different, and have, in fact, little in common, except that the existence of each is affected by contingencies. We will first briefly consider estates on condition precedent, and then devote our attention to those on condition subsequent, with only incidental reference to the former class.

### § 65. Nature of conditions precedent.

Since conditions precedent serve merely to postpone the time of commencement of an estate, their consideration logically belongs to the chapter of this work treating of future estates, and it will be there seen that they exist in the case of what are known as "contingent remainders," "shifting" and "springing uses," and executory devises, and in no other cases can they exist, except in jurisdictions where the common-law rule forbidding the creation of estates to commence *in futuro* has been abolished.<sup>441</sup>

Examples of conditions precedent may be given as fol-

<sup>441</sup> See post, c. 6, "Future Estates." And see, also, Challis, Real Prop. 80, 81; 2 Bl. Comm. 165; 1 Preston, Estates, 217; Eckhart v. Irons, 128 Ill. 568, 580.

lows: Where an estate for life is limited to A. upon his marriage to B., the marriage is a condition precedent to the vesting of an estate in A.<sup>443</sup> And where land is granted to a man for two years, with a condition that, upon the payment of a certain sum within that time, the grantee shall have the fee, such payment is a condition precedent to the creation of a fee in the grantee.<sup>443</sup>

In the case of an estate on condition precedent, the grantee has a mere possibility of an estate until the performance of the condition, while after its performance he has an absolute estate in no way differing from one of the same quantum on which no condition was originally imposed.<sup>444</sup>

#### § 66. Nature of conditions subsequent.

Examples of conditions subsequent may be given as follows: Where land is given to a widow for life, provided she do not marry, the nonmarriage of the widow is a condition subsequent, for breach of which the grantor or his heirs may re-enter;<sup>445</sup> and where land is granted to a man on condition that the grantor may re-enter if he pay a certain sum to the grantee within a certain time, the performance of the condition of payment gives a right of re-entry.<sup>446</sup>

In the case of an estate on condition subsequent, the grantee has an estate in the land which is liable to termination on breach of the condition, but until such termination

<sup>443</sup> 2 Bl. Comm. 154; 4 Kent, Comm. 125.

<sup>444</sup> Litt. §§ 349, 350; 2 Bl. Comm. 154. See, also, for examples of conditions precedent, *Nevius v. Gourley*, 95 Ill. 206, 97 Ill. 365; *Tilley v. King*, 109 N. C. 461; *Weston v. Foster*, 7 Metc. (Mass.) 297; *Johnson v. Warren*, 74 Mich. 491, 497; *Johnson v. Gooch*, 116 N. C. 64; *Whitesides v. Whitesides*, 28 S. C. 325, 331; *Moore v. Perry*, 42 S. C. 369, 373; *Vanhorne's Lessee v. Dorrance*, 2 Dall. (Pa.) 317.

<sup>445</sup> *Challis*, Réal Prop. 58; *Rollins v. Riley*, 44 N. H. 9; *Long v. Swindell*, 77 N. C. 176.

<sup>446</sup> Co. Litt. 214b.

<sup>447</sup> Litt. § 332. This, as we shall subsequently see, is the form of a common-law mortgage. See post, part 6.

he has the same rights and powers in connection with the estate as if the condition did not exist, and it may be transferred by him or by operation of law, subject to be terminated, however, in the hands of the transferee.<sup>447</sup>

A condition subsequent must be carefully distinguished from what we shall presently discuss under the name of a "special limitation," since, in the case of a limitation, the estate terminates by force of the limitation alone, while, in the case of a condition, the estate does not terminate upon its breach, unless an entry or claim is made by the person entitled to take advantage of the condition.<sup>448</sup>

A condition is also to be distinguished from a covenant, a breach of which merely renders the covenantor liable in damages.<sup>449</sup> A covenant, however, may be accompanied by a condition subsequent giving a right to terminate the estate of the covenantor on its breach, and this is in fact the most ordinary form of an estate on condition subsequent at the present day; a lease for years generally providing for such optional termination by the landlord, or right of "re-entry," on breach of a covenant by the lessee.<sup>450</sup> Thus there may be a condition terminating the lessee's term for breach of a covenant to repair,<sup>451</sup> to use the premises in a certain

<sup>447</sup> *Challis*, Real Prop. 169; 2 Washburn, Real Prop. 457; *Taylor v. Sutton*, 15 Ga. 103; *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Jackson v. Topping*, 1 Wend. (N. Y.) 383, 19 Am. Dec. 515; *Chapman v. Pingree*, 67 Me. 198; *Shattuck v. Hastings*, 99 Mass. 23; *Underhill v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 455. See post, § 76.

<sup>448</sup> Co. Litt. 214b; 2 Bl. Comm. 155; *Challis*, Real Prop. 206. See post, § 74.

<sup>449</sup> *Spear v. Fuller*, 3 N. H. 174, 28 Am. Dec. 391; *Thornton v. Trammell*, 39 Ga. 202; *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489, 508. See ante, § 52a.

Specific performance of a bare condition cannot be enforced specifically, as a covenant can. *Close v. Burlington, C. R. & N. Ry. Co.*, 64 Iowa, 149.

<sup>450</sup> See ante, § 52a.

<sup>451</sup> *Few v. Perkins*, L. R. 2 Exch. 92.

way,<sup>452</sup> to erect improvements,<sup>453</sup> not to assign or sublease,<sup>454</sup> or to pay rent.<sup>455</sup>

A condition is also to be distinguished from a trust, the latter not involving any forfeiture of the tenant's estate, but merely the interposition of equity, if necessary, to compel his performance of the stipulations in the instrument.<sup>456</sup>

### § 67. Conditions expressed and implied.

Conditions are by the common-law writers divided into conditions implied or "in law," and conditions expressed or "in deed." Implied conditions, or conditions in law, were those to which, as a result of the system of tenures, every estate was subject, to wit, that the feoffee should do nothing which would involve a denial of or injury to the feoffor's title,<sup>457</sup> as that a tenant for life or years shall not make a feoffment to a stranger in fee;<sup>458</sup> or that a tenant shall not deny his landlord's title, a condition which, to some extent, exists at the present day.<sup>459</sup> So far as implied conditions are still a matter of interest, they have been previously considered as incidents of particular classes of estates, and the present treatment of conditions will be confined to conditions expressed or "in deed."

### § 68. Creation of estates on condition.

An express condition cannot be imposed otherwise than by a written stipulation, a verbal condition being nuga-

<sup>452</sup> *Miller v. Prescott*, 163 Mass. 12, 47 Am. St. Rep. 434.

<sup>453</sup> *Winn v. State*, 55 Ark. 360.

<sup>454</sup> See ante, §§ 46, 48.

<sup>455</sup> See post, § 71.

<sup>456</sup> 1 *Perry, Trusts*, § 121; *Stanley v. Colt*, 5 Wall. (U. S.) 119, 165 See citations post, note 469.

<sup>457</sup> See Litt. § 328; Co. Litt. 215a, 233b; 2 Bl. Comm. 152.

<sup>458</sup> See ante, § 32.

<sup>459</sup> See ante, § 52f.

tory,<sup>400</sup> except, it would seem, when the lease itself is valid, though merely oral.<sup>401</sup>

While certain words are said to be appropriate for the creation of a condition, such as "on condition," "provided," "so that,"<sup>402</sup> no particular words are required, it being purely a question of the intention of the grantor or deviser as gathered from the whole instrument.<sup>403</sup> Nor does the presence of such conditional words necessarily create a condition.<sup>404</sup> A reservation of the right of re-entry on the happening of a contingency will usually render the estate one on condition.<sup>405</sup>

A condition may be reserved by the grantor on a transfer of a fee simple, or on an assignment of his entire interest in a term of years, it not being necessary that the grantor have a reversion in order to support the right of entry.<sup>406</sup>

— Construction adverse to conditions.

The law is favorable to the vesting of estates, and adverse to their destruction, and consequently a stipulation in a

<sup>400</sup> *Rogers v. Sebastian County*, 21 Ark. 440; *Adams v. Logan County*, 11 Ill. 339.

<sup>401</sup> See 1 Taylor, Landl. & Ten. § 272.

<sup>402</sup> Litt. §§ 328-331; *Portington's Case*, 10 Co. Rep. 35a, 41b, quoted in 5 Gray's Cas.; *Mahoning County v. Young*, 16 U. S. App. 253.

<sup>403</sup> *Stanley v. Colt*, 5 Wall. (U. S.) 119, 166; *Hapgood v. Houghton*, 22 Pick. (Mass.) 480; *Sumner v. Darnell*, 128 Ind. 38; *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 303; *Parmelee v. Oswego & S. R. Co.*, 6 N. Y. 74; *Watters v. Bredin*, 70 Pa. St. 235.

<sup>404</sup> *Goodman v. Borough of Saltash*, 7 App. Cas. 633; *Paschall v. Passmore*, 15 Pa. St. 295; *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350; *Mills v. Davison*, 54 N. J. Eq. 659; *Sohler v. Trinity Church*, 109 Mass. 1, 19; *City of Portland v. Terwilliger*, 16 Or. 465.

<sup>405</sup> Litt. §§ 329, 330; 1 Taylor, Landl. & Ten. § 278; *Attorney General v. Merrimack Mfg. Co.*, 14 Gray (Mass.) 612; *Kew v. Trainor*, 150 Ill. 150.

<sup>406</sup> Litt. § 325; Co. Litt. 202a; *Freeman v. Bateman*, 2 Barn. & Ald. 168, 5 Gray's Cas. 8; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Contra, Ohio Iron Co. v. Iron Co. (Minn.)* 67 N. W. 221.



conveyance or a devise will be construed, if possible, not to be a condition.<sup>467</sup> The courts will, by preference, construe language not as creating a condition, but rather as creating a covenant<sup>468</sup> or a trust.<sup>469</sup> So the mere fact that the con-

<sup>467</sup> 4 Kent, Comm. 132; 2 Cruise, Dig. tit. 13, c. 1, §§ 38-46; Scovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350; Thornton v. Trammell, 39 Ga. 202; Wheeler v. Dascomb, 3 Cush. (Mass.) 285; Emerson v. Simpson, 43 N. H. 475, 32 Am. Dec. 168; Studdard v. Wells, 120 Mo. 25; Cunningham v. Parker, 146 N. Y. 33, 48 Am. St. Rep. 765; Williams v. Vanderbilt, 145 Ill. 238; Board Com'rs Mahoning Co. v. Young, 8 C. C. A. 27, 59 Fed. 96; Ruggles v. Clare, 45 Kan. 662; Graves v. Deterling, 120 N. Y. 447; Peden v. Chicago, R. I. & P. Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680, and note; City of Portland v. Terwilliger, 16 Or. 465. See digest of cases on the subject in note to Greene v. O'Connor, 19 L. R. A. 262, 18 R. I. 56.

This principle of construction finds an important application "in construing future limitations; as remainders which are to be taken as vested rather than contingent, and executory limitations and devises which are to be taken as referring to the time of possession, rather than the vesting of the interest." 1 Leake, 238, note (d). See post, §§ 121, 141.

<sup>468</sup> Scovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Skinner v. Shepard, 130 Mass. 180; Rawson v. Inhabitants of School Dist. No. 5 in Uxbridge, 7 Allen (Mass.) 125, 83 Am. Dec. 670; Peden v. Chicago, R. I. & P. Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680; Graves v. Deterling, 120 N. Y. 447; Thornton v. Trammell, 39 Ga. 202; Carroll County Academy v. Gallatin Academy, 20 Ky. L. Rep. 324, 47 S. W. 617; Star Brewery Co. v. Primas, 163 Ill. 652; Studdard v. Wells, 120 Mo. 25; Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Tex. 218; Elyton Land Co. v. South & North Alabama R. Co., 100 Ala. 396; Palmer's Ex'r v. Ryan, 63 Vt. 227; Woodruff v. Woodruff, 44 N. J. Eq. 349.

<sup>469</sup> 1 Washburn, Real Prop. 445; Stanley v. Colt, 5 Wall. (U. S.) 165; Woodward v. Walling, 31 Iowa, 533; Sohler v. Trinity Church, 109 Mass. 1; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Mills v. Davison, 54 N. J. Eq. 659, 55 Am. St. Rep. 594; Neely v. Hoskins, 34 Me. 386.

"What by the old law was deemed a devise upon condition would now, perhaps, in almost every case, be construed a devise in fee upon trust, and, by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust can compel

veyance states the purpose for which it is made, or defines the use to which the land is to be applied, does not raise by implication a condition that the grantee's estate shall be defeated if the property is not used in accordance therewith.<sup>476</sup>

In some cases, the question whether there is a valuable

an observance of the trust by a suit in equity." 1 Sugden, Powers (8th Ed.) 106. This is quoted with approval in *Stanley v. Colt*, 5 Wall. (U. S.) 119. This sweeping statement is not, however, supported by the treatment of the subject in the standard English treatises on wills by Mr. Jarman and Mr. Theobald, though no doubt true if confined to a devise subject to the payment of a legacy. In this country, most of the cases involve conditions created by conveyance *inter vivos*, but they may unquestionably be created by devise, if such is the intention of the testator.

Prof. J. C. Gray says: "For nearly, if not quite, two centuries, the remedy by entry for breach of condition attached to a conveyance in fee simple has been practically obsolete. . . . The practice of entry undoubtedly fell into disuse, because, when the condition was for the payment of money, which it generally was, equity would restrain a forfeiture, and would in many cases enforce the payment as a trust." Gray, *Perpetuities*, § 282, note. In England, furthermore, the rule against perpetuities greatly restricts the ability to impose conditions in the creation of an estate. See post, § 155.

<sup>476</sup> *Stuart v. Easton*, 170 U. S. 323; *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350; *Thornton v. Trammell*, 39 Ga. 202; *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142; *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59; *Rawson v. Inhabitants of School Dist. No. 5 in Uxbridge*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Brown v. Caldwell*, 23 W. Va. 191, 48 Am. Rep. 376; *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 125, Finch's Cas. 527; *Rice v. Boston & W. R. Corp.*, 12 Allen (Mass.) 141, 5 Gray's Cas. 15; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 63; *Ruch v. Rock Island*, 97 U. S. 693; *Warner v. Bennett*, 31 Conn. 468; *Cross v. Carson*, 3 Blackf. (Ind.) 138, 44 Am. Dec. 742; *Hooper v. Cummings*, 45 Me. 359; *Guild v. Richards*, 16 Gray (Mass.) 309; *McElroy v. Morley*, 40 Kan. 76; *Long v. Moore*, 19 Tex. Civ. App. 363; *Higbee v. Rodeman*, 129 Ind. 244; *Faith v. Bowles*, 36 Md. 13; *Ecroyd v. Coggeshall*, 21 R. I. 1; *Board Com'rs Mahoning Co. v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Sumner v. Darnell*, 128 Ind. 38. But see *Flaten v. City of Moorhead*, 51 Minn. 518.

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consideration for the conveyance is regarded, most properly. it would seem, as important in determining whether a condition is created: language indicating that the gift is for a particular purpose being sufficient to create a condition in the case of a devise or purely voluntary conveyance which would not have that effect in the case of a conveyance on consideration.<sup>471</sup>

### § 69. Co-struction of conditions.

On the same principle of hostility to conditions, a condition precedent is construed strictly in favor of vesting the estate, while a condition subsequent is construed strictly against divesting the estate.<sup>472</sup>

<sup>471</sup> *Neely v. Hoskins*, 84 Me. 386; *Brown v. Caldwell*, 23 W. Va. 187. 48 Am. Rep. 376; *Field v. City of Providence*, 17 R. I. 803; *Ecroye v. Coggeshall*, 21 R. I. 1; *Rawson v. Inhabitants of School Dist. No. 5 in Uxbridge*, 7 Allen (Mass.) 125, 83 Am. Dec. 670.

<sup>472</sup> *Co. Litt.* 218a, 219b; 4 Kent, Comm. 129; 1 Leake, 239; *Mead v. Ballard*, 7 Wall. (U. S.) 290; *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168; *Peden v. Chicago, R. I. & P. Ry. Co.*, 73 Iowa, 330, 5 Am. St. Rep. 680; *Bradstreet v. Clark*, 21 Pick. (Mass.) 389; *Rawson v. Inhabitants of School Dist. No. 5 in Uxbridge*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Voris v. Renshaw*, 49 Ill. 425, 430; *Morrill v. Wabash, St. L. & P. Ry. Co.*, 96 Mo. 174.

Accordingly, it has been held that, where a condition subsequent provides for the performance of a certain act by the grantee, without mention of his heirs, executors, or assigns, the grantee himself is alone bound thereby, and the condition expires on his death. *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168. Compare *Upington v. Corrigan*, 151 N. Y. 143, *Finch's Cas.* 533. And a condition which required the "permanent location" within a year of an institute of learning on the land granted was held to be satisfied by the adoption within that time by the trustees of a resolution providing for such location. *Mead v. Ballard*, 7 Wall. (U. S.) 290. So, a condition that land be used for a certain purpose is not violated so as to justify re-entry by a merely temporary abandonment of its use for that purpose. *Carter v. Branson*, 79 Ind. 14; *Osgood v. Abbott*, 58 Me. 73; *Mills v. Evansville Seminary*, 58 Wis. 135.

— Precedent or subsequent.

Though the distinction between a condition precedent and a condition subsequent is obvious enough in its consequences, it is frequently difficult to determine which is intended by the language used, the question being entirely one of intention and not of the particular terms of the limitation.<sup>473</sup> The courts tend to construe a condition as subsequent, rather than precedent, so as to give the grantee or devisee a present estate liable to be divested, rather than to defer the vesting.<sup>474</sup> The rule is stated to be that, if the act or event named must necessarily precede the vesting of the estate, it is a condition precedent, while, if the act or event may accompany or follow the vesting of the estate, it is a condition subsequent.<sup>475</sup> Furthermore, the fact that the condition involves something in the nature of a consideration for the gift tends to show that it is a condition precedent.<sup>476</sup>

<sup>473</sup> See 2 Jarman, Wills, 842; *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 825, and note.

<sup>474</sup> 4 Kent, Comm. 129; *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 121, *Finch's Cas.* 527; *Martin v. Ballow*, 13 Barb. (N. Y.) 119; *Donnelly v. Eastes*, 94 Wis. 390.

Accordingly, a devise to one on condition that he marry a certain person was held to be on condition subsequent (*Finlay v. King's Lessee*, 3 Pet. [U. S.] 346), as was a devise of land to a town for a school, "provided said schoolhouse is built" on a certain part of the land (*Hayden v. Inhabitants of Stoughton*, 5 Pick. [Mass.] 518, 5 Gray's Cas. 10). So a conveyance "provided they [the grantees] fence the land and keep it in repair," was held to be on condition subsequent. *Hooper v. Cummings*, 45 Md. 359. For other applications of the same rule, see post, §§ 121, 141.

<sup>475</sup> *Finlay v. King's Lessee*, 3 Pet. (U. S.) 346; *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 125, *Finch's Cas.* 527; *Underhill v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 455; *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308; *Bell County v. Alexander*, 22 Tex. 350; *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 825.

<sup>476</sup> *Theobald, Wills* (5th Ed.) 492; *Acherley v. Vernon*, Willes, 153; *Fitzgerald v. Ryan* [1899] 2 Ir. 637; *Burleyson v. Whitley*, 97 N. C. 295; *Tilley v. King*, 109 N. C. 461.

## § 70. Void conditions.

Conditions which are impossible of performance, are illegal, or are repugnant to the nature of the estate are void. If it be a condition precedent,—that is, to be performed before the estate vests,—the condition being void, the estate dependent thereon never arises. If, on the other hand, the condition be subsequent,—that is, to be performed after the estate arises,—the estate becomes absolute in the grantee.<sup>477</sup>

## —Impossible conditions.

The impossibility rendering a condition void may exist either at the time of the limitation of the estate, or may arise subsequently, either by the act of God or of the grantor.<sup>478</sup> Examples of such conditions, as given in the books, are presented by a limitation to a man on condition that “he goes to Rome in twenty-four hours” (an insufficient time), or that “he marries with Jane S. by such a day,” within which time the woman dies, or the feoffor marries her himself.<sup>479</sup>

<sup>477</sup> Co. Litt. 206a, 206b, 218a, 223a; 2 Bl. Comm. 156; 2 Jarman, Wills, 849; Taylor v. Mason, 9 Wheat. (U. S.) 325, 350; Davis v. Gray, 16 Wall. (U. S.) 203; City of Stockton v. Weber, 98 Cal. 433; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Ricketts v. Louisville, St. L. & T. Ry. Co., 91 Ky. 221, 34 Am. St. Rep. 176; Cassem v. Kennedy, 147 Ill. 660, 664; Parker v. Parker, 123 Mass. 584; Morse v. Hayden, 82 Me. 227; Scovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350; Burdis v. Burdis, 96 Va. 81, 70 Am. St. Rep. 825, and note.

<sup>478</sup> Mahoning County v. Young, 16 U. S. App. 253, 277, 59 Fed. 96; Reed v. Hatch, 55 N. H. 327; Parker v. Parker, 123 Mass. 584; City of Stockton v. Weber, 98 Cal. 433; Hoss v. Hoss, 140 Ind. 551; Burnham v. Burnham, 79 Wis. 557, 567; Harrison v. Harrison, 105 Ga. 517; Morse v. Hayden, 82 Me. 227; Union Pac. Ry. Co. v. Cook, 39 C. C. A. 86, 98 Fed. 281.

<sup>479</sup> Co. Litt. 206a; 2 Bl. Comm. 156; Roundel v. Curren, 2 Brown. Ch. 67, 6 Gray's Cas. 7.

It is stated by the common-law writers that, if a condition precedent becomes impossible of performance owing to the act of the feoffor, the estate never arises. Co. Litt. 218a; 2 Bl. Comm. 156, 157. But since this would enable the feoffor or his successor in interest

A condition which is so vaguely expressed that it is impossible to determine exactly the contingency on which the estate is to arise or terminate is to be regarded as in effect an impossible condition, and is equally inoperative.<sup>480</sup>

— Illegal conditions.

A condition may be illegal, as calling for an act which is unlawful, or is discouraged by the policy of the law, or as restraining the doing of an act which the law commands, or which it favors from considerations of public policy. The same rules apply in determining the legality of conditions as of contracts, and consideration will therefore be given here chiefly to questions which are peculiarly apt to arise in connection with conditions. The illegality may exist at the time of limiting the estate, or may arise thereafter through a change in the law, and in the latter case, as well as the former, the condition is void.<sup>481</sup>

A condition which calls for the commission of a crime,<sup>482</sup>

to profit by his own act in fraud, as it were, of the feoffee, the condition precedent might, it seems, at the present day, more probably be regarded as discharged or waived. *Jones v. Chesapeake & O. R. Co.*, 14 W. Va. 514, 523. See, also, 2 Cruise, Dig. tit. 13, c. 2, § 25, and remarks of Somers, L. C., in *Falkland v. Bertie*, 2 Vern. 333. This would involve but an application of the same principle which applies in the case of what is called a "condition precedent" in a contract, that it need not be performed if the other party to the contract render its performance impossible. Co. Litt. 20b; Pollock, Contracts (6th Ed.) 410, 418; *Cape Fear & D. R. Nav. Co. v. Wilcox*, 7 Jones (N. C.) 481, 78 Am. Dec. 260; *Jones v. Walker*, 18 B. Mon. (Ky.) 163, 56 Am. Dec. 557; *Young v. Hunter*, 6 N. Y. 203. As to condition subsequent rendered impossible by the beneficiary of its breach, see post, note 516.

<sup>480</sup> Sheppard's Touchstone, 128; 1 Leake, 227; *Wyndham v. Carew*, 2 Q. B. 317.

<sup>481</sup> *Anglesea v. Churchwardens of Rugeley*, 6 Q. B. 107; *Board Com'rs Mahoning Co. v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Scovill v. McMahon*, 62 Conn. 378.

<sup>482</sup> Co. Litt. 206b.

or which is calculated to make it to one's interest to procure a divorce or separation of husband and wife,<sup>483</sup> is void.

Conditions requiring the grantee or devisee of property to live thereon are generally regarded as valid.<sup>484</sup>

— Conditions in restraint of marriage.

The question of the validity of conditions "in restraint of marriage," by which the estate will be prevented from vesting on failure of the grantee to marry, or will be divested upon his marriage, has been the subject of much discussion, and it is recognized that the decisions thereupon are in irreconcilable conflict. The complexity of the subject results from the fact that, while the common law permitted considerable restrictions of this sort, the Roman law absolutely forbade them, and the latter law was introduced into England and applied to personal property by the ecclesiastical courts. These two systems have interacted one on the other, and considerations arising from the nature of the condition, and the presence of a limitation over on breach of the condition, have been introduced to modify the rules in particular cases. The law will here be considered briefly only so far as it affects real property.

According to some authorities, the numerous and refined distinctions in regard to conditions in restraint of marriage apply to personalty only, and not to realty, and all such

<sup>483</sup> 2 Jarman, Wills, 852, note (a); *Conrad v. Long*, 38 Mich. 78; *Hawke v. Euyart*, 30 Neb. 149.

<sup>484</sup> 2 Jarman, Wills, 500; *Harrison v. Harrison*, 105 Ga. 517; *Harrison v. Foote*, 9 Tex. Civ. App. 576; *Hart v. Chesley*, 18 N. H. 373; *Casper v. Walker*, 33 N. J. Eq. 36, note; *Marston v. Marston*, 47 Me. 495.

A condition requiring the devisee to live in a particular town has been held to be invalid as being merely the result of caprice (*Newkerk v. Newkerk*, 2 Caines [N. Y.] 345). And a similar decision has been made when compliance with the condition involved a probable separation of husband and wife (*Wilkinson v. Wilkinson*, L. R. 12 Eq. 604).

conditions are perfectly valid in limitations of real property,<sup>485</sup> and that this is so in the case of conditions precedent there seems to be no question.<sup>486</sup> But in the case of a condition subsequent, the weight of authority seems to be that it is void if in absolute restraint of marriage, or if it is unreasonable, as when, to cite the illustrations used by Justice Story, it prohibits the grantee or devisee from marrying till he is fifty years of age, or from marrying a person of the same town, county, or state, or any person pursuing a particular profession or trade.<sup>487</sup> If, however, the restraint is reasonable, as where marriage is forbidden until the donee arrives at a certain age, not excessive, such as twenty-one, or where the consent of parents or trustees is required, or where marriage with a particular person is forbidden, the condition is undoubtedly valid.<sup>488</sup>

It is agreed that a husband may devise property to his wife on condition that she do not marry,<sup>489</sup> as may be done

<sup>485</sup> 2 Jarman, Wills, 885, and authorities cited; *Com. v. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489.

<sup>486</sup> 2 Cruise, Dig. c. 1, § 53 et seq.; 1 Story, Eq. Jur. (13th Ed.) 277, Mr. Bigelow's note; 2 Pomeroy, Eq. Jur. § 933; Phillips v. Ferguson, 85 Va. 509, 17 Am. St. Rep. 78.

<sup>487</sup> 1 Story, Eq. Jur. § 283; 2 Pomeroy, Eq. Jur. § 933; *Lowe v. Peers*, 4 Burrow, 2225; *Maddox v. Maddox's Adm'r*, 11 Grat. (Va.) 804; *Shackelford v. Hall*, 19 Ill. 212, 215; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Munroe v. Hall*, 97 N. C. 206. The English authorities on the subject are collated, with a showing in favor of the invalidity of such conditions, in an article by T. Cyprian Williams, Esq., in 12 Law Quart. Rev. 36.

<sup>488</sup> 2 Pomeroy, Eq. Jur. § 933; *Hogan v. Curtin*, 88 N. Y. 162, *Finch's Cas.* 546; *Coppage v. Alexander's Heirs*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note on page 158; *Collier v. Slaughter's Adm'r*, 20 Ala. 263; *Shackelford v. Hall*, 19 Ill. 212; *Graydon's Ex'r's v. Graydon*, 23 N. J. Eq. 229; *Munroe v. Hall*, 97 N. C. 206.

<sup>489</sup> *Giles v. Little*, 104 U. S. 291; *Vaughn v. Lovejoy*, 34 Ala. 437; *Phillips v. Medbury*, 7 Conn. 568; *Coppage v. Alexander's Heirs*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153; *Bostick v. Blades*, 59 Md. 231, *Finch's Cas.* 542; *Knight v. Mahoney*, 152 Mass. 525; *Dumey v.*



in a devise by a wife to her husband;<sup>490</sup> and in any case, a condition prohibiting a second marriage is valid, although imposed by one other than the husband or wife of the donee, second marriages not being regarded as within the policy of the law directed against celibacy.<sup>491</sup>

In this country, the view has been taken that, though a condition restraining marriage be void, a special limitation of the estate until marriage is valid, especially if there is a limitation over to others upon the marriage. Thus, though a devise to A. on condition that he do not marry be void, a devise to A. until he marries, or while he is unmarried, is valid.<sup>492</sup> This distinction between the effect of a condition and limitation has, however, been declared in England to be inapplicable in the case of realty, and it is stated that the question should be decided, independently of the language used, by determining whether the intention was actually to discourage marriage.<sup>493</sup>

— Repugnant conditions.

A condition which is repugnant to the estate limited is

*Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422; *Com. v. Stauffer*, 10 Pa. St. 250, 51 Am. Dec. 439.

<sup>490</sup> *Allen v. Jackson*, 1 Ch. Div. 399; *Bostick v. Blades*, 59 Md. 231, *Finch's Cas.* 542.

<sup>491</sup> 2 *Jarman, Wills*, 886; *Herd v. Catron*, 97 Tenn. 662. See the reference to this case in 10 *Harv. Law Rev.* 372.

<sup>492</sup> *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Selden v. Keen*, 27 *Grat. (Va.)* 576; *Bostick v. Blades*, 59 Md. 231; *Finch's Cas.* 542; *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242; *Hotz's Estate*, 38 Pa. St. 422, 80 Am. Dec. 490, and note. See *Mann v. Jackson*, 84 Me. 400; *Courter v. Stagg*, 27 N. J. Eq. 305.

<sup>493</sup> *Jones v. Jones*, 1 Q. B. Div. 279. See *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409. This latter view is approved by Mr. Bigelow in his full and instructive notes on the question of the legality of conditions in restraint of marriage in 1 *Story, Eq. Jur.* (13th Ed.) 276 et seq., and 2 *Jarman, Wills*, 886. See, also, on the subject, 6 *Gray's Cas.* 23, note. As to the distinction between a special limitation and a condition, see post, § 78.

absolutely void. Of such a character is a condition annexed to a fee simple that the tenant shall not take the profits of the land, or that he shall lease it at a named rent, or shall cultivate it in a certain manner;<sup>494</sup> as is a condition absolutely prohibiting a tenant in fee simple or fee tail from aliening the land.<sup>495</sup> And the tendency is adverse to the support of conditions which are merely the result of caprice, and are not calculated to benefit any person or property.<sup>496</sup> But conditions involving a reasonable restriction of the use of the property are valid, as in the case, quite frequently found, of a condition against the use of the premises for a particular business, such as liquor selling;<sup>497</sup> and conditions

<sup>494</sup> Co. Litt. 206b; 2 Cruise, Dig. tit. 12, c. 1, §§ 20, 21; 2 Jarman, Wills, 854; *Smith v. Clark*, 10 Md. 186.

A condition that windows shall not be put in one wall of a house is valid; while a condition that there should be no windows in the house, or no passage in or out, would be invalid. *Gray v. Blanchard*, 8 Pick. (Mass.) 284

<sup>495</sup> *Gray*, *Restraints Alien. Prop.* §§ 19, 23, 77. See, on the question of conditions and stipulations involving restraints on the alienation of property, post, § 466.

<sup>496</sup> In *Mitchell v. Leavitt*, 30 Conn. 587, it is said that "a restriction on the use of real estate, where it does not appear that either some individual or the public would be benefited by it, would be contrary to public policy and void." In Michigan and Wisconsin it is provided by statute that conditions annexed to a grant or conveyance which are merely nominal, and evince no intention of actual or substantial benefit to those in whose favor they are to be performed, may be wholly disregarded. *Comp. Laws Mich.* (8828); *St. Wis.* 1898, § 2070. See *Barrie v. Smith*, 47 Mich. 130; *Johnson v. Warren*, 74 Mich. 495; *Pepin County v. Prindle*, 61 Wis. 301.

<sup>497</sup> *Cowell v. Colorado Springs Co.*, 100 U. S. 55, affirming 3 Colo. 82; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554, 15 L. R. A. 751. Such a condition is, however, unlawful if inserted for the purpose of giving a monopoly of the liquor business to a certain person. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36.

requiring the property to be used or improved in a particular way are likewise valid.<sup>498</sup>

§ 71. Performance of conditions.

A substantial performance of a condition is, generally speaking, sufficient.<sup>499</sup> This principle seems to be substantially the same as that previously stated, to the effect that a condition will be strictly construed in favor of vesting and against divesting; and, on this principle, a condition that a building shall be used for a certain purpose has been decided not to be broken by its occasional use for another purpose.<sup>500</sup> The condition may be performed by any person who is interested in the property subject to the condition, unless, presumably, this is forbidden by the terms of the condition.<sup>501</sup>

— Time of performance.

While it is sometimes stated that the grantee has his whole lifetime for the performance of a condition, when no time is named,<sup>502</sup> and sometimes that the condition must be performed within a reasonable time,<sup>503</sup> the reasonable and

<sup>498</sup> *Allen v. Howe*, 105 Mass. 241; *Langley v. Chapin*, 134 Mass. 82; *Hammond v. Port Royal & A. Ry. Co.*, 15 S. C. 10; *Southard v. Central R. Co.*, 26 N. J. Law, 13.

<sup>499</sup> 1 *Sharswood & B. Lead. Cas. Real Prop.* 138; *Rose v. Hawley*, 118 N. Y. 502; *Wilson v. Galt*, 18 Ill. 431; *Morrill v. Wabash, St. L. & P. Ry. Co.*, 96 Mo. 174; *Irvine v. Irvine* (Ky.) 15 S. W. 511. A merely colorable performance is insufficient. *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36; *Hickox v. Chicago & C. S. Ry. Co.*, 78 Mich. 615.

<sup>500</sup> *Broadway v. State*, 8 Blackf. (Ind.) 290; *McKissick v. Pickle*, 16 Pa. St. 140; *French v. Inhabitants of Quincy*, 3 Allen (Mass.) 9; *Chapin v. School District No. Two*, 35 N. H. 445; *McKelway v. Seymour*, 29 N. J. Law, 321.

<sup>501</sup> *Marks v. Marks*, 10 Mod. 419; *Vermont v. Society for Propagation of Gospel*, 2 Paine, 545, Fed. Cas. No. 16,920; *Wilson v. Wilson*, 38 Me. 18; *Louisville & N. R. Co. v. Covington*, 2 Bush (Ky.) 526.

<sup>502</sup> *Finlay v. King's Lessee*, 3 Pet. (U. S.) 374.

<sup>503</sup> *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528, 5

proper rule seems to be that a grantee of land on condition subsequent has his whole lifetime for performance, except when a prompt performance is necessary to give to the grantor or other beneficiary the whole benefit contemplated to be secured to him, or where its immediate fruition formed his motive for entering into the agreement, in which case a reasonable time only is allowed.<sup>504</sup> A condition precedent likewise must generally be performed within a "reasonable time,"<sup>505</sup> but sometimes the time of performance may, it seems, be entirely at the will of the grantee, since he himself is the chief loser by nonperformance.<sup>506</sup>

— Demand for performance.

Where the performance of a condition in any way depends on the pleasure of the person entitled to performance, as regards the manner or time of performance, or as to whether it shall be done at all, he must request performance of the condition in order to be able to claim a forfeiture, but otherwise no demand for performance is necessary.<sup>507</sup>

Gray's Cas. 141; Rowell v. Jewett, 69 Me. 293; Allen v. Howa, 105 Mass. 241; Pierce v. Brown University, 21 R. I. 392.

<sup>504</sup> Hamilton v. Elliott, 5 Serg. & R. (Pa.) 375, per Gibson, J.; 1 Washburn, Real Prop. 449; 1 Sharswood & B. Lead. Cas. Real Prop. 140. This seems to be the gist of Lord Coke's statement. Co. Litt. 208b.

<sup>505</sup> Drew v. Wakefield, 54 Me. 291; Ward v. Patterson, 46 Pa. St. 372.

<sup>506</sup> See Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528, 5 Gray's Cas. 141; Page v. Whidden, 59 N. H. 507.

<sup>507</sup> 1 Smith, Lead. Cas. 132; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163, citing Comyn, Dig. "Pleader," C, 69; Royal v. Aultman & Taylor Co., 116 Ind. 424. And see Bowen v. Bowen, 18 Conn. 535; Ellis v. Elkhart Car Works Co., 97 Ind. 247; Rowell v. Jewett, 69 Me. 293; Irvine v. Irvine (Ky.) 15 S. W. 511 (condition precedent). But that a demand is necessary, see Donnelly v. Eastes, 94 Wis. 390. See, also, Hurto v. Grant, 90 Iowa, 414; Bowman v. Foot, 29 Conn. 341; Merrifield v. Cobleigh, 4 Cush. (Mass.) 182. That a legatee absent from the country must make a demand on one to whom land was devised on condition that he pay the legacy, see Bradstreet v. Clark, 21 Pick. (Mass.) 389.

When, as is frequently the case, the nonpayment of rent is made a ground for the forfeiture of an estate as for a breach of condition subsequent, there are, by the common law, certain requirements as to the making of a demand for the rent as a prerequisite to the enforcement of the forfeiture. The demand must be made on the day on which the rent falls due,<sup>508</sup> and it must be at a convenient hour on such day, before sunset.<sup>509</sup> The demand must, moreover, be made upon the premises, at the most notorious place thereon,<sup>510</sup> and must be for a sum neither greater nor less than the amount then due.<sup>511</sup> The requirement of a demand has, however, been dispensed with by statute in England and some states in this country,<sup>512</sup> and it is not necessary when the recovery of possession by the landlord is based, not on an express condition in the lease, but on a statutory right to recover possession on nonpayment of rent, unless, of course, the statute requires a demand.<sup>513</sup>

#### § 72. Waiver of condition.

Compliance with a condition subsequent may be waived by the person entitled to the benefit thereof, or, as it may be

<sup>508</sup> *Forster v. Wandlass*, 7 Term R. 117; *Chapman v. Harney*, 100 Mass. 353; *McCormick v. Connell*, 6 Serg. & R. (Pa.) 151; *McQuesten v. Morgan*, 34 N. H. 400; and see cases in next note.

<sup>509</sup> *Duppa v. Mayo*, 1 Saund. 287; *Prout v. Roby*, 15 Wall. (U. S.) 471; *Woodward v. Cone*, 73 Ill. 241; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Johnston v. Hargrove*, 81 Va. 118.

<sup>510</sup> *Connor v. Bradley*, 1 How. (U. S.) 211, 217; *McGlynn v. Moore*, 25 Cal. 384; *Van Rensselaer v. Jewett*, 2 N. Y. 141, 51 Am. Dec. 275; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Johnston v. Hargrove*, 81 Va. 118.

<sup>511</sup> *Wheeldon v. Paul*, 3 Car. & P. 613; *Connor v. Bradley*, 1 How. (U. S.) 217; *McCormick v. Connell*, 6 Serg. & R. (Pa.) 151; and see cases in preceding notes.

<sup>512</sup> 2 Taylor, Landl. & Ten. § 494; 15 & 16 Vict. c. 76, § 210 (A. D. 1852). See *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

<sup>513</sup> *Kimball v. Rowland*, 6 Gray (Mass.) 224; *Gibbens v. Thompson*, 21 Minn. 328; *Horan v. Thomas*, 60 Vt. 325.

otherwise expressed, "a license" may be given dispensing with the condition, or the condition may be released.<sup>514</sup> Such waiver or license may be implied from acts, as well as expressed;<sup>515</sup> and so, it has been decided, advantage of a breach cannot be taken by one who has rendered compliance with the condition impossible.<sup>516</sup> A mere silent acquiescence in, or parol assent to, the doing of an act involving a breach of condition, is not, however, sufficient to show a waiver;<sup>517</sup> but if, by his silence or acquiescence, the grantor or lessor induces the grantee or lessee to expend money on the property in the belief that the condition will not be enforced, he is thereafter estopped to enforce it.<sup>518</sup>

It was determined in an early case that, where a lease was upon a proviso that "the lessee or his assigns should not alien" "without the special license of the lessors," if the license was once given, the condition was thereafter a nullity.<sup>519</sup> This decision as to the effect of a license to assign has been followed in other cases,<sup>520</sup> and it has been regarded

<sup>514</sup> *Petro v. Cassiday*, 13 Ind. 239; *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 194; *Proprietors of Brattle Square Church v. Grant*, 3 Gray (Mass.) 142, 148; *Alexander v. Alexander*, 156 Mo. 413; *Hurto v. Grant*, 90 Iowa, 414; *Birdsall v. Grant*, 37 App. Div. (N. Y.) 348.

<sup>515</sup> *Thropp v. Field*, 26 N. J. Eq. 82; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 342; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 18 Am. St. Rep. 420, 4 L. R. A. 373.

<sup>516</sup> *Lamb v. Miller*, 18 Pa. St. 448; *Jones v. Chesapeake & O. R. Co.*, 14 W. Va. 514; *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215; *Co. Litt.* 206b. See ante, note 479.

<sup>517</sup> *Perry v. Davis*, 3 C. B. (N. S.) 769; *Jackson v. Cryslar*, 1 Johns. Cas. (N. Y.) 125; *Gray v. Blanchard*, 3 Pick. (Mass.) 233, 291.

<sup>518</sup> *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Hooper v. Cummings*, 45 Me. 359; *Barrie v. Smith*, 47 Mich. 130; *Yancey v. Savannah & W. R. Co.* 101 Ala. 234; *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 194.

<sup>519</sup> *Dumport's Case*, 4 Coke, 119b, 1 Smith, Lead. Cas. 47 (95), 5 Gray's Cas. 23.

<sup>520</sup> *Brummell v. Macpherson*, 14 Ves. Jr. 173, 5 Gray's Cas. 26; (176)

likewise as authority for a rule referred to in the text books and decisions to the effect that a license once given for the breach of a condition discharges it forever.<sup>521</sup> The case itself, as well as the rule referred to in it, are, however, of doubtful authority; most cases in which reference is made to the rule being, for one reason or another, outside of its operation.<sup>522</sup> There are also occasional intimations that such a rule has no application to the very large class of conditions which are termed "continuous," as clearly contemplating repeated acts, and therefore repeated breaches.<sup>523</sup> Nor, as hereafter stated, does a waiver of the right to enforce a forfeiture for one breach affect the right to enforce it upon a subsequent breach.<sup>524</sup>

### § 73. Waiver of breach.

Not only may a condition be dispensed with by express license, as explained in the preceding section, but the right

*Dougherty v. Matthews*, 35 Mo. 520; *Pennock v. Lyons*, 118 Mass. 92; *Murray v. Harway*, 56 N. Y. 337. These American cases may be distinguished from *Dumpor's Case* in that in them the condition did not expressly bind "assigns." See 1 Smith, *Lead. Cas.* (9th Ed.) 133.

In *Reid v. John F. Wiessner Brewing Co.*, 88 Md. 234, the rule of *Dumpor's Case* was applied even to a covenant, though "assigns" was not mentioned. In thus extending the rule to covenants, the court departed from the precedents both in England and this country. See 12 Harv. Law Rev. 273.

<sup>521</sup> *Williams*, *Real Prop.* 398; 1 Washburn, *Real Prop.* 317, and note; *Dakin v. Williams*, 17 Wend. (N. Y.) 447; *Williams v. Dakin*, 22 Wend. (N. Y.) 209; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 349. See, also, *Gannett v. Albree*, 103 Mass. 372.

<sup>522</sup> See an able criticism of *Dumpor's Case*, with a review of the cases in which it is referred to, by Joseph Willard, Esq., in 7 Am. Law Rev. 616, and also, to the same effect, 1 Smith, *Lead. Cas.* (9th Ed.) 135 et seq.; *Kew v. Trainor*, 150 Ill. 150.

<sup>523</sup> Notes to *Dumpor's Case*, 1 Smith, *Lead. Cas.* 106, 108, 110.

<sup>524</sup> See cases cited post, note 532.

to take advantage of the breach may be waived after the occurrence of the breach, either expressly or by implication.<sup>525</sup>

Any act on the part of the grantor or lessor, after knowledge of the breach, which unequivocally recognizes the interest of the grantee or lessee as still existing, is sufficient to show a waiver.<sup>526</sup> Accordingly, a breach of condition by a lessee is waived by the lessor if, after knowing of the breach, he accepts from the lessee or his assignee rent which accrued after the date of the breach;<sup>527</sup> and a protest on his part, at the time of its receipt, that it is not to affect his right to enforce the condition, will have no effect.<sup>528</sup> The institution of an action of ejectment is, however, such an election to determine the lease that the subsequent acceptance of rent can have no effect as a waiver, or as restoring the lease;<sup>529</sup> nor is a waiver shown by the acceptance of rent which accrued before the breach.<sup>530</sup> The institution of a distress

<sup>525</sup> Co. Litt. 211b; 1 Smith, Lead. Cas. 110; *Guild v. Richards*, 16 Gray (Mass.) 309; *Andrews v. Senter*, 32 Me. 394; *Stevens v. Taylor*, 58 Iowa, 664.

<sup>526</sup> *Green's Case*, Cro. Eliz. 3; *Hubbard v. Hubbard*, 97 Mass. 188; *Duryee v. City of New York*, 96 N. Y. 477; *Grigg v. Landis*, 21 N. J. Eq. 494; *Garnhart v. Finney*, 40 Mo. 449; *Deaton v. Taylor*, 90 Va. 219.

<sup>527</sup> *Pennant's Case*, 3 Coke, 64a, 5 Gray's Cas. 18; *Goodright v. Davids*, Cowp. 803, 5 Gray's Cas. 25; *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427; *Newman v. Rutter*, 8 Watts (Pa.) 51; *Conger v. Duryee*, 90 N. Y. 594; *McKildor's Ex'r v. Darracott*, 13 Grat. (Va.) 278; *Bowling v. Crook*, 104 Ala. 130; *Webster v. Nichols*, 104 Ill. 160; *Gulf, C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 256; *Gomber v. Hackett*, 6 Wis. 323, 70 Am. Dec. 467; *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 198, note.

<sup>528</sup> *Davenport v. Reg.*, 3 App. Cas. 115, 5 Gray's Cas. 40.

<sup>529</sup> 2 Taylor, Landl. & Ten. § 497; *Jones v. Carter*, 15 Mees. & W. 718, 5 Gray's Cas. 33; *Cleve v. Mazzoni* (Ky.) 45 S. W. 88.

<sup>530</sup> *Green's Case*, Cro. Eliz. 3; *Price v. Worwood*, 4 Hurl. & N. 512, 5 Gray's Cas. 37; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Miller v. Prescott*, 163 Mass. 12, 47 Am. St. Rep. 434; *Morrison v. Smith*, 90 Md. 76. Compare *Medinah Temple Co. v. Currey*, 162 Ill. 441, 53 Am. St. Rep. 320.



proceeding for rent accruing either before or after the breach waives the breach, since such a proceeding presupposes the relation of landlord and tenant at the time of its institution.<sup>531</sup>

The waiver operates only on previous breaches, and does not affect the right to take advantage of a subsequent breach;<sup>532</sup> and, accordingly, mere silence or acquiescence in a breach of a condition will not imply a license for a subsequent breach.<sup>533</sup> Nor can the waiver affect the question of what will constitute a subsequent breach, as by extending the time for performance of the condition.<sup>534</sup>

It was formerly the law that, since no re-entry is necessary in order to enforce a forfeiture in the case of a lease for years, if such a lease is, by its terms, to be "void" upon breach of a condition, the breach cannot be waived by the lessor; but a different rule now generally prevails, the termination of the lease for a breach by the lessee being regarded as at the option of the lessor alone.<sup>535</sup>

<sup>531</sup> Co. Litt. 211b; Pennant's Case, 3 Coke, 64a, 5 Gray's Cas. 18; Flower v. Peck, 1 Barn. & Adol. 428, 5 Gray's Cas. 30; Dermott v. Wallach, 1 Wall. (U. S.) 61; McKilloe's Ex'r v. Darracott, 13 Grat. (Va.) 278.

<sup>532</sup> Ambler v. Woodbridge, 9 Barn. & C. 376, 5 Gray's Cas. 29; Flower v. Peck, 1 Barn. & Adol. 428, 5 Gray's Cas. 30; Farwell v. Easton, 63 Mo. 446; Ireland v. Nichols, 46 N. Y. 413; Alexander v. Hodges, 41 Mich. 691; Gillis v. Bailey, 21 N. H. 149; Bleecker v. Smith, 13 Wend. (N. Y.) 533; McKilloe's Ex'r v. Darracott, 13 Grat. (Va.) 278; Crocker v. Old South Soc., 106 Mass. 489.

<sup>533</sup> Boscawen v. Bliss, 4 Taunt. 735, 5 Gray's Cas. 28; Adams v. Ore Knob Copper Co., 7 Fed. 634; Douglas v. Herms, 53 Minn. 204; Bleecker v. Smith, 13 Wend. (N. Y.) 530.

<sup>534</sup> Baker v. Jones, 5 Exch. 498, 5 Gray's Cas. 34, where it was held that, though a previous breach of condition to repair was waived by acceptance of rent, a forfeiture might be subsequently enforced for nonrepair, though a reasonable time for such repairs had not elapsed since the receipt of rent, such reasonable time having elapsed since the repair was required.

<sup>535</sup> 2 Taylor, Landl. & Ten. § 492; 1 Smith, Lead. Cas. 119; Rede

## § 74. Enforcement of forfeiture for breach.

Upon the breach of a condition subsequent annexed to a freehold estate, an actual entry by the grantor or his heir, or its equivalent, is generally declared to be necessary in order to revest the estate in the grantor, this being originally based on the theory that the estate, having commenced by livery of seisin, can be terminated only by an act of equal solemnity.<sup>536</sup>

This requirement of entry never applied to things and interests which did not lie in livery, and were not the subject of entry, such as a reversion, a remainder, or a rent,

*v. Farr*, 6 Maule & S. 121, 5 Gray's Cas. 5; *Jones v. Carter*, 15 Mees. & W. 718, 5 Gray's Cas. 32; *Dermott v. Wallach*, 1 Wall. (U. S.) 61; *Clark v. Jones*, 1 Denio (N. Y.) 516; *Cartwright v. Gardner*, 5 Cush. (Mass.) 273, 281; *Read v. Tuttle*, 35 Conn. 25. The former rule was stated and recognized in *Pennan's Case*, 3 Coke, 64a, 5 Gray's Cas. 18; *Sheaffer v. Sheaffer*, 37 Pa. St. 535; *Davis v. Moss*, 38 Pa. St. 346. See 7 Am. Law Rev. 627.

<sup>536</sup> Litt. § 351; Co. Litt. 214b; 1 Leake, 225; Challis, Real Prop. 168, 206. See, also, *Ruch v. Rock Island*, 97 U. S. 693; *Warner v. Bennett*, 31 Conn. 468; *Board of Education v. Trustees of First Baptist Church*, 63 Ill. 204; *Cross v. Carson*, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742; *Osgood v. Abbott*, 53 Me. 73; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Adams v. Lindell*, 72 Mo. 198; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215; *Carter v. Branson*, 79 Ind. 14; *Little Falls Water-Power Co. v. Mahan*, 69 Minn. 253. "Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim." Co. Litt. 218a.

In the case of a public grant, the right to a forfeiture for breach "must be asserted by judicial proceedings, \* \* \* the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition." *Schulenberg v. Harriman*, 31 Wall. (U. S.) 44.

and in such case it was sufficient to make "claim."<sup>527</sup> Nor has an entry ever been required when the person entitled to the benefit of the condition was already in possession of the land.<sup>528</sup>

After the introduction of the fictions in ejectment, which involved a confession by the defendant in such action of an entry by the plaintiff, it was considered that, proof of entry being thus dispensed with, actual entry was unnecessary, provided an action of ejectment was instituted by the person entitled to the benefit of the breach, and entry was therein admitted.<sup>529</sup> In this country it is generally considered that an action of ejectment, or the statutory action to recover land, brought to enforce the condition, need not be preceded by an entry; this view being sometimes based on the confession of entry involved in this action, and sometimes merely on the fact that, since the estate no longer begins with livery of seisin, no solemnity is necessary to terminate it.<sup>540</sup>

<sup>527</sup> Co. Litt. 218a.

<sup>528</sup> Co. Litt. 218a; *Andrews v. Senter*, 32 Me. 394; *Lincoln & Kennebeck Bank v. Drummond*, 5 Mass. 321; *Rollins v. Riley*, 44 N. H. 9; *Hamilton v. Elliott*, 5 Serg. & R. (Pa.) 375; *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371; *Moore v. Wingate*, 51 Mo. 398.

<sup>529</sup> *Goodright v. Cator*, 2 Doug. 485; *Jones v. Carter*, 15 Mees. & W. 718, 5 Gray's Cas. 32; *Cornellius v. Ivins*, 26 N. J. Law, 376; *Jackson v. Cryslar*, 1 Johns. Cas. (N. Y.) 125.

<sup>540</sup> *Ruch v. Rock Island*, 97 U. S. 693; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Union Pacific Ry. Co. v. Cook*, 98 Fed. 281; *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36; *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Sioux City & St. P. R. Co. v. Singer* 49 Minn. 301, 32 Am. St. Rep. 554, 15 L. R. A. 751; *Brown v. Bennett*, 75 Pa. St. 423; *Plumb v. Tubbs*, 41 N. Y. 442; *Gulf, C & S. F. Ry. Co. v. Dunman*, 74 Tex. 265; *Ellis v. Kyger*, 90 Mo 600; *Little Falls Water-Power Co. v. Mahan*, 69 Minn. 253. But see to the contrary, *Preston v. Bosworth*, 153 Ind. 458; *Hammond v. Port Royal & A. Ry. Co.*, 15 S. C. 11.

— Condition annexed to term of years.

Since a lease for years did not, at common law, begin by livery of seisin, resumption of seisin by entry, in order to enforce a breach of condition, was never necessary.<sup>541</sup> A forfeiture for breach of a condition imposed in such a lease is ordinarily enforced by an action of ejectment,<sup>542</sup> or, in some states, by a statutory proceeding of a summary character for the recovery of possession.<sup>543</sup>

§ 75. Persons entitled to enforce forfeiture.

The right to take advantage of a condition subsequent belongs, at common law, exclusively to the grantor or lessor and his heirs, and he cannot reserve such right to others, even by express stipulation.<sup>544</sup> Nor can the right to enforce a forfeiture, or, as it is usually called, the right of re-entry, be, at common law, assigned or transferred by the grantor to a third person before entry for the breach, this being in conformity with the common-law rule that "nothing in action, entry, or re-entry can be granted over."<sup>545</sup>

<sup>541</sup> Co. Litt. 214b; 2 Cruise, Dig. tit. 13, c. 2, § 43; *Adams v. Ore Knob Copper Co.*, 7 Fed. 634.

<sup>542</sup> 1 Taylor, Landl. & Ten. § 298; *Shaufelter v. Horner*, 81 Md. 621; *Kirk v. Mattier*, 140 Mo. 23; *Roach v. Heffernan*, 65 Vt. 485.

<sup>543</sup> 1 Taylor, Landl. & Ten. § 303. See *Smith v. Hill*, 63 Cal. 51; *Schroeder v. Tomlinson*, 70 Conn. 348; *Whitwell v. Harris*, 106 Mass. 532; *Quinn v. McCarty*, 81 Pa. St. 475.

<sup>544</sup> This rule is a result of the feudal origin of conditions, they being formerly always inserted exclusively for the benefit of the lord, the grantor. See post, note 556.

The heir of the grantor is entitled to avail himself of the benefit of the condition, though he is not specially named in the reservation thereof. *Bowen v. Bowen*, 18 Conn. 535; *Jackson v. Topping*, 1 Wend. (N. Y.) 323, 19 Am. Dec. 515; *Thomas v. Record*, 47 Me. 500. But see, to the contrary, *Sheppard's Touchstone*, 133; 1 Leake, 239.

<sup>545</sup> Litt. § 347; Co. Litt. 214a; *Pennant's Case*, 3 Coke, 64a, 5 Gray's Cas. 13. In this lies one of the distinctions between a special limitation and a condition. Co. Litt. 214b. See post, § 79.

These restrictions as to the persons able to take advantage of a breach and the inability to assign the right have been generally recognized in this country, and, not only will an attempted assignment of the right of re-entry be void, but it will have the effect of destroying the grantor's right to enforce the condition, which is thereafter in effect non-existent.<sup>546</sup> Occasionally the rule has been changed by statutes making rights of entry transferable or devisable.<sup>547</sup> In two states it has been decided that the right to take advantage of a condition may be reserved to a person other than the grantor and his heirs;<sup>548</sup> and in two or three states the prohibition of the alienation of the right of re-entry has been held not to apply to a devise.<sup>549</sup> This latter exception in

<sup>546</sup> *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708; *Boone v. Clark*, 129 Ill. 466, 498; *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527; *Inhabitants of Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Skipwith v. Martin*, 50 Ark. 141; *McElroy v. Morley*, 40 Kan. 76.

The rule that such attempted transfer invalidates the condition has been held to apply even when the attempted transfer was to the son of the grantor, who would otherwise have been entitled, as heir, to avail himself of the breach of the condition after the grantor's death. *Rice v. Boston & W. R. Corp.*, 12 Allen (Mass.) 141, 5 Gray's Cas. 15.

<sup>547</sup> In England, rights of entry for breach of condition may now, by statute, be assigned, or may be devised. St. 8 & 9 Vict. c. 106, § 6 (1845); 1 Vict. c. 26, § 3 (1837). See 1 Leake, 59. For references to similar state statutes, see *Southard v. Central R. Co.*, 26 N. J. Law, 13; *Hoyt v. Ketcham*, 54 Conn. 60.

In *Pinkum v. City of Eau Claire*, 81 Wis. 301, it was decided that the grantee of land which was subject to an easement on condition could take advantage of the condition, the rule against the assignment of rights of entry not being applicable.

<sup>548</sup> *McKissick v. Pickle*, 16 Pa. St. 140; *Hamilton v. Kneeland*, 1 Nev. 40, 55.

<sup>549</sup> *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528, 5 Gray's Cas. 10; *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215, 224; *Boone v. Clark*, 129 Ill. 466 (dictum); *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202. The Kentucky decision is expressly based on the Massachusetts decision first cited. The Massa-

favor of a devise has, however, elsewhere been emphatically repudiated.<sup>550</sup>

The common-law rule prohibiting the transfer of the right to re-enter for breach of a condition was changed by St. 32 Hen. VIII. c. 34 (A. D. 1540), in the case of leases for life or for years, so as to allow the grantee of the reversion upon such an estate to avail himself of the condition. This statute, in its application to conditions, was construed in the same way as it was in regard to covenants,<sup>551</sup> and it is held to apply only to conditions which run with the land or the reversion.<sup>552</sup> It does not, from its very terms, apply to conditions created in deeds in fee, where no reversion arises.<sup>553</sup>

A condition cannot be apportioned, and accordingly it is not available to a grantee of part of the reversion on a leasehold estate, a rule which, however, does not apply to an apportionment resulting from the act of the law, as when the reversion descends to two or more persons, nor when apportionment is contemplated in the creation of the condition.<sup>554</sup>

chusetts cases cannot be supported on principle, but they may perhaps be based on the local statute. See 2 Washburn, Real Prop. 451.

<sup>550</sup> *Ruch v. Rock Island*, 97 U. S. 693; *Southard v. Central R. Co.*, 26 N. J. Law, 13; *Upton v. Corrigan*, 151 N. Y. 143, *Finch's Cas.* 533.

<sup>551</sup> See ante, § 49.

<sup>552</sup> *Co. Litt.* 215b; *Williams*, Real Prop. 245, 397; *Stevens v. Copp*, L. R. 4 Exch. 20; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

<sup>553</sup> *Lewes v. Ridge*, Cro. Eliz. 863; 1 *Smith*, Lead. Cas. 127. Compare *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Ball*, 19 N. Y. 100, construing the New York statute as giving the assignees of a grantor in fee, reserving rent, the right of entry.

<sup>554</sup> *Co. Litt.* 215a; *Dumport's Case*, 4 Coke, 119b, 1 *Smith's Lead. Cas.* 95, 5 *Gray's Cas.* 47; *Van Rensselaer v. Jewett*, 5 *Denio* (N. Y.) 121; *Cruger v. McLaury*, 41 N. Y. 219; *Tinkham v. Erie Ry. Co.*, 53 *Barb.* (N. Y.) 393; 1 *Taylor, Landl. & Ten.* § 296; 1 *Smith's Lead. Cas.* (9th Ed.) 136.

The reason for this rule is stated to be that the grantor should (184)

Since no one but the grantor or his heirs can enforce the benefit of a condition imposed on an estate of inheritance, a right which he has, without regard to his interest in the performance of the condition,<sup>555</sup> it may result that the only person who is interested in the performance of the condition will have no remedy for its nonperformance, as when the condition is for the payment of money to one other than the grantor.<sup>556</sup> Equity will, however, frequently, in such a case, regard the condition as a trust for such person's benefit, and enforce it accordingly;<sup>557</sup> or, if intended merely to regulate the mode in which the grantee may use and enjoy the land, it may sometimes be enforced at the suit of owners of adjoining land, as an equitable easement, or as a covenant running with the land.<sup>558</sup>

§ 76. Effect of enforcement of forfeiture.

The enforcement of a forfeiture for the breach of an ex-

be in of his original estate on the enforcement of the condition, which could not be if he has parted with the reversion of part. *Dumpor's Case*, 4 Coke, 119b. See the adverse criticism of the rule by Mr. Willard, 7 Am. Law Rev. 621-623.

<sup>555</sup> *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Bowen v. Bowen*, 18 Conn. 535.

<sup>556</sup> See Co. Litt. 201a, Butler's note (84), where it is remarked that limitations of estates on condition "are often of such a nature as to make it more natural that a stranger should have the estate on the nonperformance of the condition than the donor," but that the remedy is confined to the donor and his heirs as a result of the strained application of the original principle of conditions, that, on a nonperformance of them, the lord should have his fief, to a class of conditions entirely different from those involving the performance of feudal services, where the rule had its origin.

<sup>557</sup> 1 Smith's Lead. Cas. 142; *West v. Biscoe*, 6 Har. & J. (Md.) 460; *Tomlin v. Blunt*, 31 Ill. App. 234; *Smith v. Jewett*, 40 N. H. 530. See ante, § 68, note 469.

<sup>558</sup> *Ayling v. Kramer*, 123 Mass. 12; *Fuller v. Arms*, 45 Vt. 400; *Jewell v. Lee*, 14 Allen (Mass.) 145, 92 Am. Dec. 744; and note. See post, §§ 342-353.

press condition subsequent avoids the estate *ab initio* for most purposes, the grantor being in as of his original estate as if he had never parted with it.<sup>559</sup> As a result of this rule, any estates or incumbrances created by the grantee on condition are rendered nugatory by such enforcement of forfeiture, or, in other words, all persons claiming under such grantee are bound by the conditions.<sup>560</sup> The rule applies as against an assignee of an estate for years as of other estates, and he takes it subject to any conditions imposed in its creation, and is liable to be divested on the breach of any one of them;<sup>561</sup> and it is immaterial, in this respect, whether the condition is for the performance of some covenant which touches the land and runs with it, or one which is wholly collateral.<sup>562</sup>

### § 77. Relief against forfeiture.

Courts of equity will frequently interpose to relieve against the consequences of a breach of a condition. Such relief will, however, be restricted to cases in which the injury occasioned by the breach is susceptible of compensation in damages which are capable of ascertainment by some fixed rule of computation.<sup>563</sup> Accordingly, equity will relieve where

<sup>559</sup> Co. Litt. 202a, where some few exceptions are mentioned.

<sup>560</sup> 1 Leake, 230; Scott v. Stipe, 12 Ind. 74; Barker v. Cobb, 36 N. H. 344; Thomas v. Record, 47 Me. 500; Moore v. Pitts, 53 N. Y. 85; Winnepesaukee Camp-Meeting Ass'n v. Gordon, 67 N. H. 98; Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301; Provost v. Morgan's L. & T. R. Co., 42 La. Ann. 309.

The rule was different on a forfeiture for an implied condition, the feoffor recovering the land subject to incumbrances imposed by the feoffee. Co. Litt. 233b.

<sup>561</sup> Williams v. Vanderbilt, 145 Ill. 233, 36 Am. St. Rep. 486; Carnegie Natural Gas Co. v. Philadelphia Co., 153 Pa. St. 317; Abrahams v. Tappe, 60 Md. 317.

<sup>562</sup> Flower v. Peck, 1 Barn. & Adol. 423, 5 Gray's Cas. 30.

<sup>563</sup> Notes to Peachy v. Duke of Somerset, 3 White & Tudor's (186)



the condition involves the payment of money, and compensation for delay in payment can be made by payment of interest.<sup>564</sup> And relief is regularly given against forfeiture for nonpayment of rent, the condition in such a case being regarded as merely a security for payment.<sup>565</sup> On the other hand, relief will not generally be given against forfeiture for breach of a condition not to assign a term, to make repairs, to insure, and the like, since damages for the breach cannot be ascertained.<sup>566</sup>

In the case of forfeiture for causes other than nonpayment of money, it seems that, as a general rule, relief will be refused unless the breach of condition resulted from fraud, accident, or surprise;<sup>567</sup> while, on the other hand, if it did result from such causes, relief will generally be given if the

Lead. Cas. Eq. 2614; 2 Washburn, Real Prop. 455; 2 Cruise, Dig. tit. 13, c. 2, §§ 29-34; Davis v. Gray, 16 Wall. (U. S.) 203, 230; Worthen v. Ratcliffe, 42 Ark. 330; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657; Grigg v. Landis, 21 N. J. Eq. 494.

<sup>564</sup> Walker v. Wheeler, 2 Conn. 299; Sanborn v. Woodman, 5 Cush. (Mass.) 36; Stevens v. Pillsbury, 57 Vt. 205, 52 Am. Rep. 121; Rogan v. Walker, 1 Wis. 527.

<sup>565</sup> 2 Story, Eq. Jur. §§ 1315, 1321; 1 Pomeroy, Eq. Jur. § 453; Atkins v. Chilson, 11 Metc. (Mass.) 112; Hagar v. Buck, 44 Vt. 235, 3 Am. Rep. 368; Wilson v. Jones, 1 Bush (Ky.) 173; Thropp v. Field, 26 N. J. Eq. 82; Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204; Sheets v. Selden, 7 Wall. (U. S.) 416. But see Palmer v. Ford, 70 Ill. 369.

<sup>566</sup> 2 Story, Eq. Jur. § 1324; Wafer v. Mocato, 9 Mod. 112; Eastern Telegraph Co. v. Dent [1899] 1 Q. B. Div. 835; Parsons v. Smith, 97 Cal. 647; Henry v. Tupper, 29 Vt. 358, 372; Sheets v. Selden, 7 Wall. (U. S.) 416. But in Mactier v. Osborn, 146 Mass. 399, a breach of a condition that the lessee insure was relieved against, she having merely failed to procure the proper form of policy through the mistake of the insurance agent, and no injury having resulted therefrom to the lessor.

<sup>567</sup> 2 Story, Eq. Jur. § 1323; Henry v. Tupper, 29 Vt. 358; Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657. Compare Hancock v. Carlton, 6 Gray (Mass.) 39, 52.

parties can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred.<sup>568</sup>

It is said that equity will relieve against a condition subsequent only, and not a condition precedent,<sup>569</sup> but there are statements to the contrary to be found.<sup>570</sup>

### III (B). ESTATES ON SPECIAL LIMITATION.

An estate on special limitation is one which is, by the terms of its creation, to terminate on the happening of some contingency at a time previous to that which the character of the estate would otherwise fix for its termination.

An estate which, while given to one and his heirs general, is subject to a special limitation which renders it liable to terminate, before the failure of such heirs, upon the happening of some contingency, which may possibly never happen, is called variously a "determinable," a "base," or a "qualified" fee, and the grantor's right to the land on the happening of such contingency is known as a "possibility of reverter." The existence of such an estate is questioned by high authority, but it is generally recognized in this country.

#### § 78. Nature of special limitation.

An estate on special limitation resembles an estate on condition subsequent in that, while it may continue for the natural duration of an estate in fee simple, in fee tail, for life, or for years, it may possibly determine before the end of

<sup>568</sup> *Mactier v. Osborn*, 146 Mass. 399, 4 Am. St. Rep. 323; *Henry v. Tupper*, 29 Vt. 358.

<sup>569</sup> 4 Kent, Comm. 125; 2 Washburn, Real Prop. 455; *City Bank of Baltimore v. Smith*, 3 Gill & J. (Md.) 265; *Wells v. Smith*, 2 Edw. Ch. (N. Y.) 78; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Donnelly v. Eastes*, 94 Wis. 390. See *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657; *Johnson v. Warren*, 74 Mich. 491, 497.

<sup>570</sup> Co. Litt. 237a, Butler's note (152); 2 Cruise, Dig. tit. 13, c. 2, § 29; 2 Story, Eq. Jur. § 1315; *Hayward v. Angell*, 1 Vern. 222; *Hollinrake v. Lister*, 1 Russ. 500, 508; *Thompson v. Whipple*, 5 R. I. 144.

such period, owing to the happening of a contingency named. There is, however, a fundamental distinction between an estate on condition and one on special limitation, in that, while in the former case the words which provide for the termination of the estate on a contingency are not regarded as a part of the original limitation of the estate, but are considered to provide for the cutting off of the estate before its regular termination, in the case of an estate on special limitation the words of contingency are regarded as a part of the limitation itself, and so as not cutting off an estate previously limited, but merely marking the quantum of the estate.

The term "conditional limitation," rather than "special limitation," is by some writers used to describe a limitation, thus providing for the termination of an estate by the intrinsic force of its limitation upon the happening of a contingency, but this use of the term "conditional limitation" is productive of much confusion, owing to the fact that the term is very generally used to describe a provision for an estate which is to arise in derogation of another estate upon the happening of a contingency, being either a "shifting use" or a "shifting executory devise," hereafter considered.<sup>571</sup>

<sup>571</sup> Prof. Gray (Restraints, Allen. Prop. § 22, note 1) enumerates the more prominent writers using the term in the respective senses, showing that a minority only have used it to describe what we call a "special limitation."

Mr. Challis (Real Prop. 198, 199) calls what we call "special limitations," "determinable limitations," and adds: "They are not unfrequently styled 'conditional limitations'; but this last phrase is commonly used in so many different senses that to make use of it at all is only to invite obscurity and confusion." Mr. Preston called such limitations "collateral limitations." 1 Preston, Estates, 42. The expression "proviso for cesser," or "clause of cesser," is also sometimes used, especially, it seems, in connection with estates tail. See 1 Leake, 217.

The difference above stated between estates on condition and special limitation has important practical results. Since, in the latter case, the contingency is the proper termination of the estate, after it has happened no estate can possibly remain in the grantee or lessee, and consequently, without any entry or equivalent act, the property immediately reverts to the grantor or lessor.<sup>572</sup> Moreover, while the right to take advantage of a condition cannot, at common law, pass to one other than the grantor or lessor, or his heir, the assignee of a reversion, or a remainderman, after an estate in fee tail, for life, or for years, on special limitation, has always been entitled to take advantage of the termination of the estate by such limitation.<sup>573</sup>

#### § 79. Words appropriate to special limitation.

An estate of this character is created generally by a grant or devise "until" a certain event takes place, or "while" or "so long as" an existing state of things shall endure, or other equivalent words; such words, introducing a limitation, being distinguished in the books from those suited for the creation of an estate on condition.<sup>574</sup>

#### § 80. Particular estates subject to special limitation.

Estates in fee simple, when thus subjected to the possibility of termination, have been usually considered as forming a class by themselves, and are considered in the next section under the head of "Determinable, base, or qualified fees."

An estate tail may be limited to determine on some con-

<sup>572</sup> Co. Litt. 214b; 4 Kent, Comm. 127; Challis, Real Prop. 206; First Universalist Soc. of North Adams v. Boland, 155 Mass. 171, Finch's Cas. 425.

<sup>573</sup> Co. Litt. 214b.

<sup>574</sup> Challis, Real Prop. 198; Sheppard's Touchstone, 125; Portington's Case, 10 Coke, 35a, 41b, quoted 5 Gray's Cas. 2.

tingency.<sup>575</sup> An estate for life may likewise be subject to such a limitation, as appeared in our discussion of estates for life; it being there stated that the character of an estate as one for life is not changed by the fact that it may terminate on a contingency before the end of the life.<sup>576</sup> Examples of estates for life so subject to the possibility of termination are presented by a grant to a woman so long as she remains unmarried, or during widowhood, or so long as she behave well, or to a man and a woman during coverture, or so long as the grantee dwell in a certain house.<sup>577</sup> So an estate may be limited to one for life, to determine on its voluntary alienation by him, or on his bankruptcy or insolvency,<sup>578</sup> or for so long as he may use the property for certain business purposes.<sup>579</sup>

An estate for years may likewise be limited to terminate on a contingency before the expiration of the number of years named,<sup>580</sup> as when a lease is for twenty-one years if A. live so long, in which case the lease expires on A.'s death before the lapse of twenty-one years.<sup>581</sup> So an estate for years may be subject to a special limitation that it shall expire before the termination of the term, at the option of the lessor<sup>582</sup> or of the lessee.<sup>583</sup> An estate for years cannot, however, be

<sup>575</sup> *Challis*, Real Prop. 199; 1 *Leake*, 217; *Portington's Case*, 10 *Coke*, 36; *Gray*, Restraints, Allen. Prop. § 69.

<sup>576</sup> See ante, § 30. See, also, *Harrison v. Foote*, 9 Tex. Civ. App. 576.

<sup>577</sup> Co. Litt. 42a, 214b.

<sup>578</sup> 1 *Leake*, 219; *Gray*, Restraints, Allen. Prop. §§ 73, 80.

<sup>579</sup> *Warner v. Tanner*, 38 Ohio St. 118, *Finch's Cas.* 576.

<sup>580</sup> See 1 *Taylor*, Landl. & Ten. § 272; *Munigle v. City of Boston*, 3 Allen (Mass.) 230; *Shaw v. Hoffman*, 25 Mich. 172.

<sup>581</sup> Co. Litt. 45b, 214b; 4 *Kent*, Comm. 105.

<sup>582</sup> *Liddy v. Kennedy*, L. R. 5 H. L. 134; *Taylor v. Frohock*, 85 Ill. 584; *Pratt v. Paine*, 119 Mass. 439; *Miller v. Levi*, 44 N. Y. 489; *Johnston v. King*, 83 Wis. 8.

<sup>583</sup> *King v. Grafton*, 18 Q. B. 496; *Woodbridge Co. v. Charles E. Hires Co.*, 19 App. Div. (N. Y.) 123.

regarded as one on special limitation, merely because it is to terminate on the contingency of a default in some matter by the lessee, even though it is expressly provided that the lease shall be "void" on such default, such a provision being regarded as a condition, and not as a limitation.<sup>584</sup>

§ 81. Determinable, base, or qualified fees.

A limitation to a man and his heirs, so long as A. shall have heirs of his body, or till the marriage of a certain person, or so long as St. Paul's Church shall stand, or a tree shall stand, are among the examples given in the books of an estate which, while descending to the heirs general, is liable to terminate on the happening of some event.<sup>585</sup> So, when land is granted for certain purposes, as for a school-house, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purpose only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of

<sup>584</sup> Gray, *Restraints, Allen. Prop.* § 101, note; *Davenport v. Reg.*, 3 App. Cas. 115, 128-130.

<sup>585</sup> See 2 Bl. Comm. 109; 4 Kent, Comm. 9, 129; Challis, *Real Prop.* 197 et seq.; 1 Cruise, Dig. tit. 1, §§ 75-80; 2 Sharswood & B. Lead. Cas. Real Prop. pp. 17-29.

As stated above, an estate of this character is called by different writers a determinable or a base or a qualified fee. The term "base fee" is, perhaps, more properly applied only to the estate which arises in the grantee of a tenant in tail upon the barring of the issue in tail by any act which is ineffectual to bar the reversion expectant on the estate tail. 4 Kent, Comm. 9; Challis, *Real Prop.* 44, 264; 2 Sharswood & B. Lead. Cas. Real Prop. 18. See *Fines & Recoveries Act*, 3 & 4 Wm. IV. c. 74, § 1, where a "base fee" is expressly so defined.

The term "qualified" fee is by Preston and Challis applied to an estate which is limited to a man and certain of his heirs only, as to a man and the heirs of his father; but such an estate need not be here considered, since, as the latter writer says, it has rarely, if ever, occurred. Challis, *Real Prop.* 215 et seq.; 4 Kent, Comm. 9, note a; 1 Preston, *Estates*, 449.

the kind now under consideration is created.<sup>556</sup> It is necessary, it is said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever.<sup>557</sup>

— Question as to existence of estate.

By a number of writers of the highest authority, it is denied that such an estate as that here considered can, on principle, exist since the passage of the statute of *Quia Emptores*; their view being, stated in general terms, that, as the whole fee is granted, there is no estate in reversion left in the grantor to entitle him to the possession on the happening of the contingency, and that, since the statute referred to

<sup>556</sup> *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law, 13; *Gillespie v. Broas*, 23 Barb. (N. Y.) 370; *Board of Education v. Inhabitants of Van Wert*, 18 Ohio St. 221; *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, *Finch's Cas.* 425.

<sup>557</sup> 4 Kent, Comm. 9; *Challis*, 197, citing 1 Preston, *Estates*, 479; *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, *Finch's Cas.* 525. The possibility referred to is evidently, however, of a legal, rather than a physical, character. It is physically impossible that St. Paul's or a tree shall stand forever; but the law does not apparently take cognizance of that fact, at least in this connection. See 4 Kent, Comm. 9.

Determinable fees are divided by Mr. Challis into two classes, according to whether the event named as terminating the fee is or is not liable at any time to become "impossible to happen." If it is such an event, the determinable fee is, when the event so becomes impossible, enlarged into a fee simple. In the other class of cases, where the event is not liable to become impossible, the estate can never be enlarged into a fee simple except by a release by the person who owns the possibility of reverter. *Challis*, *Real Prop.* 200. He names as the only case in which the event can become impossible one in which the event is an act to be done or suffered by a living person, the impossibility accruing on such person's death. But the impossibility may apparently accrue in other cases. See *Williams v. Cincinnati First Presbyterian Soc.*, 1 Ohio St. 473; *Friedman v. Steiner*, 107 Ill. 125.

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prevents the relation of tenure between the grantor and grantee such as would entitle him to resume possession as by escheat, there is consequently no principle upon which the right of reverter can be supported.<sup>538</sup> The existence of such an estate has, however, been assumed by the great majority of the earlier writers on real property;<sup>539</sup> and in this country its existence has been recognized in a considerable number of decisions.<sup>540</sup>

— Incidents of estate.

After the grant of such an estate by a tenant in fee simple, he has no estate in reversion left in him, since he has

<sup>538</sup> 1 Sanders, Uses & Trusts, 208; 1 Leake, 36, and note (d); Pollock, Land Laws (2d Ed.) 221; Edwards, Prop. Land (2d Ed.) 48. See Gray, Perpetuities, §§ 31-42, where this view is presented at length. See, also, an article by the same writer in 3 Law Quart. Rev. 399. The same view is apparently taken by Jessel, M. R., in *Collier v. Walters*, L. R. 17 Eq. 252.

<sup>539</sup> See Challis, Real Prop. c. 17, and an article by the same writer in 3 Law Quart. Rev. 403, where the view is taken that the Statute of Quia Emptores, applying in terms only to estates in "fee simple," means thereby estates in "fee simple absolute."

<sup>540</sup> See, in addition to the cases above cited, *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, *Finch's Cas.* 525; *Stuart v. Easton*, 170 U. S. 383; *Siegel v. Lauer*, 148 Pa. St. 236; *Friedman v. Steiner*, 107 Ill. 125; *Hall v. Turner*, 110 N. C. 292; *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law, 13; *Gibson v. Hardaway*, 68 Ga. 370; *Halifax Congregational Soc. v. Stark*, 34 Vt. 243; *Leonard v. Burr*, 18 N. Y. 96, *Finch's Cas.* 521. For other cases see 1 Sharswood & B. Lead. Cas. Real Prop. 17 et seq., where this subject is well treated.

In some decisions, a statutory dedication of land for a particular public use is considered to create an estate of this character in the public, subject to termination upon the cessation of such use. *Board of Education v. Inhabitants of Van Wert*, 18 Ohio St. 221; *Gebhardt v. Reeves*, 75 Ill. 301; *Matthiessen & H. Zinc Co. v. City of La Salle*, 117 Ill. 411; *Hooker v. Utica & M. Turnpike Road Co.*, 12 Wend. (N. Y.) 371. See *People v. White*, 11 Barb. (N. Y.) 28; *Thayer v. McGee*, 20 Mich. 195. Contra, *Pettingill v. Devin*, 35 Iowa, 344.



granted away the fee, and there cannot be more than one fee in the same land.<sup>591</sup> The right in the grantor to the possession of the land upon the happening of the contingency is a mere possibility, and is termed a "possibility of reverter."<sup>592</sup> A mere possibility such as this would seem, on principle, not to be assignable;<sup>593</sup> but a contrary view has been taken in one state.<sup>594</sup>

The owner of the estate has all the rights of an owner in fee simple, with the same rights of user and power to commit unlimited waste;<sup>595</sup> but if he conveys his estate, the grantee takes it subject to the same liability to termination as existed before the grant.<sup>596</sup>

<sup>591</sup> Challis, Real Prop. 64.

<sup>592</sup> Challis, Real Prop. 63; 4 Kent, Comm. 10; 2 Sharswood & B. Lead. Cas. Real Prop. 26; First Universalist Soc. of North Adams v. Boland, 155 Mass. 171, Finch's Cas. 525; Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 150.

<sup>593</sup> Challis, Real Prop. (2d Ed.) 73, 201.

<sup>594</sup> In Pennsylvania it has been held that a possibility of reverter is assignable. Slegel v. Lauer, 148 Pa. St. 236; Scheetz v. Fitzwater, 5 Pa. St. 126. See, also, Pemberton v. Barnes [1899] 1 Ch. Div. 544.

<sup>595</sup> 1 Cruise, Dig. tit. 1, § 80; Walsingham's Case, Plowd. 557; Challis, Real Prop. 207.

<sup>596</sup> 4 Kent, Comm. 10; Challis, Real Prop. 207.

## **CHAPTER V.**

### **EQUITABLE OWNERSHIP.**

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## I. USES AND THE STATUTE OF USES.

A use, as it originally existed, was a right to the benefit and profits of land, the seisin or possession of which was in another. Such rights were not recognized in the courts of law, but chancery assumed jurisdiction of their enforcement.

By the Statute of Uses, it was provided that, in the case of a use, the seisin should be transferred to the person entitled to the use, and thereafter uses ceased to exist as equitable obligations separate from the legal title, except in certain cases which were decided not to be within the operation of the statute, and three of which have survived under the name of trusts. The uses thus excepted from the operation of the statute are:

- (1) Active uses.
- (2) Uses in chattel interests.
- (3) Uses to the legal grantees.
- (4) Uses upon a use.

## § 82. Origin of uses.

The law of estates in land, as heretofore stated and explained, was established in the courts of common law. At a later period, the court of chancery established a concurrent jurisdiction over land by means of the system of uses, which latter subsequently, owing to the Statute of Uses, became a part of the law of land as recognized in the common-law courts, and exercised a profound influence, more particularly upon the law of future estates and the transfer of interests in land, while in the court of chancery it developed into the modern law of trusts.

The practice of conveying land to one person to the use of another seems, according to the investigations of the modern

writers, to trace its origin to the German law, rather than to the system of *fidei commissa* which existed in Roman law, as stated by the older authorities.<sup>1</sup> Beginning soon after the Conquest, land was sometimes conveyed by one man to another, to the use of a third, and so land was occasionally conveyed to religious houses to some particular "use," or, as we would say, for some particular purpose. But the idea of conveying lands to one person for the benefit of another seems to have been chiefly applied, in those times, in the conveyance of lands to a person to the use of a religious order, which was, by its constitution, forbidden to own any property, a distinction being thus made between the ownership and the "use" of a thing.<sup>2</sup>

### § 83. Jurisdiction assumed by chancery.

Upon the first introduction of uses into England, and for a considerable period thereafter, the beneficiary of the use, called later the *cestui que use*, had no specific legal remedy whereby to compel the person seised of the land, the *feoffee to uses*, to carry out the terms of the conveyance, but was to a great extent dependent on the good faith of the latter.<sup>3</sup> At the time, however, that such conveyances to uses were becoming general, the jurisdiction of the chancellor as a judicial officer, giving relief outside the ordinary rules of law, was

<sup>1</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 228, 236; article by Hon. O. W. Holmes, in 1 *Law Quart. Rev.* 162. For the view which formerly prevailed, see 2 *Bl. Comm.* 328; 4 *Kent, Comm.* 290; 1 *Spence, Eq. Jur.* 435.

The word "use" is derived, not from the Latin "usus," but from the phrase "ad opus," which in old French became "os" or "oes."  
<sup>2</sup> Pollock & Maitland, *Hist. Eng. Law*, 226, 1 *Law Quart. Rev.* 162, 3 *Law Quart. Rev.* 116.

<sup>3</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 229, 235.

<sup>4</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 229; Williams, *Real Prop.* (18th Ed.) 165; Digby, *Hist. Real Prop.* §12; 1 Cruise, *Dig. tit. 11, c. 1, § 11.*

increasing in importance, and it was but natural that *cestui que use* should have recourse to this officer for relief, which he might naturally be inclined to give, it being his duty, as an ecclesiastic, to enforce moral obligations, and his system of procedure, more flexible than that of the common-law courts, and independent of a jury, being well fitted to aid him in determining the real purpose of a transfer of land. Accordingly, in the first half of the fifteenth century, his jurisdiction to give relief against a feoffee to uses who failed to comply with the terms of the conveyance to him seems to have become firmly established, and the rules in regard to the grant of such relief regularly systematized.<sup>4</sup>

While the courts of law took no notice of the *cestui que use*, treating him, even when in possession, as a mere tenant at will, and regarding the feoffee to uses as exclusively the tenant of the land for all purposes, he being the one who owed the feudal services, on whose death without heirs the estate escheated, and who alone had the power to alien the land by legal conveyance, the court of chancery, on the other hand, regarded the *cestui que use* as the real owner of the property, compelling payment to him by the feoffee of the rents and profits, allowing him to call on the feoffee to convey the land to whomever he might name, and requiring the feoffee to defend the title, and re-enter or bring an action in case of disseisin by a third person, in order to protect the interests of the *cestui que use*.<sup>5</sup>

#### § 84. Characteristics of a use.

A use, not being an estate in the land, was not the subject of tenure, and consequently, on the death of the *cestui que use*, the lord had no wardship or marriage of the heir, the

<sup>4</sup> 1 Spence, Eq. Jur. 442; Digby, Hist. Real Prop. 322.

<sup>5</sup> Bacon, St. Uses, 10, 20; Co. Litt. 271b, and Butler's note; Digby, Hist. Real Prop. 324; 2 Cruise, Dig. tit. 11, c. 2, § 6; 4 Kent, Comm. 292.

land did not escheat on the death of the *cestui que use* without heirs, and it was not forfeited, when the *cestui que use* was attainted of treason or felony.<sup>6</sup> The legal ownership, however, represented by the feoffee to uses, was subject to the incidents of tenure, which could be enforced against the land, but by vesting the seisin in two or more feoffees jointly, whose number was renewed from time to time, and the survivor of whom took the whole legal estate, the burdens incident to the descent of land were generally avoided.<sup>7</sup>

Interests of different durations in a use were recognized by chancery corresponding to legal estates, and accordingly there might be a use to one in fee simple or fee tail, passing to the heirs of the *cestui que use*, or for life or for years.<sup>8</sup>

A use, it was decided, could be transferred by any species of writing,<sup>9</sup> and it was provided by an early statute that the *cestui que use* might dispose even of the legal estate without the concurrence of the feoffees.<sup>10</sup> Uses were also devisable, though at that time legal estates in land were not so devisable, and a feoffment could be made to one to the uses declared by the last will of the feoffor, and in that case the uses resulted to the feoffor till his death, and after his death the feoffee would be compelled to hold the land to the uses named in the will.<sup>11</sup>

<sup>6</sup> Co. Litt. 191a, Butler's note VI., 11; 1 Cruise, Dig. tit. 11, c. 2, §§ 22-24; Williams, Real Prop. (18th Ed.) 164; 1 Sanders, Uses & Trusts, 66.

<sup>7</sup> Co. Litt. 191a, Butler's note VI., 11; 1 Leake, 102; Williams, Real Prop. (18th Ed.) 164.

<sup>8</sup> Sugden's Gilbert, Uses, c. 1, § 2; Digby, Hist. Real Prop. 326.

<sup>9</sup> Bacon, St. Uses, 16; 1 Sanders, Uses & Trusts, 64; 1 Cruise, Dig. tit. 11, c. 2, §§ 28, 29.

<sup>10</sup> St. 1 Rich. III. c. 1 (A. D. 1483); 1 Gray's Cas. 462; 1 Sanders, Uses & Trusts, 20. See Challis, Real Prop. 310.

<sup>11</sup> Bacon, St. Uses, 20; Co. Litt. 111b, Butler's note; Sugden's Gilbert, Uses, 70; Digby, Hist. Real Prop. 328; 1 Cruise, Dig. tit. 11, c. 2, § 36.

At common law, as we shall see later,<sup>12</sup> a freehold could not be limited to commence *in futuro*, owing to the requirement of livery of seisin and the rule against abeyance of the freehold, but these rules had no application to limitations of uses, since their transfer did not involve livery of seisin, and the freehold for purposes of tenure existed in another, and consequently they could be created to spring up in the future, or to shift from one person to another at a future time, or on the happening of a particular contingency.<sup>13</sup> Moreover, a use could be limited to arise not only on a future event, but in a mode to be declared in the future by a person named in the declaration of the use; that is, in favor of such person or persons and for such estates as the person named might direct or appoint.<sup>14</sup>

§ 85. Creation of a use.

The ordinary and simplest method of creating a use was by a feoffment to A. and his heirs for the use of B. and his heirs. Likewise, a use could be raised by the levy of a fine or the suffering of a recovery to a particular use, these being, as stated before, collusive judicial proceedings resulting in a transfer of title. By these modes of conveyance, the legal seisin was transferred, and the use was then said to be created by a conveyance operating by "transmutation of possession."<sup>15</sup>

Besides these methods of creating a use by an expression of intention that the donee should hold the land to certain uses, an intention to that effect was sometimes implied by the chancellor. This was done when a feoffment or other conveyance was made without any consideration being given, and

<sup>12</sup> See post, § 119(a).

<sup>13</sup> Sugden's Gilbert, Uses, 152; Butler's note to Fearn, Cont. Rem. 383.

<sup>14</sup> Sugden's Gilbert, Uses, 158; Chance, Powers, 5.

<sup>15</sup> Sugden's Gilbert, Uses, Introduction, and chapter 1, § 5; Digby, Hist. Real Prop. 326.

also without any declaration of use, it being assumed in such a case that the intention of the grantor was that the donee should hold the land, not for his own benefit, but for the use and benefit of the donor, the use being then said to "result" or come back to the donor. This class of uses received the name of "resulting uses."<sup>16</sup> If, however, the use was actually declared, then such express declaration was allowed to prevail, and the payment or nonpayment of consideration was immaterial in determining the destination of the use.<sup>17</sup>

An intention to create a use was also implied by the chancellor in certain cases when there was no transmutation of possession. This occurred in the case of a "bargain and sale" and of a "covenant to stand seised." A bargain and sale was a transaction of the following nature: If the owner of land made an agreement with a purchaser for the sale to the latter of an estate or interest in the land, and the purchaser paid a pecuniary consideration therefor, but no legal conveyance was made, chancery regarded the vendor as seised of the legal estate merely for the use and benefit of the vendee in accordance with the terms of the agreement.<sup>18</sup> A covenant to stand seised was an agreement or declaration by deed made by the owner of land that he would thereafter "stand seised" of the legal estate to the use of some blood relation, as a child or cousin, which agreement was enforced by chancery to the extent of recognizing a use in the covenantee.<sup>19</sup> So a covenant by A. to stand seised to the use of the heirs male of his body, and in default of such heirs to the use of his various brothers, was sufficient to raise uses in the persons named.<sup>20</sup>

<sup>16</sup> Sugden's Gilbert, Uses, c. 1, §§ 5, 6; 1 Sanders, Uses & Trusts, 60; 1 Cruise's Dig. tit. 11, c. 4, § 19 et seq.

<sup>17</sup> Sugden's Gilbert, Uses, 89; 1 Sanders, Uses & Trusts, 59.

<sup>18</sup> Digby, Hist. Real Prop. 328; Sugden's Gilbert, Uses, 94; Williams, Real Prop. 183.

<sup>19</sup> Sugden's Gilbert, Uses, 92; Digby, Hist. Real Prop. 328.

<sup>20</sup> Sharington v. Strotton, Plowd. 298, 1 Gray's Cas. 485.



## § 86. Persons bound by the use.

At first the court of chancery regarded a use as in the nature of a purely personal confidence in the feoffee to uses, so that, on his death, it could not be enforced against his heir, but subsequently, probably about the middle of the fifteenth century, this rule was changed, and the heir was held to take the lands subject to the same uses as existed during his ancestor's life.<sup>21</sup> A person to whom the feoffee conveyed the land, if he had notice of the use, likewise took the land subject thereto, and the rule was the same when he had no notice, if he paid no consideration for the conveyance. But if he paid a valuable consideration, and was without notice of the use, he took the land free therefrom.<sup>22</sup>

Persons who obtained seisin of the land otherwise than by descent from the original feoffee or by contract with him, claiming by paramount title, or, as it was usually expressed, coming in *in the post* and not *in the per*, were not bound by the use, and so a disseisor, or the lord who entered on an escheat or forfeiture, or the feoffee's widow or widower claiming dower or curtesy, was not bound by the use.<sup>23</sup>

## § 87. The Statute of Uses.

From time to time, statutes were passed with the intent of rendering uses more or less subject to the rules of the common law,<sup>24</sup> but these were but partially effective, and were superseded by St. 27 Hen. VIII. c. 10 (A. D. 1535), generally known as the "Statute of Uses." This statute, after reciting the evils, real or imaginary, which pro-

<sup>21</sup> Bacon, *St. Uses*, 23; Digby, *Hist. Real Prop.* 324, and note 5; 1 Cruise's Dig. tit. 11, c. 2, § 11; Kellw. 42, pl. 7, quoted 1 Gray's Cas. 462.

<sup>22</sup> Sugden's *Gilbert, Uses*, 12-14; 1 Cruise's Dig. tit. 11, c. 2, § 9.

<sup>23</sup> Co. Litt. 271b, Butler's note II.; 1 Spence, *Eq. Jur.* 445; 1 Cruise's Dig. tit. 11, c. 2, §§ 12-14.

<sup>24</sup> 1 Digby, *Hist. Real Prop.* 343.

ceeded from the existing system, provided, in effect, that where one person was seised of lands, tenements, or hereditaments to the use of any other person, the person having the use should be seised and deemed to be in full seisin and possession of such lands, tenements, and hereditaments, of and in such like estates, as he might have had in the use.

It has by some writers been said that the intention of this statute was to entirely abolish uses, but it seems more probable that its purpose was to turn equitable into legal estates, making the *cestui que use* in every case the legal tenant, and, as such, liable to the feudal burdens, and also to prevent the disposal of lands by will.<sup>25</sup>

This statute has the effect of transferring the legal title to the *cestui que use*, who has thereafter the complete title, both that at law and in equity, the use being said to be "executed" by the statute. The legal estate, however, thus executed in the *cestui que use*, cannot be greater than that given to the feoffee to uses. Accordingly, in the case of a grant to A. for life, to the use of B. and his heirs, B. takes a legal estate for life merely, and not one in fee.<sup>26</sup>

The Statute of Uses has been substantially re-enacted in a number of the states of this country, and in others has been adopted as a part of the common law;<sup>27</sup> and accordingly in those states, unless the case is within the one of the exceptions

<sup>25</sup> Sugden's Gilbert, Uses, 139, note; Digby, Hist. Real Prop. 344.

<sup>26</sup> Bacon, St. Uses, 47; 1 Sanders, Uses & Trusts, 107; 1 Perry, Trusts, § 312; Meredith v. Joans, Cro. Car. 244, 1 Gray's Cas. 515; First Baptist Soc. in Andover v. Hazen, 100 Mass. 322. Compare Sugden's Gilbert, Uses, 127, note (2). Wilcox v. Wheeler, 47 N. H. 488, contra, is not in accord with this view, the court there applying to a use executed in the *cestui que use* the rule ordinarily applicable in this country to trusts,—that the trustee shall take such an estate as the nature of the trust requires.

<sup>27</sup> 1 Perry, Trusts, § 299, and note; Flint, Trusts, § 121. See 1 Stimson's Am. St. Law, § 1702; note to Kay v. Scates, 78 Am. Dec. 399 (37 Pa. St. 31); articles in 5 Am. Law Reg. 641, 6 Am. Law Reg. 65.

which the courts have engrafted on the statute, as hereinafter stated, if an estate is conveyed to A. for the use of or in trust for B., the legal title in terms conveyed to A. will immediately vest by force of the statute in B., and A. will take nothing.<sup>28</sup> In several states, however, the statute cannot be regarded as in force, owing either to direct adjudications to that effect, or particular statutory provisions.<sup>29</sup>

§ 88. Effect of the statute.

Since, by the express terms of the statute, uses were thereafter to be regarded as converted into legal estates, it became necessary for the courts of law to take cognizance of them, though previously they were recognized only in chancery.<sup>30</sup> In so doing, however, these courts applied the rules developed by chancery as to the mode of creation of the use, and conse-

<sup>28</sup> *Tindal v. Drake*, 51 Ala. 574; *Bryan v. Bradley*, 16 Conn. 474; *Adams v. Guerard*, 29 Ga. 651, 76 Am. Dec. 624; *Ramsay v. Marsh*, 2 McCord (S. C.) 252; *Moore v. Shultz*, 13 Pa. St. 98; *Nightingale v. Hidden*, 7 R. I. 115; *Webster v. Cooper*, 14 How. (U. S.) 488; *Fellows v. Ripley*, 69 N. H. 410; *Morgan v. Rogers*, 25 C. C. A. 97, 79 Fed. 577; *Holmes v. Pickett*, 51 S. C. 271; *McKenzie v. Sumner*, 114 N. C. 425; *Reeves v. Brayton*, 36 S. C. 384; *Hughes v. Farmers' S., B. & L. Ass'n* (Tenn. Ch. App.) 46 S. W. 362; *Henderson v. Adams*, 15 Utah, 30; *Sullivan v. Chambers*, 18 R. I. 799; *Kirkland v. Cox*, 94 Ill. 400; *Myers v. Myers*, 167 Ill. 52.

<sup>29</sup> The Statute of Uses has been decided not to be in force in Nebraska (*Farmers' & M. Ins. Co. v. Jensen*, 58 Neb. 522), Ohio (*Heifenstine v. Garrard*, 7 Ohio, 275), and Vermont (*Gorham v. Daniels*, 23 Vt. 600).

In New York, and in those states which have adopted the legislation of that state abolishing uses and trusts (Minnesota, Michigan, Dakota, and Wisconsin), the Statute of Uses is not in force, but the statutory provision restricting the creation of trusts has in some cases the same effect. 1 *Stimson's Am. St. Law*, § 1702. See post, § 95.

In Florida, Kentucky, Mississippi, and Virginia, the statute is not in force, it seems, except for the purpose of giving effect to conveyances under the statute. 1 *Perry, Trusts*, § 299, note.

<sup>30</sup> See 1 *Leake*, 105.

quently transactions of a character which, before the statute, would have created a use in a person other than the legal tenant, after the statute, as a general rule, gave such person not only the beneficial use, but also the legal title. The statute thus provided a means of transferring the legal title in ways unknown to the common law, and eventually effected a complete revolution in the systems of conveying land.

So a use raised by a conveyance operating by transmutation of possession was executed in the *cestui que use*. For example, on a feoffment to A. and his heirs to the use of (or in trust for)<sup>81</sup> B. and his heirs, B., instead of having a fee in the use only, acquired, by means of the statute, the legal title in fee.<sup>82</sup>

Uses which, before the statute, were, as explained above, created without any transmutation of possession, by a bargain and sale or a covenant to stand seised, were also by the statute converted into legal estates. Thus, if A., for a consideration of £100, bargained and sold land to B. and his heirs, the use thereby created in B. was converted into a legal estate in fee simple. And so, if A. covenanted to stand seised to the use of B. and his heirs, a use was created in B. which was by the statute converted into a legal estate in fee simple in him.<sup>83</sup> A bargain and sale and a covenant to stand seised thus operating, by reason of the consideration, to

<sup>81</sup> The words "use" and "trust" are synonymous in this connection, and the employment of one or the other does not affect the question of the application of the statute (*Carr v. Richardson*, 157 Mass. 576), though the word "use" is generally employed if it is intended that the statute shall operate, and a legal estate only be created, and the word "trust" is employed if a trust is intended to be created. *Williams, Real Prop.* (18th Ed.) 176.

<sup>82</sup> 1 Sanders, *Uses & Trusts*, 95; *Williams, Real Prop.* 158.

<sup>83</sup> 1 Hayes, *Conveyancing* (5th Ed.) 74, 75; 2 Sanders, *Uses & Trusts*, 53, 97; 1 Leake, 109; Digby, *Hist. Real Prop.* 354; *Roe v. Tranmer*, 2 Wils. 75, 1 Gray's Cas. 492, 3 Smith, *Lead. Cas.* (9th Ed.) 1780, and notes.

transfer the use or equitable title, and the statute then transferring the legal title to the same person, they became regularly recognized modes of conveyance, the formalities necessary for the transfer of possession at common law, such as livery of seisin, entry, and attornment, being thereby avoided.

The statute transfers not only the legal title, but also the seisin "in deed," and what is regarded as the actual possession of the land; and hence, by a bargain and sale, or by a covenant to stand seised, the purchaser acquires the seisin and possession, as if there had been a livery of seisin, or, in the case of an estate for years, an entry by him.<sup>34</sup>

Partaking somewhat of the nature of a conveyance by bargain and sale is that by lease and release, which is effected in the following manner: Even before the Statute of Uses, it was not unusual to transfer a freehold by the making of a lease for years to the intending purchaser, who, after his entry into possession under the lease, was competent to receive from the lessor a deed of release of the reversion; such a deed being the recognized mode of conveyance of a reversion to one having a prior vested estate in the land.<sup>35</sup> Thus, the conveyance of a present estate of freehold was effected without any livery of seisin.<sup>36</sup> Since, however, it was necessary that the purchaser should enter on the premises in order that he might be able to take a release from the lessor, this mode of conveyance had little, if any, advantage over that by livery of seisin. But under the Statute of Uses the necessity of entry could be avoided, the statute transferring, as just stated,

<sup>34</sup> Williams, Settlements, 11 et seq.; Anonymous, Cro. Eliz. 46. 1 Gray's Cas. 506; Comyn, Dig. tit. "Uses" (1); Heelis v. Blain, 18 C. B. (N. S.) 90, 1 Gray's Cas. 506; Hadfield's Case, L. R. 3 C. P. 306; Witham v. Brooner, 63 Ill. 344; Hutchins v. Heywood, 50 N. H. 491.

<sup>35</sup> See, post, § 375.

<sup>36</sup> Litt. §§ 452, 460; Co. Litt. 46b, 270a; Sugden's Gilbert, Uses, 235.

the actual possession without entry, and it became the practice for the intending vendor to make a bargain and sale for a year to the purchaser, which raised in him a use which was executed by the statute, giving him a legal estate for years, and then a deed of release of the reversion was made to him.<sup>87</sup> This mode of conveyance was at one time by far the most usual in England, and is still occasionally used.

— In connection with wills.

Since the Statute of Wills,<sup>88</sup> allowing devises of freehold interests in lands, was not passed until several years after the Statute of Uses, it has been contended by some authorities that the latter statute does not apply to devises; but a contrary opinion has generally prevailed, and the question is really immaterial, since it is admitted by the former class of authorities that, where limitations in a will are such as would have a recognized effect in connection with the Statute of Uses in a deed, it will be presumed that the testator intended them to have such effect. Accordingly, the Statute of Uses may be regarded as applying to devises as well as to transactions *inter vivos*.<sup>89</sup>

§ 89. Resulting uses after the statute.

In cases in which, before the statute, a use resulted to the grantor owing to the want of consideration for the conveyance, in the absence of an express declaration of use, after

<sup>87</sup> Williams, Real Prop. 185; Sugden's Gilbert, Uses, 224; 4 Cruise, Dig. tit. 32, c. 11; Barker v. Keat, 2 Mod. 249, Freem. 249, 1 Gray's Cas. 491; Lutwich v. Mitton, Cro. Jac. 604, 1 Gray's Cas. 491.

<sup>88</sup> Challis, Real Prop. 312; 1 Hayes, Conveyancing (5th Ed.) 82; Sugden, Powers (8th Ed.) 146; Jarman, Wills, 1137; Lewin, Trusts, 220. See Broughton v. Langley, 2 Salk, 679, 1 Gray's Cas. 477; Leicester v. Biggs, 2 Taunt. 109; In re Brooke [1894] 1 Ch. 43.

the statute the use thus resulting to the grantor was converted into a legal estate, and he remained seised as before.<sup>39</sup>

A use could thus result, however, from the absence of consideration, only in case of a common-law conveyance, since, in the case of a conveyance under the Statute of Uses by bargain and sale or covenant to stand seised, a consideration moving from the grantee necessarily exists or is implied;<sup>40</sup> and it may in any case be shown that there was no intention that a use should result to the grantor.<sup>41</sup> Furthermore, it has been held that a use will not result on this principle when the conveyance is of an estate less than that which the grantor has, it being considered that, by such a conveyance, there is created a tenure, which, with its attendant services and obligations, implies a consideration.<sup>42</sup>

— Partial declaration of use.

If, upon a conveyance in fee, a use be declared by the grantor in favor of another for an estate of less duration, a use in the residue of the fee will result to the grantor, it being presumed, from the express mention of the use for a limited period, that no further beneficial interest is to pass. For in-

<sup>39</sup> Williams, *Real Prop.* (18th Ed.) 170; 1 Sanders, *Uses & Trusts*, 96; 1 Leake, 107; Edwards, *Prop. Land* (2d Ed.) 352; Beckwith's Case, 2 Coke, 58a; *Armstrong v. Wolsey*, 2 Wils. 19, 1 Gray's Cas. 480; *Van der Volgen v. Yates*, 9 N. Y. 219; *Shelton v. Shelton*, 5 Jones, Eq. (N. C.) 292.

<sup>40</sup> 1 Perry, *Trusts*, § 162. See 1 Sanders, *Uses & Trusts*, 96; *Lovett v. Taylor*, 54 N. J. Eq. 311. It is doubtful whether a use can result upon a conveyance by lease and release without any consideration. 2 Cruise's Dig. tit. 32, c. 11, § 17; *Shortridge v. Lamplugh*, 2 Salk. 678, 1 Gray's Cas. 476; 2 Sanders, *Uses & Trusts*, 77.

<sup>41</sup> 1 Sanders, *Uses & Trusts*, 105; *Altham v. Anglesey*, Gilb. Ch. 16, 1 Gray's Cas. 477; *Roe v. Popham*, Doug. 26.

<sup>42</sup> 1 Leake, 108; 1 Cruise's Dig. tit. 11, c. 4, §§ 50-53; *Castle v. Dod*, Cro. Jac. 200.

stance, if A. convey land to B. and his heirs to the use of C. for life, the use will, after the death of C., revert to A.<sup>43</sup>

If, however, the use be declared, not to another person, but to the grantor, for an estate for life or years, no use will result to the grantor as to the residue of the estate, since, if it were to do so, the estate for life or years would merge therein, and his estate would, in violation of his express declaration, be the same as before.<sup>44</sup>

— Future uses.

As uses could be created, before the statute, to arise or shift from one person to another in the future, after the statute it was possible, by the creation of such future uses, to be immediately turned by the statute into legal estates, to create future legal estates, a thing which could not be done at common law.<sup>45</sup> Moreover, where, before the statute, a use was limited to arise according to the appointment or direction of some person named in the deed for that purpose, after the statute such a use was executed as it arose, and it thus became possible, instead of actually limiting the future legal estate or estates at the time of the conveyance, to name some other person who should limit them in the future.<sup>46</sup>

§ 90. Uses not within the statute.

In construing the statute, it was decided that certain classes

<sup>43</sup> 1 Leake, 107; Co. Litt. 22b, 23a, 271b; 1 Hayes, Conveyancing (5th Ed.) 464; 1 Sanders, Uses & Trusts, 101, 107; Van der Volgen v. Yates, 9 N. Y. 219; Kenniston v. Leighton, 43 N. H. 311.

<sup>44</sup> 1 Leake, 107; 1 Sanders, Uses & Trusts, 103; 1 Cruise's Dig. tit. 11, c. 4, § 47; Adams v. Tertenants of Savage, 2 Salk. 679. If the use declared be for an estate tail, the use for the residue of the fee simple may result to him, since an estate tail is not merged in the reversion. Dyer, 111b, in marg., 1 Gray's Cas. 474; 1 Cruise's Dig. tit. 11, c. 4, § 48.

<sup>45</sup> See post, § 134.

<sup>46</sup> See post, § 275.



of uses were not within its operation, and that they consequently were not changed into legal estates, and these uses have in part survived under the name of "trusts." These uses not within the statute are (1) active uses, (2) uses declared in chattel interests, (3) uses to the legal grantee, and (4) uses upon a use.<sup>47</sup> They will be considered in the above order.

— Active uses.

It has always been held, since a few years after the passage of the statute, that if the use or trust imposed on the feoffee is of an active nature, involving the exercise of some power, agency, or control by him, it is not executed by the statute, on the ground that the exercise of such duties by him is impossible unless he is permitted to retain the legal title.<sup>48</sup> Accordingly, the statute does not operate if the holder of the legal title is to pay the rents to the beneficiary named,<sup>49</sup> or to

<sup>47</sup> To these cases excepted from the statute may be added that of a conveyance to one in fee tail to the use of another, the statute not applying, it seems, in such a case, since a tenant in fee tail would have no power over the seisin, this being appropriated to the heirs by the Statute De Donis, and since the Statute of Uses does not execute any use which, before the statute, the feoffee could not be compelled to execute. *Cooper v. Franklin*, Cro. Jac. 400, 1 Gray's Cas. 514; 1 Leake, 118; Sugden's *Gilbert, Uses*, 19. Compare 1 Sanders, *Uses & Trusts*, 118.

<sup>48</sup> Bro. Ab. Feoff. al Uses, 52; 1 Gray's Cas. 510; 1 Sanders, *Uses & Trusts*, 253; 1 Cruise's Dig. tit. 12, c. 1, § 12 et seq.; Digby, *Hist. Real Prop.* 367, note 1; *Gratrex v. Homfray*, 6 Adol. & E. 206; *Kellogg v. Hale*, 108 Ill. 164; *Howard v. Henderson*, 18 S. C. 184; *Ure v. Ure*, 185 Ill. 216; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Morton v. Barrett*, 22 Me. 261, 39 Am. Dec. 575; *Hutchins v. Heywood*, 50 N. H. 500; *Barnett's Appeal*, 46 Pa. St. 392; *Clarke's Appeal*, 70 Conn. 195; *Hart v. Seymour*, 147 Ill. 598; *Blount v. Walker*, 31 S. C. 13; *Ayer v. Ritter*, 29 S. C. 135; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *Sprague v. Sprague*, 13 R. I. 701.

<sup>49</sup> *Jones v. Say*, 1 Eq. Cas. Abr. 383; *Hutchins v. Heywood*, 50 N. H. 500; *Rife v. Geyer*, 59 Pa. St. 393, 98 Am. Dec. 351; *Ware v. Richardson*, 3 Md. 505, 558. See *Leggett v. Perkins*, 3 N. Y. 297.

apply them to another's maintenance,<sup>50</sup> or even to merely protect estates in the property from sale or destruction.<sup>51</sup> But a grant to one to permit or suffer another to occupy the land, or to receive the rents and profits, does not impose any such active duty as will prevent the execution of the use,<sup>52</sup> though the case is different if the "net" or "clear" rents are referred to; these adjectives indicating that the legal grantee is to pay any necessary charges, and pay over the balance to the beneficiary.<sup>53</sup>

— Separate use of married women.

On the principle, it appears, that one to whom property is conveyed or devised for the separate use of a married woman<sup>54</sup> has a *quasi* active duty to perform in protecting it from the husband and the husband's creditors, and also from a desire not to defeat the purpose of such a limitation by vesting the legal title in the married woman, it has almost universally been considered that the statute does not apply to such a case.<sup>55</sup> But occasionally, since the passage of statutes giving

<sup>50</sup> 1 Perry, Trusts, § 305; Shelley v. Edlin, 4 Adol. & E. 582.

<sup>51</sup> McCaw v. Galbraith, 7 Rich. Law (S. C.) 74; Hart v. Bayless, 97 Tenn. 72; Vanderheyden v. Crandall, 2 Denio (N. Y.) 9; People's Loan & Exchange Bank v. Garlington, 54 S. C. 413, 71 Am. St. Rep. 800; Kay v. Scates, 37 Pa. St. 37, 78 Am. Dec. 399.

<sup>52</sup> Broughton v. Langley, 2 Salk. 679, 1 Gray's Cas. 477, 2 Ld. Raym. 273; Upham v. Varney, 15 N. H. 467; Ramsay v. Marsh, 2 McCord (S. C.) 252, 13 Am. Dec. 717.

<sup>53</sup> Barker v. Greenwood, 4 Mees. & W. 421; White v. Parker, 1 Bing. N. C. 573.

In Pennsylvania, there is a disposition, it seems, to treat as passive, and so as executed by the statute, some trusts or uses which in other jurisdictions are regarded as active, and, on the other hand, to treat as active some which are regarded elsewhere as passive. 2 Pomeroy, Eq. Jur. § 986; Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399, and note.

<sup>54</sup> See post, § 177.

<sup>55</sup> Cornish, *supra*, 57, 59; 1 Perry, Trusts, § 310; Harton v. Harton, 7 Term R. 152; Ware v. Richardson, 3 Md. 505; Ayer v. Ayer, (212)

the wife full control of her property, and freeing it from the control of her husband, it has been decided that the reason for the rule no longer exists, and that the statute will execute the use, if not involving active duties on the part of the trustee.<sup>56</sup>

— Uses in chattel interests.

A second class of uses not executed by the statute were those declared on a term of years or other chattel interest, since the statute expressly stated that, to bring it into operation, one person must be "seised" to the use of another, and this word applies only to the possession of freehold interests in land. Accordingly, if one leases land to A. for a term of years to the use of B., since A. has merely a chattel interest, the statute does not apply.<sup>57</sup> But this rule does not prevent the execution of a use of a term of years which is raised on

16 Pick. (Mass.) 331; *Pittsfield Sav. Bank v. Berry*, 63 N. H. 109; *Richardson v. Stodder*, 100 Mass. 528; *Escheator of St. P. & St. M. v. Smith*, 4 McCord (S. C.) 452; *Bowen v. Chase*, 94 U. S. 312; *Lancaster v. Dolan*, 1 Rawle (Pa.) 251; *Pullen v. Rianhard*, 1 Whart. (Pa.) 514, *Finch's Cas.* 95; *Steacy v. Rice*, 27 Pa. St. 75, 67 Am. Dec. 447; *Moore v. Stinson*, 144 Mass. 594; *Walton v. Drumtra*, 152 Mo. 489; *Dean v. Long*, 123 Ill. 447; *Frey v. Allen*, 9 App. D. C. 400. Compare *Williams v. Waters*, 14 Mees. & W. 166; *Nightingale v. Hidden*, 7 R. I. 115.

In Pennsylvania it is held that, in the case of a trust for the separate use of a woman, if she is not married, or the declaration is not made in contemplation of marriage, the use is executed, even though active duties are imposed. *Snyder's Appeal*, 92 Pa. St. 504; *Kuntzleman's Estate*, 136 Pa. St. 142, 20 Am. St. Rep. 909; 2 *Pomeroy*, Eq. Jur. § 986, note.

<sup>56</sup> *Georgia, C. & N. Ry. Co. v. Scott*, 38 S. C. 24; *Sutton v. Alken*, 62 Ga. 733.

<sup>57</sup> *Bacon*, St. Uses, 42; 1 *Sanders*, Uses & Trusts, 275; 1 *Cruise's Dig.* tit. 12, c. 1, § 34; 1 *Perry*, Trusts, §§ 303, 311; *Williams v. McConico*, 36 Ala. 22; *Ure v. Ure*, 185 Ill. 216; *Slevin v. Brown*, 32 Mo. 176; *Ramsay v. Marsh*, 2 McCord (S. C.) 252, 13 Am. Dec. 717; *Denton's Guardians v. Denton's Ex'rs*, 17 Md. 403.

a seisin of a freehold, and in fact, as shown above, the conveyance by lease and release is based on the execution of such a use.<sup>58</sup>

— Use to legal grantee.

A use limited to the grantee of the legal estate was not regarded as within the statute, which applied in terms to cases where one person was seised to the use of "another" person. So, on a conveyance to A. and his heirs to the use of A. and his heirs, the use is not executed by the statute, and the grantee takes the estate at common law, coupled with the use therein, the declaration of the use merely serving to rebut the presumption of a resulting use, and also serving, on occasion, to limit the estate taken by the grantee.<sup>59</sup> If, however, there be some person named in the declaration of the use who is not named in the grant, as in the case of a conveyance to A. to the use of A. and B. and their heirs, the Statute of Uses applies, and the use is executed, in the above case, in A. and B.<sup>60</sup>

— Use upon a use.

Another case in which the use is not executed by the statute occurs in the case of a use limited upon a use. Thus, in the case of a feoffment to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, the first use is executed by the statute in B., he thus acquiring the legal title, while the second use, to C., is not executed.<sup>61</sup>

<sup>58</sup> 2 Sanders, Uses & Trusts, 61.

<sup>59</sup> 1 Sanders, Uses & Trusts, 89; Meredith v. Joans, Cro. Car. 244, 1 Gray's Cas. 515; 1 Cruise's Dig. tit. 11, c. 3, §§ 27-29; Orme's Case, L. R. 8 C. P. 281, 1 Gray's Cas. 525; Peacock v. Eastland, L. R. 10 Eq. 17, 1 Gray's Cas. 520. See Lloyd v. Passingham, 6 Barn. & C. 305, 1 Gray's Cas. 516.

<sup>60</sup> Sammes' Case, 13 Coke, 54, 1 Gray's Cas. 511; Williams, Settlement, 5.

<sup>61</sup> 1 Sanders, Uses & Trusts, 275; 1 Perry, Trusts, §§ 301, 304; (214)

On the same principle, in the case of a bargain and sale to A. with a declaration of a use to B., the use raised in A. by the giving of consideration is executed in him by the statute, while the use expressly declared remains unexecuted.<sup>62</sup>

Even where the first use is to the feoffee himself, as in the case of a conveyance to A. and his heirs, to the use of A. and his heirs, to the use of (or in trust for) B., though the first use is not executed, A. being in by the common law,<sup>63</sup> the use ex-

*Durant v. Ritchie*, 4 Mason, 65, Fed. Cas. No. 4,190; *Croxall v. Sherard*, 5 Wall. (U. S.) 268; *Hutchins v. Heywood*, 50 N. H. 491; *Reid v. Gordon*, 35 Md. 183; *Guest v. Farley*, 19 Mo. 147; *Ramsay v. Marsh*, 2 McCord (S. C.) 252, 13 Am. Dec. 717; *Blount v. Walker*, 31 S. C. 13.

<sup>62</sup> *Tyrrel's Case*, Dyer, 155a, 1 Gray's Cas. 510; *Croxall v. Sherard*, 5 Wall. (U. S.) 268; *Durant v. Ritchie*, 4 Mason, 45, 66, Fed. Cas. No. 4,190; *Nelson v. Davis*, 35 Ind. 474; *Guest v. Farley*, 19 Mo. 147.

This principle of the nonexecution of a use upon a use, enunciated in *Tyrrel's Case*, supra, has been the subject of constant animadversion, as being utterly illogical, Mr. Joshua Williams (*Real Prop.* 160) adopting Mr. Watkins' remark, that "it must have surprised every one who was not sufficiently learned to have lost his common sense." The doctrine has, however, been more recently explained by Prof. J. B. Ames (4 Green Bag, 81) in such a way as to give it a more logical appearance, it being shown by this writer that, even before the statute, it was decided that, if one bargained and sold land to another to the use of the bargainor, the use declared was void, as repugnant to that raised by the consideration; and so, after the statute, the second use was considered as merely repugnant to the first use. This view is adopted in the latest (eighteenth and nineteenth) editions of Williams on Real Property by the editor, Mr. T. Cyprian Williams.

In Massachusetts it has been decided that a conveyance in form one of bargain and sale to A. and his heirs to the use of B. and his heirs may be considered a feoffment to A. to the use of B., so that the use will be executed in B., if this is apparently the intention of the parties. *Thatcher v. Omans*, 3 Pick. (Mass.) 521; *Carr v. Richardson*, 157 Mass. 576; *Durant v. Ritchie*, 4 Mason, 45, 71, Fed. Cas. No. 4,190. In Illinois, the same effect is given to the conveyance, it seems, even apart from the question of intention. *Witham v. Brooner*, 63 Ill. 344.

<sup>63</sup> See ante, note 59.

ists in A., and the use in B. is a use upon a use, and consequently the legal estate is not executed in B.<sup>64</sup>

## II. TRUSTS.

A trust in land is an equitable obligation imposed on the holder of the legal title to land, by reason of a confidence reposed in him, or a duty assumed by him, to use and apply such property for the benefit of another person.

A trust may, according to the mode of its creation, be either an express trust, a resulting trust, or a constructive trust.

An express trust, that is, one created by express declaration or agreement, may be created without the use of any technical terms, and without any consideration, but can be, under the Statute of Frauds, proven only by writing.

A resulting trust arises by implication of law, in compliance with the presumed intent of the parties, (1) in favor of the grantor or his heirs, when a conveyance is subject to a trust which does not exhaust the trust property, or which fails, in whole or in part; (2) in favor of one paying a consideration for a conveyance to another person, other than his wife or child.

A constructive trust is one which arises by implication of law, in case one obtains by fraud property to which another is entitled, he being regarded, for some purposes, as trustee for the latter.

The trustee may be discharged by a court of equity, and in such case, or if otherwise a vacancy in the office arises, the court may appoint a trustee.

The duties and powers of the trustee of an express trust are, in general, determined by the terms of the declaration of trust. He is liable for any negligence in the management of the trust property, and can make no profit from the trust other than the compensation allowed him by law.

The title of the trustee is transferable, but it passes subject

<sup>64</sup> Lloyd v. Passingham, 6 Barn. & C. 305, 1 Gray's Cas. 51; Whetstone v. Bury, 2 P. Wms. 146; Challis, Real Prop. 313.

to the rights of the cestui que trust, except to a purchaser for value without notice of the trust. The interest of the cestui que trust is also transferable, as if it were a legal estate.

A charitable trust is a trust created for the moral, mental, physical, or pecuniary benefit of the public, or a particular class of the public. In most jurisdictions, the particular purpose of the charity need not be named in the declaration of trust, if there is a trustee named with power to apply the property to charitable purposes.

By the cy pres doctrine, which prevails in a number of states, if the expressed purpose of a charitable gift thereafter becomes impracticable, owing to a change in the law or otherwise, a court of equity may apply the trust fund to a kindred purpose.

#### § 91. The nature of a trust.

The Statute of Uses, as previously stated, was decided not to apply to uses and confidences involving active duties on the part of the grantee, uses declared on a term of years, and uses upon a use.<sup>65</sup> These uses and confidences not executed by the statute were recognized by the court of chancery, either immediately after the passage of the statute, or at a later period,<sup>66</sup> as being still within its jurisdiction, and they have since been administered in equity upon the same equitable principles as were applied to uses before the statute, but with a more extensive application. Trusts are, generally speaking, the same as uses before the statute, but

<sup>65</sup> See ante, § 90.

The case of a use to the legal grantee, though not within the operation of the statute, is not a trust, since one cannot be a trustee for himself, but merely, as before stated, confers the beneficial interest on him.

<sup>66</sup> A use upon a use, though excluded by the courts of law from the operation of the statute by the decision in *Tyrrel's Case*, rendered but a few years after its passage, was, in the view of Prof. Ames, not recognized and enforced by chancery until the reign of Charles I.; the earliest reported instance of the support of a use upon a use being *Sambach v. Dalston*, Toth. 189. See article, *Green Bag*, 81.

the analogy may, if pushed too far, cause confusion, and it is important for the student to bear in mind that between uses as they have been recognized since the statute by courts of law, merely for the purpose of being executed, and uses not executed, and therefore recognized in equity under the name of "trusts," there is, in most respects, a merely superficial resemblance.

The owner of the beneficial interest or trust is known as the "*cestui que trust*," while the owner of the legal title is the "trustee." The interest of the *cestui que trust* is defined, in reference to quantum or duration, by the same measures of limitation as apply to legal estates, being in fee simple, fee tail, for life, or for years, and is generally referred to as an "equitable estate," of which the *cestui que trust* is quite frequently said to be "seised."<sup>67</sup>

— Trust rights recognized in equity only.

The rights of the *cestui que trust* are recognized in equity only, except as this may be changed by statutory provisions. Accordingly, he cannot enforce at law a liability against the trustee for breach of trust.<sup>68</sup> Nor can he set up

<sup>67</sup> See 1 Leake, 126; 1 Hayes, Conveyancing (5th Ed.) 93; Williams, Real Prop. (18th Ed.) 176; 1 Perry, Trusts, § 357; 12 Law Quart. Rev. 247.

<sup>68</sup> 1 Perry, Trusts, §§ 17, 843; 1 Ames, Cas. Trusts, 240, note; Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3,505; Norton v. Ray, 139 Mass. 230; Hearne v. Hearne, 55 Me. 445; Carnes v. Irving, 31 Vt. 604.

After the trust is closed, however, an action of assumpsit for money had and received will lie at the suit of the *cestui que trust* against the trustee to recover the balance due. Johnson v. Johnson, 120 Mass. 465; Howard v. Patterson, 72 Me. 57.

In a few early cases, an action in assumpsit against the trustee for breach of trust was allowed (1 Ames, Cas. Trusts, 235-240; 1 Perry, Trusts, § 17), and it has been in states where there was no chancery jurisdiction (Newhall v. Wheeler, 7 Mass. 198; Aycinena v. Peries, 6 Watts & S. [Pa.] 243).



his equitable title as a defense in an action of ejectment by the trustee,<sup>69</sup> except where equitable defenses to actions at law are allowed by statute, as is, at the present day, frequently the case.<sup>70</sup>

— Rights not strictly proprietary.

The *cestui que trust*, though spoken of as the owner of the land, and though, as regards his right of beneficial enjoyment, he is in effect the owner, has not, strictly speaking, proprietary rights therein. His claim is one *in personam* against the trustee, and not *in rem* against the whole world, and, in enforcing it, a court of equity does not attempt, in the absence of statutory provisions providing therefor, to act upon the *res*, but merely compels a performance of the trust by subpoena and decree against the trustee.<sup>71</sup> Accordingly, the trustee, as the owner of the trust property, and not the *cestui que trust*, is the proper party to bring suit against third persons in regard to the property, and this applies not only to legal actions, such as ejectment,<sup>72</sup> or actions for a

<sup>69</sup> *Reade v. Reade*, 3 Term R. 118; *Johnson v. Christian*, 128 U. S. 374; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531; *Commissioners of Somerville v. Johnson*, 36 N. J. Eq. 211; *Hooper v. Columbus & W. Ry. Co.*, 78 Ala. 213; *Moore v. Spellman*, 5 Denio (N. Y.) 225; *Beach v. Beach*, 14 Vt. 28, 39 Am. Dec. 204; 1 Ames, Cas. Trusts, 242. Contra, *Edes v. Herrick*, 61 N. H. 60; *Sawyer v. Town of Skowhegan*, 57 Me. 500.

<sup>70</sup> See 1 Ames, Cas. Trusts, 242, 243.

<sup>71</sup> See 1 Ames, Cas. Trusts, c. 2, § 2; Lewin, *Trusts*, Introduction; Williams, *Real Prop.* (18th Ed.) 177; 1 Hayes, *Conveyancing* (5th Ed.) 98; Pollock, *Contracts* (6th Ed.) 196.

<sup>72</sup> *Goodtitle v. Jones*, 7 Term R. 45; *Langdon v. Sherwood*, 124 U. S. 74; *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 713; *Fischer v. Esalaman*, 68 Ill. 78; *Paisley v. Holzshu*, 83 Md. 325; *Barrett v. Hinckley*, 124 Ill. 32; *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 530; *Kinney v. Dexter*, 31 Wis. 30. Cases cited 1 Ames, Cas. Trusts, 255.

A *cestui que trust* in possession may no doubt bring trespass for

tort relating to the land,<sup>73</sup> but also to proceedings in equity against third persons in regard to the property, which are properly brought by the trustee without joinder of the *cestui que trust*, unless the relations between the trustee and the *cestui que trust* are involved therein.<sup>74</sup>

On the same principle, in a suit in equity by a third person in regard to the trust property, it is sufficient to make the trustee a defendant without joining the *cestui que trust*, if the latter can be regarded as adequately represented by the trustee.<sup>75</sup> Likewise, the *cestui que trust* is barred of all rights in the trust property as against third persons, either at law or in equity, by the running of the statutory period of limitations against the trustee.<sup>76</sup>

injury to his possession, but this is based on his possession, and not on his equitable title. 1 Ames, Cas. Trusts, 251.

In Pennsylvania, where there is no court of chancery, and ejectment is regarded as an equivalent to some extent for a bill in equity, the *cestui que trust* may bring ejectment. *Peebles v. Reading*, 8 Serg. & R. (Pa.) 491; *McCullough v. Staver*, 119 Pa. St. 432. See, also, as to the effect of state statutes as changing the rule, *Merrill v. Dearing*, 47 Minn. 137; *Duffey v. Rafferty*, 15 Kan. 9; *Glover v. Stamps*, 73 Ga. 209, 54 Am. Rep. 870. But see *Brown v. Brown*, 96 Ga. 578. In North Carolina, the *cestui que trust* may bring ejectment, although there is no statutory authority therefor. *Condry v. Cheshire*, 88 N. C. 375; *Johnson v. Prairie*, 91 N. C. 159.

<sup>73</sup> 1 Ames, Cas. Trusts, 255, 256; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Rice v. Brown*, 77 Ill. 549; *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460; *Mordecai v. Parker*, 3 Dev. (N. C.) 425.

<sup>74</sup> 1 Ames, Cas. Trusts, 260, 261; *Carey v. Brown*, 92 U. S. 171; *Horsley v. Fawcett*, 11 Beav. 569; *Abell v. Brown*, 55 Md. 217; *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217; *In re Straut*, 126 N. Y. 201.

<sup>75</sup> 1 Ames, Cas. Trusts, 261; *Vetterlein v. Barnes*, 124 U. S. 169; *Beals v. Illinois, M. & T. R. Co.*, 133 U. S. 290; *Tucker v. Zimmerman*, 61 Ga. 599; *Jewett v. Tucker*, 139 Mass. 566; *Redin v. Branhan*, 43 Minn. 283. Contra, *Ebell v. Bursinger*, 70 Tex. 130; *Biron v. Scott*, 80 Wla. 206.

<sup>76</sup> 2 Perry, Trusts, §§ 858, 859; 1 Ames, Cas. Trusts, 271, note; *Lewellin v. Mackworth*, 2 Eq. Cas. Abr. 579; *Meeks v. Olpherts*, (220)

It is in accordance with the same principle, as well as with the general doctrine that equity acts *in personam*, and not *in rem*, that the *cestui que trust* may assert his rights against the trustee, regardless of whether the land is within the jurisdiction of the court; it being sufficient that the trustee is therein, so that he may be reached by subpoena.<sup>77</sup>

### § 92. Express trusts.

An express trust is one created by language intended to have that effect, such language being known as a "declaration of trust."<sup>78</sup>

A declaration of trust generally accompanies a transfer of the legal title by the person declaring the trust, the grantee being named as trustee. Such a conveyance is, however, unnecessary, and the owner of land may, without parting with the legal title, declare a trust in favor of another, and will thus himself become trustee for such other.<sup>79</sup>

—No technical language necessary.

No technical terms or expressions are necessary for the

100 U. S. 564; Chase v. Cartright, 53 Ark. 358, 22 Am. St. Rep. 207; Coleman v. Walker, 3 Metc. (Ky.) 65, 77 Am. Dec. 163; Bryan v. Weems, 29 Ala. 423, 65 Am. Dec. 407; Collins v. Loftus, 10 Leigh (Va.) 5, 34 Am. Dec. 735, note.

<sup>77</sup> 1 Ames, Cas. Trusts, 245; 1 Perry, Trusts, §§ 71, 72; 3 Pomerooy, Eq. Jur. § 1318. See Massie v. Watts, 6 Cranch (U. S.) 148; Burnley v. Stevenson, 24 Ohio St. 474; Cooley v. Scarlett, 38 Ill. 316; Vaughan v. Barclay, 6 Whart. (Pa.) 392; Lindley v. O'Reilly, 50 N. J. Law, 636; Newton v. Bronson, 13 N. Y. 587.

<sup>78</sup> The words "express," "implied," and "constructive" are used in connection with trusts in different senses by different text writers and judges. Messrs. Lewin and Perry, for instance, apply the term "implied trusts" to trusts created by language intended to have that effect, but not in terms stating that purpose, which are here considered as "express" trusts. The term "implied" trusts seems more properly to be used to describe all trusts not express, thus including both resulting and constructive trusts, they being "implied" by law.

<sup>79</sup> Lewin, Trusts (9th Ed.) 66; 1 Perry, Trusts, § 33; 1 Spence, Eq. Jur. 507.

creation of a trust, any language being sufficient for the purpose if the intention to create a trust clearly appear.<sup>80</sup>

A trust is created even by what are termed "precatory" words,—that is, words which in themselves do not imply an absolute command, but rather a request,—if such words appear, in the particular case, to be used in a mandatory, and not a precatory, sense. Accordingly, a trust has been, in some cases, held to arise from a testator's use of such words as "desire," "request," "wish," "entreat," "in confidence," or "in the belief that," as imposing an imperative obligation upon the donee to make a certain disposition of the gift, or of a part thereof.<sup>81</sup> No rule can be stated as to when words of this character will be regarded as mandatory, and so create a trust, but the tendency of the later cases is to so regard them only when the intent of the testator to that effect is clearly apparent, and the fact that the person to be benefited or the property to be given him is uncertain tends strongly to exclude the inference of a trust.<sup>82</sup>

A trust may also arise from words indicating a desire that the property be used for the maintenance of one's family, as

<sup>80</sup> *Estate of Smith*, 144 Pa. St. 428, 27 Am. St. Rep. 641; *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447; *Kintner v. Jones*, 122 Ind. 148; *Steinhardt v. Cunningham*, 130 N. Y. 292; *Cockrill v. Armstrong*, 31 Ark. 580; *Pownal v. Taylor*, 10 Leigh (Va.) 183, 84 Am. Dec. 725.

<sup>81</sup> 1 *Perry, Trusts*, §§ 112-116; *Harding v. Glyn*, 1 Atk. 469, *Ames' Cas.* 78; *Colton v. Colton*, 127 U. S. 300; *Handley v. Wrightson*, 60 Md. 198; *Major v. Herndon*, 78 Ky. 123; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487; *Harrisons v. Harrison's Adm'x*, 2 *Grat. (Va.)* 1, 44 Am. Dec. 365, and note; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544.

<sup>82</sup> 1 *Perry, Trusts* (5th Ed.) §§ 114, 115, and notes; *Underhill, Trusts* (Am. Ed.) 21, 25, et seq.; 2 *Pomeroy, Eq. Jur.* § 1015; 4 *Kent, Comm.* (14th Ed.) 305, notes (b), (s); note in *Harrisons v. Harrison's Adm'x*, 44 Am. Dec. 377 (2 *Grat. [Va.]* 1); notes to *Harding v. Glyn*, 2 *White & T. Lead. Cas. Eq.* 1859 et seq. And see the large collection of decisions in regard to particular phrases in *Ames, Cas. Trusts*, 85-106.

in the case of a devise of property to a testator's widow for the support of herself and testator's children; the question in such case, as in others, being whether the testator intended a command that the property be so appropriated, or merely used such expressions to indicate the motive of the gift.<sup>83</sup>

But while technical language is not necessary to create a trust, in order to limit an equitable estate in fee, the word "heirs" is, as before stated, necessary whenever it would be necessary to create a similar estate at law, though, on the other hand, the estate of the trustee is determined by the needs of the trust, independently of the use of particular words of limitation.<sup>84</sup>

— No consideration necessary.

A declaration of trust, which is otherwise valid, is not affected by the fact that it is voluntary; that is, made without any consideration.<sup>85</sup> The presence or absence of a consideration is, however, of controlling importance in case the trust is not completely created; that is, if there is a mere agreement to create a trust, or a mere manifestation of an intention so to do. In such case, equity will not enforce the trust in the absence of a consideration; while it will do so if there is a valuable consideration, and, according to some American decisions, even if there is a merely meritorious or good consideration.<sup>86</sup>

— Requirements of Statute of Frauds.

The Statute of Frauds (29 Car. II. c. 3, § 7 [A. D. 1677])

<sup>83</sup> 1 Perry, Trusts, § 117; 1 Ames, Cas. Trusts, 87 et seq.

<sup>84</sup> See ante, § 20.

<sup>85</sup> 1 Perry, Trusts, §§ 96, 98; 1 Ames, Cas. Trusts, 125; *Ellison v. Ellison*, 6 Ves. Jr. 656, 1 White & T. Lead. Cas. Eq. 382, and notes; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Padfield v. Padfield*, 68 Ill. 210, 72 Ill. 322; *Lane v. Ewing*, 31 Mo. 75, 77 Am. Dec. 632; *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 505.

<sup>86</sup> 1 Perry, Trusts, § 95 et seq.; *Underhill, Trusts* (Am. Ed.) 41 et seq.; 2 Pomeroy, Eq. Jur. §§ 996-999. See note to *Williamson v. Yager*, 34 Am. St. Rep. 189-224 (91 Ky. 282).

provides that all declarations or creations of trusts of lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party creating the trust, or by his last will in writing. Previous to the passage of this statute, a trust could be proven by parol evidence.<sup>87</sup> This section of the statute has been substantially adopted in a majority of the states of this country.<sup>88</sup> In a number of states, however, there is no such provision requiring a declaration of trust to be in writing, and in such states it has generally been decided that an oral trust of land is valid.<sup>89</sup>

It will be observed that the statute does not require that the trust be created or declared in writing, but merely that it shall be so manifested and proved, and consequently the writing is sufficient, though it be subsequent to the creation of the trust.<sup>90</sup> The same construction has even been placed upon statutory provisions which provide that the trust be "created or declared" by an instrument in writing.<sup>91</sup> Ac-

<sup>87</sup> 1 Perry, Trusts, § 75.

<sup>88</sup> 1 Ames, Cas. Trusts, 176; 1 Stimson's Am. St. Law, § 1710; 1 Perry, Trusts, § 75.

<sup>89</sup> 1 Ames, Cas. Trusts, 177; Harvey v. Gardner, 41 Ohio St. 642; Bank of United States v. Carrington, 7 Leigh (Va.) 576; Haywood v. Ensley, 8 Humph. (Tenn.) 460; Miller v. Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

<sup>90</sup> 1 Ames, Cas. Trusts, 178; 1 Perry, Trusts, § 79; Forster v. Hale, 3 Ves. 696; Gardner v. Rowe, 5 Russ. 258, affirming 3 Sim. & S. 846; 1 Ames, Trusts, 179; Second Unitarian Soc. v. Woodbury, 14 Me. 281; Safford v. Rantoul, 12 Pick. (Mass.) 238; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157; Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67; Lane v. Erwing, 31 Mo. 75, 77 Am. Dec. 636; McVay v. McVay, 43 N. J. Eq. 47.

<sup>91</sup> 2 Pomeroy, Eq. Jur. § 1006; Jenkins v. Eldredge, 3 Story, 294, Fed. Cas. No. 7,266; McClellan v. McClellan, 65 Me. 500; Urann v. Coates, 109 Mass. 581. As to the construction of statutes requiring the trust to be "created" or "created and declared" in writing. Prof. Ames says that a subsequent writing would seem to be insufficient; citing Richardson v. Woodbury, 43 Me. 206. Contra Gaylord v. City of Lafayette, 115 Ind. 423, 428. See 1 Ames, Cas. Trusts, 178.

cordingly, the writing to establish the trust may be one executed by one to whom the legal title has been previously conveyed, and its form is immaterial. Letters, receipts, memoranda, even an answer in chancery, if signed by the grantee of the property, and containing admissions of the trust, are sufficient for the purposes of the statutory requirements.<sup>92</sup>

— Testamentary trusts.

If a trust in land is sought to be created by will, it is necessary that the will be executed in accordance with the statutory provisions as to wills of land, in order that it may be admissible to prove the trust, and the fact that it complies with the requirements of the Statute of Frauds is not in itself sufficient, since an instrument which is to take effect only after the death of the maker derives its effect entirely from the statute in regard to wills.<sup>93</sup>

— Capacity of parties.

A trust may be created by any person who has power to make a transfer of land.<sup>94</sup> So any person who is capable of being the transferee of land may be a *cestui que trust*, as the state, a corporation authorized to hold land, a married woman, an infant, or even a person unborn.<sup>95</sup> An alien can-

<sup>92</sup> 1 Perry, Trusts, §§ 82, 84, 85; Hampton v. Spencer, 2 Vern. 288; McClellan v. McClellan, 65 Me. 500; Garnsey v. Gothard, 90 Cal. 603; Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67; Roberts' Appeal, 92 Pa. St. 407; Urann v. Coates, 109 Mass. 581.

<sup>93</sup> 1 Perry, Trusts, §§ 90-94; Addlington v. Cann, 3 Atk. 141; Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753; Schultz's Appeal, 80 Pa. St. 396; Chase v. Stockett, 72 Md. 235. As to the statutory requirements in regard to the execution of wills, see post, §§ 409-420.

<sup>94</sup> 1 Perry, Trusts, §§ 28-37. As to what persons are capable of transferring land, see post, §§ 501-505.

<sup>95</sup> 1 Perry, Trusts, §§ 60-66; 1 Ames, Cas. Trusts, 218; Collins v. Hoxie, 9 Paige (N. Y.) 81; Ashhurst v. Given, 5 Watts & S. (Pa.) 323.

country at least, there is no implication of a resulting trust upon a conveyance without any consideration.<sup>107</sup> Furthermore, it seems to be agreed that, admitting the possibility of a resulting trust to the grantor upon a voluntary conveyance, the declaration in the conveyance of a trust or use in favor of the grantee,<sup>108</sup> or the acknowledgment therein of the receipt of a consideration,<sup>109</sup> shows conclusively that no trust was intended to result.

Where land is conveyed or devised to a trustee for a particular purpose, as for the payment of debts, and such purpose does not exhaust the beneficial interest, such interest, so far as unexhausted, *prima facie* results to the donor or his heirs, and the rule is the same if the declaration of trust pur-

<sup>107</sup> Hill, *Trustees* (4th Am. Ed.) 170; 1 Sanders, *Uses & Trusts*, 365; 1 Leake, 134; 1 Perry, *Trusts*, § 162; *Dyer v. Dyer*, 1 White & T. Lead. Cas. Eq. 349; *Lloyd v. Spillet*, 2 Atk. 150, 1 Gray's Cas. 535; Williams, *Real Prop.* 163; *Young v. Peachy*, 2 Atk. 256; *Lovett v. Taylor*, 54 N. J. Eq. 311; *Palmer v. Sterling*, 41 Mich. 218; *Philbrook v. Delano*, 29 Me. 410; *Rogers v. Rogers*, 20 R. I. 400; *Moore v. Horsley*, 156 Ill. 36; *Groff v. Rohrer*, 35 Md. 327; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Stucky v. Stucky*, 30 N. J. Eq. 546; *Squire v. Harder*, 1 Paige (N. Y.) 494, 19 Am. Dec. 446; *Osborn v. Osborn*, 29 N. J. Eq. 385; *Bartlett v. Bartlett*, 14 Gray (Mass.) 277; *Timcomb v. Morrill*, 10 Allen (Mass.) 15; *Blodgett v. Hildreth*, 103 Mass. 484; *Gould v. Lynde*, 114 Mass. 366; *Miller v. Willson*, 15 Ohio, 108; *Stevenson v. Crapnell*, 114 Ill. 19.

<sup>108</sup> 1 Perry, *Trusts*, § 76; *Gould v. Lynde*, 114 Mass. 366; *Groff v. Rohrer*, 35 Md. 327; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641. And see *Myers v. Myers*, 167 Ill. 52.

<sup>109</sup> Hill, *Trustees* (4th Am. Ed.) 173; notes to *Dyer v. Dyer*, 1 White & T. Lead. Cas. Eq. 350; *Leman v. Whitley*, 4 Russ. 423; *Ohmer v. Boyer*, 89 Ala. 273; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Philbrook v. Delano*, 29 Me. 410; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Groff v. Rohrer*, 35 Md. 327; *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Graves v. Graves*, 29 N. H. 129; *Belden v. Seymour*, 8 Conn. 312, 21 Am. Dec. 661; *Blodgett v. Hildreth*, 103 Mass. 484.



ports to dispose of a part only of the beneficial interest.<sup>110</sup> Likewise, if the trust declared for any reason fails, as, for instance, when there is ambiguity in the description of the *cestui que trust*, or incapacity on his part to take, the beneficial interest will generally result to the donor or his heirs.<sup>111</sup>

— From payment of consideration.

Where the consideration for a conveyance is paid by a person other than the grantee named therein, a resulting trust will generally arise in favor of the person making such payment, it being presumed that one would not pay for property unless he were to be the person benefited by the purchase.<sup>112</sup>

<sup>110</sup> 1 Sanders, *Uses & Trusts*, 358; 1 Perry, *Trusts*, § 152; Underhill, *Trusts* (Am. Ed.) 148; Lewin, *Trusts* (9th Ed.) 153; Lloyd v. Spillet, 2 Atk. 150, 1 Gray's Cas. 535; Hopkins v. Grimshaw, 165 U. S. 342; Washington B. El. Ass'n v. Wood, 4 Mackey, D. C. 19, 54 Am. Rep. 251; Schlessinger v. Mallard, 70 Cal. 326; Loring v. Elliot, 16 Gray (Mass.) 568.

<sup>111</sup> 1 Perry, *Trusts*, §§ 157, 159, 160; Underhill, *Trusts* (Am. Ed.) 150; Ackroyd v. Smithson, 1 Brown, Ch. 508, 1 White & T. Lead. Cas. Eq. 1171, notes; Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Olliffe v. Wells, 130 Mass. 221; Jenkins v. Jenkins University, 17 Wash. 160, 173; Rizer v. Perry, 58 Md. 112; Roy v. Monroe, 47 N. J. Eq. 356; Hawley v. James, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; Phillips v. Ferguson, 85 Va. 509, 17 Am. St. Rep. 78.

<sup>112</sup> 1 Perry, *Trusts*, § 126; Lewin, *Trusts*, 171; Dyer v. Dyer, 2 Cox, 92, 1 White & T. Lead. Cas. Eq. 314, and notes; Lloyd v. Spillet, 2 Atk. 150, 1 Gray's Cas. 535; Olcott v. Bynum, 17 Wall. (U. S.) 44; Powell v. Monson & B. Mfg. Co., 3 Mason, 362, Fed. Cas. No. 11,356; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Champlin v. Champlin, 136 Ill. 309, 29 Am. St. Rep. 323; Sullivan v. McLennan, 2 Iowa, 437, 65 Am. Dec. 780; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; McGowan v. McGowan, 14 Gray (Mass.) 119, 74 Am. Dec. 668; Paul v. Chouteau, 14 Mo. 580; Williams v. Hollingsworth, 1 Strob. Eq. (S. C.) 103, 47 Am. Dec. 527; Dudley v. Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; Nell v. Keese, 5 Tex. 23, 51 Am. Dec. 746, and note; Parker v. Logan, 82 Va. 376; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Depeyster v. Gould,

Since the trust thus raised is within the exception in the Statute of Frauds as to trusts arising by operation of law, the payment of the consideration by a person other than the legal grantee may be proven by parol evidence,<sup>113</sup> and such evidence is admissible for the purpose, even though the conveyance recites that the consideration was paid by the grantee.<sup>114</sup> Nor does the fact that there was an agreement between the parties as to the title to the property, identical with that implied by the law, cause the trust to be an express, rather than a resulting, trust, and thus exclude parol evidence in regard thereto.<sup>115</sup> Such a trust being based on the presumed intention of the parties, it may be shown that the intention was otherwise, and that the grantee of the legal title was also to take the beneficial interest.<sup>116</sup>

3 N. J. Eq. 474, 29 Am. Dec. 723; *Summers v. Moore*, 113 N. C. 394; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

<sup>113</sup> 1 Perry, *Trusts*, §§ 137, 138; *Lloyd v. Spillet*, 3 Atk. 150, 1 Gray's Cas. 535; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Strong v. Messenger*, 148 Ill. 431; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 421; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Dryden v. Hanway*, 31 Md. 254; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Fritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *McGinity v. McGinity*, 63 Pa. St. 38; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Parker v. Logan*, 82 Va. 376; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

<sup>114</sup> 1 Perry, *Trusts*, § 137; 2 Pomeroy, *Eq. Jur.* § 1040; *Lewin, Trusts* (9th Ed.) 176; *Millard v. Hathaway*, 27 Cal. 119; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Cooper v. Skeel*, 14 Iowa, 578; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Neil v. Keese*, 5 Tex. 23, 51 Am. Dec. 746, note; *Page v. Page*, 8 N. H. 187.

<sup>115</sup> *Smithsonian Institution v. Meech*, 169 U. S. 389; *Corr's Appeal*, 62 Conn. 403; *Cotton v. Wood*, 25 Iowa, 48; *Robinson v. Leflore*, 59 Miss. 148.

<sup>116</sup> 1 Perry, *Trusts*, §§ 139, 140; *Bayles v. Baxter*, 23 Cal. 576; *Walsh v. McBride*, 72 Md. 45; *Acker v. Priest*, 92 Iowa, 610; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Strimpfer v. Roberts*, 18 Pa. (230)

The payment of the consideration must be made at or before the time of the conveyance, a payment thereafter by a person other than the legal grantee not being sufficient to raise a trust in his favor.<sup>117</sup> The payment need not be in actual cash, it being sufficient if the person for whose benefit a resulting trust is sought to be raised becomes liable as purchaser.<sup>118</sup>

Payment of the purchase price by a third person will not raise a trust in his favor if it is made as a loan to the legal grantee, since in that case the latter, and not the former, really makes the payment.<sup>119</sup> On the other hand, if the purchase price is paid by the legal grantee, but merely in behalf of a third person, the actual purchaser, and as a loan to the latter, the legal title being taken by the lender as security, a trust results in favor of such third person, and the grantee has at most merely a lien for the sum advanced by him.<sup>120</sup>

If the purchase price is paid by two or more persons, and the land is conveyed to one of them, or to a third person, a

St. 232, 57 Am. Dec. 606; *Smith v. Strahan*, 16 Tex. 214, 67 Am. Dec. 622; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 337.

<sup>117</sup> 1 *Perry, Trusts*, § 133; *Dyer v. Dyer*, 1 *White & T. Lead. Cas. Eq.* 337; *Ducie v. Ford*, 138 U. S. 587; *Whaley v. Whaley*, 71 Ala. 159; *Buck v. Swazey*, 35 Me. 41, 56 Am. Dec. 631; 1 *Harv. Law Rev.* 185; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; *Francetown v. Deering*, 41 N. H. 438; *Richardson v. Day*, 20 S. C. 412; *Parker v. Coop*, 60 Tex. 111; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Beecher v. Wilson*, 84 Va. 813, 10 Am. St. Rep. 883.

<sup>118</sup> *Bibb v. Hunter*, 79 Ala. 351; *McGovern v. Knox*, 21 Ohio St. 547, 3 Am. Rep. 80; *Williams v. Wager*, 64 Vt. 326; *Gilchrist v. Brown*, 165 Pa. St. 275.

<sup>119</sup> 1 *Perry, Trusts*, § 133; *Whaley v. Whaley*, 71 Ala. 159; *Stewart v. Fellows*, 128 Ill. 480; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Torrey v. Cameron*, 73 Tex. 583; *McDevitt v. Frantz*, 85 Va. 922.

<sup>120</sup> 1 *Perry, Trusts*, § 133; *Rothwell v. Dewees*, 2 Black (U. S.) 613; *Jordan v. Garner*, 101 Ala. 411; *Ward v. Matthews*, 73 Cal. 13; *Low v. Graff*, 80 Ill. 360; *Dryden v. Hanway*, 31 Md. 254, 100 Am. Dec. 61; *Kendall v. Mann*, 11 Allen (Mass.) 15; *Hall v. Congdon*, 56 N. H. 273.

trust results to each in proportion to the share advanced by him,<sup>121</sup> though this occurs, according to the weight of authority, only when the payment is distinctly made for a specific part.<sup>122</sup>

When the legal title is conveyed to the wife of the person paying the purchase price, the usual presumption of intent that the person paying the money should have the beneficial interest does not apply, the presumption being rather that the transaction was intended as a gift or advancement to the wife by the husband.<sup>123</sup> And likewise in the case of payment by a parent, or by one standing *in loco parentis*, for property conveyed to the child, the presumption is against a resulting trust.<sup>124</sup> It may be shown, however, that no gift or advancement to the wife or child was intended, and, if

<sup>121</sup> *Wray v. Steele*, 2 Ves. & B. 388; *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 347, Fed. Cas. No. 11,356; *Robarts v. Haley*, 65 Cal. 397; *Crawford v. Manson*, 82 Ga. 118; *Strong v. Messinger*, 148 Ill. 431; *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Dow v. Jewell*, 13 N. H. 340, 45 Am. Dec. 371; *McGovern v. Knox*, 21 Ohio St. 547, 8 Am. Rep. 80; *Wallace v. Duffield*, 2 Serg. & R. (Pa.) 521, 7 Am. Dec. 660; *Barnett v. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98.

<sup>122</sup> 1 *Perry, Trusts*, § 132; *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Van Buskirk v. Van Buskirk*, 148 Ill. 9; *Bailey v. Hemenway*, 147 Mass. 326; *O'Donnell v. White*, 18 R. I. 659; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Sayre v. Townsends*, 15 Wend. (N. Y.) 650.

<sup>123</sup> 1 *Perry, Trusts*, § 143; *Smithsonian Institution v. Meech*, 169 U. S. 398; *Corr's Appeal*, 62 Conn. 403; *Goelz v. Goelz*, 157 Ill. 33; *Hagan v. Powers*, 103 Iowa, 593; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 36, 79 Am. Dec. 673; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Gilliland v. Gilliland*, 96 Mo. 522; *Dickinson v. Davis*, 43 N. H. 647, 80 Am. Dec. 202; *Bowser v. Bowser*, 82 Pa. St. 57; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837.

<sup>124</sup> *Lewin, Trusts*, 179; *Dyer v. Dyer*, 2 Cox, 92, 1 White & T. Lead. Cas. Eq. 314, and notes; *Watson v. Murray*, 54 Ark. 499; *Culp v. Price*, 107 Iowa, 133; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Wheeler v. Kidder*, 105 Pa. St. 270.

this is shown, a trust will result in favor of the husband or parent, as in other cases.<sup>125</sup>

By the statutes of some states, including New York, a trust does not result to the person paying the consideration unless the absolute conveyance to another than himself is made without his consent.<sup>126</sup> An exception is, however, made by these statutes in favor of the creditors of the person paying the consideration, they being allowed to enforce a resulting trust so far as may be necessary for the satisfaction of their claims.<sup>127</sup>

### § 94. Constructive trusts.

Trusts which arise, in the view of a court of equity, in favor of persons equitably entitled to property wrongfully obtained or withheld by another, are not "trusts" at all, in the proper sense of the word, as no relation of confidence exists, and the person equitably entitled seeks, not to secure an equitable estate, but merely to enforce an equitable right. Since, however, courts of equity in such a case frequently apply the same remedy as in the case of a fraudulent breach of trust by a trustee, the custom has become almost universal of assuming or implying the existence of a trust, for

<sup>125</sup> *Finch v. Finch*, 15 Ves. 43; *Smithsonian Institution v. Meech*, 169 U. S. 398; *Corr's Appeal*, 62 Conn. 403; *Goelz v. Goelz*, 157 Ill. 33; *Watson v. Murray*, 54 Ark. 499; *Hagan v. Powers*, 103 Iowa, 593; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Hall v. Hall*, 107 Mo. 101; *Wallace v. Bowen*, 28 Vt. 638; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

<sup>126</sup> 1 *Stimson's Am. St. Law*, § 1706; 1 *Perry, Trusts*, § 142. See *Harlan v. Ellike*, 100 Ky. 642; *Fisher v. Fobes*, 22 Mich. 454; *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97; *Reitz v. Reitz*, 80 N. Y. 538; *Campbell v. Campbell*, 70 Wis. 311.

<sup>127</sup> 1 *Stimson's Am. St. Law*, § 1706. See *Fairbairn v. Middlemiss*, 47 Mich. 372; *McCartney v. Bostwick*, 32 N. Y. 53; *Allen v. McRae*, 91 Wis. 224.

the purpose of giving relief to the person defrauded, a trust so implied being generally known as a "constructive trust."<sup>120</sup> In view of the remedial, rather than substantive, nature of these trusts, a consideration of the circumstances which will give rise thereto involves chiefly a discussion of various classes of fraudulent conduct, against which equity will relieve, a matter outside of the scope of this work, and a few, merely, of the cases in which this principle of constructive trusts is applied will be referred to.

If one is induced by misrepresentation or oppression to convey land to another, the latter may be regarded as a constructive trustee for the grantor, and will be compelled to make a reconveyance and account for any receipts from the property.<sup>120</sup>

So, if one is prevented by the fraud or improper persuasion of his expectant heir from making a testamentary provision in favor of another, the heir, on acquiring the land by descent, will be regarded as a trustee for such other;<sup>120</sup> and if one procures a devise by promising the testator to give the beneficial interest in the whole or a part of the property to a third person, he will be regarded as holding in trust for such person.<sup>121</sup>

In the case of a conveyance by a person to another stand-

<sup>120</sup> 1 Perry, Trusts, § 166; 1 Leake, 247; 2 Pomeroy, Eq. Jur. § 1044; 2 Spence, Eq. Jur. 3; Rolfe v. Gregory, 4 De Gex, J. & S. 576.

<sup>120</sup> 1 Perry, Trusts, § 171; 2 Pomeroy, Eq. Jur. § 1053; Moore v. Crawford, 130 U. S. 122; Huxley v. Rice, 40 Mich. 73.

<sup>120</sup> Dyer v. Dyer, 1 White & T. Lead. Cas. Eq. 352; Mestaer v. Gillespie, 11 Ves. 638; Jenkins v. Eldredge, 3 Story, 181, Fed. Cas. No. 7,266; Williams v. Fitch, 18 N. Y. 546.

<sup>121</sup> Dowd v. Tucker, 41 Conn. 197; Olliffe v. Wells, 130 Mass. 221; Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. Rep. 245; Ragsdale v. Ragsdale, 68 Miss. 92, 24 Am. St. Rep. 256; O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Hoge v. Hoge, 1 Watts (Pa.) 163, 26 Am. Dec. 52.

ing in a confidential relation to him, as by a *cestui que trust* to a trustee, ward to his guardian, client to attorney, principal to agent, the transaction will be severely scrutinized, and, if there appear the slightest circumstances of suspicion, the grantee may be regarded as a trustee for the grantor as regards the property so conveyed.<sup>182</sup>

In England and one or two states, it is apparently the law that the mere repudiation of a verbal promise by the grantee of land, made previous to the conveyance, to hold it on a certain trust, constitutes such fraud as to render him a constructive trustee.<sup>183</sup> This, however, seems to involve a direct violation of the provision of the Statute of Frauds requiring an express trust to be proven by writing, and to render such statute practically nugatory, and the decided weight of authority in this country is adverse to such a view, a fraudulent purpose at the time of procuring the conveyance and making the promise being regarded as necessary in order to create such a trust.<sup>184</sup>

### § 95. Active and passive trusts.

A trust which involves some active duty on the part of the trustee, such as to care for the land, to pay taxes, to collect the income therefrom, to make a sale, mortgage, or con-

<sup>182</sup> 1 Perry, Trusts, §§ 194-210; 2 Pomeroy, Eq. Jur. § 1052; Fox v. Mackreth, 1 White & T. Lead. Cas. Eq. 188, and notes.

<sup>183</sup> Haigh v. Kaye, L. J. 41 Ch. 567; Booth v. Turle, L. R. 16 Eq. 182; Davies v. Otty, 35 Beav. 208; Giffen v. Taylor, 139 Ind. 573; Myers v. Jackson, 135 Ind. 136; Shields v. Whitaker, 82 N. C. 516.

<sup>184</sup> 2 Pomeroy, Eq. Jur. § 1056; Browne, St. Frauds, § 94; Brock v. Brock, 90 Ala. 86; Lovett v. Taylor, 54 N. J. Eq. 311; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242; Brown v. Brown, 66 Conn. 498; Davis v. Stambaugh, 163 Ill. 557; McClain v. McClain, 57 Iowa, 167; Tatge v. Tatge, 34 Minn. 272; Thomas v. Churchill, 48 Neb. 266; Wood v. Rabe, 96 N. Y. 426, 48 Am. Rep. 640; Shaffner v. Shaffner, 145 Pa. St. 163; Rasdall's Adm'rs v. Rasdall, 9 Wis. 279; Bonham v. Craig, 80 N. C. 224; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189.

veyance thereof, is known as an "active" or "special" trust, in contradistinction to one whereby the trustee is merely the depositary of the legal title, with no duties except to make a conveyance when called upon by the *cestui que trust*, and to defend the legal title, or to allow his name to be used for the purpose; such a trust being termed a "simple," "passive," "bare," "naked," or "dry" trust.<sup>135</sup> A trust such as we have described above under the names "resulting" and "constructive" trusts cannot, it would seem, be other than a passive trust, and consequently the distinction here referred to may be considered as applicable to express trusts alone.

Passive or simple trusts are not common in this country, and in some states it is provided by statute that the legal title shall vest in the *cestui que trust*.<sup>136</sup> In New York, and other states adopting its legislative policy in this regard, no passive trust in land can be created, and active trusts are allowed only for the following purposes:<sup>137</sup> (1) To sell real property for the benefit of creditors; (2) to sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of real property, and apply them to the use of any person during the life of that person, or for any shorter term; or (4) to receive such rents and profits and to accumu-

<sup>135</sup> 1 Perry, Trusts, c. 17; Lewin, Trusts, Introduction, and chapter 2; 2 Pomeroy, Eq. Jur. § 991 et seq.

Where the Statute of Uses is in force, a passive or simple trust in real property must be created by means of a limitation of a use upon a use, since otherwise it will not be a passive trust, but a passive use, and as such be executed by the statute. See ante, § 87.

<sup>136</sup> See 2 Pomeroy, Eq. Jur. §§ 1003, 1004; 1 Dembitz, Land Titles, § 20.

<sup>137</sup> Chaplin, Exp. Trusts, c. 7; 1 Stimson's Am. St. Law, §§ 1701-1702.



late them for the purposes and within the limits prescribed by law. The effect of such prohibition of passive trusts is to vest the legal title in the beneficiary in case of an attempt to create such a trust, and so its effect is similar in that respect to that of the Statute of Uses.<sup>128</sup> Certain classes of attempted trusts that are invalid as trusts because not of a kind specified in the statute are, however, by express provision of the statute, upheld as "powers in trust" or "charges" on land.<sup>129</sup>

### § 96. Executed and executory trusts.

Express trusts are sometimes classified as "executed" and "executory" trusts. Executed trusts are those which have been explicitly and fully declared, the trustee thereunder having merely to carry out the duties imposed on him by the instrument declaring the trust; while an executory trust is one the general outline only of which is stated, the actual limitations of the equitable interests to be created being left to the trustee, or to the court, to be determined according to the apparent intention of the creator of the trust.<sup>130</sup> Executory trusts are much less usual in this

<sup>128</sup> Chaplin, *Exp. Trusts*, § 518; 2 Pomeroy, *Eq. Jur.* § 1004.

<sup>129</sup> Chaplin, *Exp. Trusts*, §§ 517, 519; 1 Stimson's *Am. St. Law*, § 1703.

<sup>130</sup> 1 Perry, *Trusts*, § 359; 2 Pomeroy, *Eq. Jur.* § 1000; *Glenorchy v. Bosville*, *cas. temp. Talbot*, 3, 1 *White & T. Lead. Cas. Eq.* 1, and notes; *Egerton v. Brownlow*, 4 *H. L. Cas.* 210; *Neves v. Scott*, 9 *How. (U. S.)* 196; *Nicoll v. Ogden*, 29 *Ill.* 323, 81 *Am. Dec.* 311; *Cushing v. Blake*, 30 *N. J. Eq.* 639; *Dennison v. Goehring*, 7 *Pa. St.* 175, 47 *Am. Dec.* 505.

The term "executed," used in connection with a trust, must be carefully distinguished from the same word used in connection with a use, to describe the effect of the Statute of Uses. A use not executed by the statute may be, and generally is, an executed trust.

In some cases, the expressions "executed" and "executory" are used to distinguish trusts the declaration of which is complete

country than in England, but they are not unknown here. They are of most frequent occurrence in the case of articles of agreement made upon the occasion of a marriage, and in the case of trusts declared by will. In such cases, the property may be given to trustees with directions of the most general character as to the disposition of the property, as that they shall settle it "in strict settlement," or that it shall be "entailed," or that they shall make such a settlement of the property as will best insure its continuance to a certain person and his children, or they are directed to settle the property upon two persons named, and their issue, in the event of their marriage.<sup>141</sup>

In the case of an executory trust created by marriage articles, it has frequently been decided that the purpose and object of such articles are to be considered as raising a presumption that a provision for the issue of the marriage is intended, which neither of the parents shall be in a position to defeat, and the language of the articles will be construed accordingly in framing the limitations of the estates to be created thereunder, while in the case of an executory trust created by a will no such presumption of intent arises.<sup>142</sup>

and which are therefore valid without any consideration, from those which are not completely declared, and which are therefore invalid if not supported by a consideration. See *Padfield v. Padfield*, 72 Ill. 322; *Gaylord v. City of Lafayette*, 115 Ind. 429. Such use of the terms seems unnecessary, and is almost sure to produce confusion.

<sup>141</sup> Executory trusts "are often expressed in compendious terms by way of instructions for the limitations directed to be made, without setting out the limitations at length, as by directing or agreeing that property shall be settled 'in strict settlement,' 'entailed,' settled 'with usual or proper powers,' or the like; in which cases the construction consists in developing the limitations involved in such expressions in the form best suited to carry out the general intention of the trust." 1 Leake. 245.

<sup>142</sup> 1 Perry, Trusts, § 360; *Glenorchy v. Bosville*. 1 White & T. (238)

The chief practical distinction between executory and executed trusts lies in the fact that in the case of the former the intention of the creator of the trust will be sought for and carried out, and technical words which may be used in the declaration of trust will not be taken in their technical legal sense, unless this will accord with such intention; while, on the other hand, in the case of an executed trust, such words will be given the same effect as if they occurred in connection with the creation of a legal estate, irrespective of the question of intention.<sup>143</sup> The chief occasion for the application of this distinction has been in connection with the Rule in Shelley's Case, hereafter discussed,<sup>144</sup> which has been held to be strictly applicable to executed, but not to executory, trusts.<sup>145</sup>

### § 97. Duties and powers of trustees.

The duties of a trustee, if the trust is passive, are, as stated above, merely to transfer the legal title as directed by the *cestui que trust*, and to defend it or allow the use of his name for its defense. The *cestui que trust* is entitled to the possession and to the absolute control.<sup>146</sup> In the case of an active trust, the trustee has various powers in the conduct of the trust, either expressly given to him, or implied from the nature of the duties imposed on him. Thus, a

Lead. Cas. Eq. 47; *Blackburn v. Stables*, 2 Ves. & B. 369; *Cushing v. Blake*, 30 N. J. Eq. 639.

<sup>143</sup> 1 Perry, Trusts, § 357; *Wright v. Pearson*, 1 Eden, 119; *Merrill v. Preston*, 135 Mass. 451; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 639.

<sup>144</sup> See post, §§ 130-133.

<sup>145</sup> 4 Kent, Comm. 218; 1 Perry, Trusts, § 359; *Austen v. Taylor*, 1 Eden, 367; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Edmondson v. Dyson*, 2 Kelly (Ala.) 307; *Loving v. Hunter*, 8 Yerg. (Tenn.) 4; *Tallman v. Wood*, 26 Wend. (N. Y.) 89.

<sup>146</sup> 1 Perry, Trusts, § 520; *Campbell v. Prestons*, 22 Grat. (Va.) 396; *Wade v. Powell*, 20 Ga. 645.

trustee may generally make necessary repairs, and may make leases for reasonable periods. He may likewise be given, either in express language or by implication, the power to sell land, and frequently there are express directions to this effect, as there may be to invest trust money in land.<sup>147</sup> If the trust involves active duties on the part of the trustee, the question of the right of the *cestui que trust* to the possession of the property is determined primarily by the intention of the creator of the trust, as shown by its terms and purposes, or the nature of the subject-matter; but the court may also consider, in this connection, the possibility of loss to others interested by giving possession to one of the beneficiaries.<sup>148</sup> While the trustee is bound to account to the *cestui que trust* for the net proceeds of the property, he may deduct therefrom the expenses necessarily involved in the maintenance and protection of the trust property, and in the execution of the trust.<sup>149</sup>

In England, a trustee is denied compensation for his time and services except in certain special cases, but a different rule prevails in most of the states of this country, quite frequently by statutory provision, and he is allowed compensation, the amount of which is determined in different ways in different jurisdictions, it being sometimes a fixed percentage on the amount of the trust property or the proceeds thereof, and sometimes it is adjusted on equitable principles

<sup>147</sup> Lewin, Trusts, cc. 23, 24; 2 Perry, Trusts, cc. 16, 26. Express powers of sale and of leasing are hereafter considered in connection with the general subject of "powers" to create estates in land. See post, c. 10.

<sup>148</sup> Lewin, Trusts, 758; 1 Perry, Trusts, § 329; Tidd v. Lister 5 Madd. 429; Cooper v. Cooper, 36 N. J. Eq. 121; Wickham v. Berry 55 Pa. St. 70; Cox v. Williams, 5 Jones. Eq. (N. C.) 150.

<sup>149</sup> 1 Perry, Trusts, §§ 910-913; Flint, Trusts, §§ 338, 339; King v. Cushman, 41 Ill. 31, 39 Am. Dec. 366; Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 203.

with reference to the amount of labor and time consumed, or the profits resulting from the trustee's services.<sup>150</sup>

Apart from the compensation allowed him, as just stated, for his time and services, a trustee is not allowed to make any profit from the trust, and accordingly, if he use the trust property to further any purpose of his own, he is not only liable for any resulting losses, but must also account to the *cestui que trust* for any profits which may accrue from such use of the property.<sup>151</sup> The trustee is bound to exercise the same care in the management of the trust property as a man of ordinary prudence may be expected to show in the care of his own property, and he is liable to the *cestui que trust* for any losses caused by his failure to exercise such care.<sup>152</sup>

In the case of joint trustees, one is not liable for the default or negligence of a co-trustee, unless by his negligence or connivance he contributed thereto.<sup>153</sup>

### § 98. Transfer of equitable interest.

The *cestui que trust* may convey his equitable interest,

<sup>150</sup> 1 Perry, Trusts, c. 31; note to Gibson's Case, 17 Am. Dec. 257 (1 Bland, Ch. [Md.] 138).

<sup>151</sup> 1 Perry, Trusts, §§ 427, 429, 432, 454, 538; notes to Keech v. Sandford, 1 White & T. Lead. Cas. Eq. 43; Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715; Green v. Winter, 1 Johns. Ch. (N. Y.) 27, 7 Am. Dec. 475; Chorpenning's Appeal, 32 Pa. St. 315, 72 Am. Dec. 789; Myers v. Myers, 2 McCord, Eq. (S. C.) 214, 16 Am. Dec. 648.

<sup>152</sup> 1 Perry, Trusts, §§ 441, 843, 845; Barney v. Saunders, 16 How. (U. S.) 533; Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389; State v. Meagher, 44 Mo. 356, 100 Am. Dec. 298; Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534; Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Hutchinson v. Lord, 1 Wis. 286, 60 Am. Dec. 321.

<sup>153</sup> Townley v. Sherborne, 2 White & T. Lead. Cas. Eq. 1738, and notes; 1 Perry, Trusts, §§ 415-419; Monell v. Monell, 5 Johns. Ch. 283, 9 Am. Dec. 298; Stowe v. Bowen, 99 Mass. 194; Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576; Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Fesmire's Estate, 134 Pa. St. 67, 19 Am. St. Rep. 676.

except in so far as his power in this respect may be restrained by the purpose of the trust or valid stipulations against alienation in the instrument creating the trust.<sup>154</sup> In New York and a few other states there are statutory provisions precluding an assignment of his interest by the beneficiary under certain classes of trusts, and providing for the termination of the trust upon such assignment.<sup>155</sup> The *cestui que trust* may also devise his interest, with the forms required by statute in making a will,<sup>156</sup> and on his death intestate it passes to his heirs in the same course of descent as a legal estate.<sup>157</sup>

#### § 99. Transfer of legal estate.

A trustee may devise the legal estate, and in case of his death intestate it will pass to his heir or heirs.<sup>158</sup> In a few states, the statute provides that, on the death of the trustee, the trust shall vest in the court, which shall appoint new trustees to carry on the trust.<sup>159</sup> The trustee may convey the legal title to a third person, even though this involves a breach of trust on his part, since he is, in the view, at least, of courts of law, the owner of the property.<sup>160</sup> The rights of the *cestui que trust* are, how-

<sup>154</sup> 1 Perry, Trusts, 386a; Lewin, Trusts (9th Ed.) 778; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Dibrell v. Carlisle, 51 Miss. 785; Henson v. Wright, 88 Tenn. 501.

<sup>155</sup> 1 Stimson's Am. St. Law, § 1720; Chaplin, Exp. Trusts, c. 9.

<sup>156</sup> 1 Jarman, Wills, 48, 50.

<sup>157</sup> Lewin, Trusts, 937; Williams, Real Prop. 166; Pierson v. Armstrong, 1 Iowa, 282, 63 Am. Dec. 440; Avery v. Dufrees, 9 Ohio, 145; Nicholson v. Halsey, 1 Johns. Ch. (N. Y.) 417.

<sup>158</sup> 1 Perry, Trusts, §§ 334-340; Lewin, Trusts, 238; 1 Ames, Trusts, 345; Druid P. H. Co. v. Oettinger, 53 Md. 46; Zabriskie v. Morris & E. R. Co., 33 N. J. Eq. 22; Jackson v. Delancy, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; Gill's Heirs v. Logan's Heirs, 11 B. Mon. (Ky.) 231. As to when the legal estate will pass by general words of devise in the trustee's will, see 1 Ames, Trusts, 316.

<sup>159</sup> 1 Perry, Trusts, § 341.

<sup>160</sup> Lewin, Trusts, 237; 1 Perry, Trusts, § 321; Bank of United (242)

ever, as a general rule, entirely unaffected by any changes in the legal title, whether by descent, devise, or conveyance, and persons claiming under the trustee, except those to whom he conveys the land in the course of the execution of the trust, will take it subject to the trust. An exception to this rule exists, however, in favor of one who pays a valuable consideration for the property without notice of the trust, and he acquires the property discharged therefrom,<sup>161</sup> as does one who, with notice of the trust, purchases the property from an innocent purchaser for value, unless he be the trustee who committed the breach of trust.<sup>162</sup> In order that one be able to claim the property free from the trust as a purchaser for value, without notice, he must have paid the consideration before receiving notice;<sup>163</sup> but even if he did pay the consideration before notice, he will, it seems, take subject to the trust if he received notice thereof before the execution of the conveyance, since he might have refused the conveyance and demanded a return of the money.<sup>164</sup>

In the case of a sale and transfer of the property by the trustee in the course of the execution of the trust, a rule formerly prevailed that the purchaser was generally bound to see that the purchase money paid by him was properly applied by the trustee. The rule was never regarded with

*States v. Benning*, 4 Cranch, C. C. 81, Fed. Cas. No. 908; *Prather v. McDowell*, 8 Bush (Ky.) 46; *Dawson v. Hayden*, 67 Ill. 52.

<sup>161</sup> 1 Perry, Trusts, §§ 217-223; 1 Ames, Trusts, 286; *Pomeroy*, Eq. Jur. §§ 730, 1048; *Lewin*, Trusts, 260.

<sup>162</sup> 1 Ames, Trusts, 286, 287; 1 Perry, Trusts, § 222. See post, § 484.

<sup>163</sup> 1 Perry, Trusts, § 221; 1 Ames, Trusts, 287; *Tourville v. Naish*, 3 P. Wms. 307; *Wormley v. Wormley*, 8 Wheat. (U. S.) 449; *Keys v. Test*, 33 Ill. 316; *Blanchard v. Tyler*, 12 Mich. 339; *Patten v. Moore*, 32 N. H. 382.

<sup>164</sup> 1 Perry, Trusts, § 221; 1 Ames, Trusts, 288; *Wigg v. Wigg*, 1 Atk. 332.

favor in this country, and, even when not expressly abolished by statute, may be regarded at the present day as practically nonexistent; the purchaser being so liable only when the circumstances were such as affect him with notice of a possible misapplication by the trustee.<sup>166</sup>

Upon the death of one of two or more joint trustees, the legal estate will, in most jurisdictions, vest in the survivor or survivors.<sup>167</sup>

### § 100. Appointment and substitution of trustees.

It is a well-settled rule that equity will not permit a trust to fail for want of a trustee, and consequently, if a trustee is not named in the declaration of trust, or the person named dies, or the office in any other way becomes vacant, the court will appoint a person to act as trustee, and, if necessary, require the holder of the legal title, whether a former trustee, or his heir, or the heir of the creator of the trust, to convey the legal title to the trustee so appointed.<sup>167</sup>

One named as trustee in an express declaration of trust, if he has in no way indicated an acceptance of the office, may refuse to accept it, and such disclaimer will relate back and prevent the vesting in him of the legal title.<sup>168</sup>

<sup>166</sup> 2 Perry, Trusts, §§ 790, note, 791-808; 1 Ames, Trusts, 369; Elliot v. Merryman, 1 White & T. Lead. Cas. Eq. 109, notes; Claiborne v. Holland, 88 Va. 1046. For statutory provisions relieving the purchaser of liability, see 1 Stimson's Am. St. Law, § 1723.

<sup>167</sup> 1 Perry, Trusts, § 343; 1 Ames, Trusts, 346; Peter v. Beverly, 10 Pet. (U. S.) 532; Golder v. Bressler, 105 Ill. 419; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Parsons v. Boyd, 20 Ala. 118; Gray v. Lynch, 8 Gill (Md.) 423. In other words, co-trustees are generally regarded as joint tenants, rather than tenants in common. See post, § 162.

<sup>168</sup> 1 Perry, Trusts, §§ 38, 45, 240; Lewin, Trusts, c. 28; 1 Ames, Trusts, 230.

<sup>169</sup> 1 Perry, Trusts, §§ 259, 268; Robinson v. Pett, 3 P. Wms. 251;



The effect of such disclaimer is to place the parties in the same situation as if he had not been named in the first place, and consequently, if there are other trustees who do not disclaim, they may act as trustees without him, while, if there are no others named, the legal title will, if the trust was created by devise, pass to the heirs of the testator, and the court will appoint a trustee.<sup>169</sup>

If one who receives the legal title as heir or devisee of the previous holder thereof, as heretofore explained, is not competent to act, as not being a person within the scope of the terms of the declaration of trust, or is not a proper person for the office, the court will appoint a trustee, to whom the legal title will be transferred.<sup>170</sup> Likewise, if for any cause the interests of the *cestui que trust* are liable to suffer by a continuance in office of a particular trustee, the court has full power to remove or relieve him and substitute another in his place.<sup>171</sup>

A trustee appointed by the court is not vested with the legal title by the appointment, but the previous holder of such title must make a conveyance thereof to him, except in some states, where the statute provides that the appointment shall vest the title in the new trustee.<sup>172</sup>

*Burritt v. Silliman*, 13 N. Y. 93, 64 Am. Dec. 532; *Beekman v. Bonser*, 23 N. Y. 298, 80 Am. Dec. 269.

<sup>169</sup> 1 Perry, Trusts, § 273; 1 Ames, Trusts, 230; *Wheeler's Appeal*, 70 Conn. 511; *Taylor v. Benham*, 5 How. (U. S.) 233, 273; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632.

<sup>170</sup> 1 Perry, Trusts, §§ 340, 341; *In re Abbott's Petition*, 55 Me. 580.

<sup>171</sup> 1 Perry, Trusts, §§ 274-283; *Lewin, Trusts*, 963; 1 Ames, Trusts, 223, 224; *Williamson v. Suydam*, 6 Wall. (U. S.) 723, 738; *Bowditch v. Banuelos*, 1 Gray (Mass.) 220; *Matter of Livingston*, 34 N. Y. 555.

<sup>172</sup> 1 Ames, Trusts, 249; 1 Perry, Trusts, § 284. See *Hart v. Sansom*, 110 U. S. 151; *McCann v. Randall*, 147 Mass. 81; *Burnley v. Stevenson*, 24 Ohio St. 474.

§ 101. Termination of the trust.

One who has created a trust in favor of another, even though it was without consideration, cannot thereafter revoke the trust, unless a power of revocation was expressly reserved.<sup>173</sup>

If the equitable and the legal estates meet in one person, the equitable estate is generally merged in the legal estate, and the trust comes to an end.<sup>174</sup> But such extinguishment of the equitable estate will not occur, it is said, unless the estates are of equal duration, or unless the legal estate is greater than the equitable, and a court of equity would probably regard the legal estate as still outstanding if necessary to carry out the purposes of the trust, or to prevent injustice.<sup>175</sup>

The *cestui que trust*, or all the *cestuis que trust*, if more than one, if in existence and under no personal disability, may generally call on the trustee for a conveyance of the legal title, or may in equity proceed for that purpose, and the effect of such conveyance will be to terminate the trust.<sup>176</sup> But, according to some decisions, the court will

<sup>173</sup> 1 Ames, Trusts, 233; 1 Perry, Trusts, § 104; *Souverby v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Minot v. Tilton*, 64 N. H. 371; *Massey v. Huntington*, 118 Ill. 80; *Sargent v. Baldwin*, 60 Vt. 17; *Monday v. Vance*, 92 Tex. 428; *Ewing v. Jones*, 130 Ind. 247. Compare *Ewing v. Wilson*, 132 Ind. 223; *Thurston, Petitioner*, 154 Mass. 596; *Hellman v. McWilliams*, 70 Cal. 449; *Brown v. Mercantile T. & D. Co.*, 87 Md. 377; *Wilson v. Anderson*, 186 Pa. St. 531; *Lovett v. Farnham*, 169 Mass. 1.

<sup>174</sup> 1 Perry, Trusts, §§ 13, 347; *Goodright v. Wells*, 2 Doug. 771; *Greene v. Greene*, 125 N. Y. 506, 510; *Whyte v. Arthur*, 17 N. J. Eq. 521; *Peacock v. Stott*, 101 N. C. 149; *Hopkinson v. Dumas*, 42 N. H. 296; *Finch's Cas.* 675; *Parker v. Converse*, 5 Gray (Mass.) 336.

<sup>175</sup> *Lewin, Trusts*, 12; 1 Perry, Trusts, § 347.

<sup>176</sup> 1 Perry, Trusts, § 920; 1 Ames, Trusts, 453; *Smith v. Harrington*, 4 Allen (Mass.) 566; *Inches v. Hill*, 106 Mass. 575; *Matthews v. McPherson*, 65 N. C. 189; *Nightingale v. Nightingale*, 13 R. I. 113; *Sears v. Choate*, 146 Mass. 395; *Armistead's Ex'rs v. Hart*, 97 Va. 316.

not decree such a conveyance when the resulting termination of the trust is obviously inconsistent with the purpose of the trust;<sup>177</sup> and one only of several *cestuis que trust* cannot generally demand a conveyance.<sup>178</sup> In cases in which the circumstances are such that it would be the trustee's duty to convey to the *cestui que trust*, a conveyance or surrender of the legal title to the *cestui que trust* may, in order to support a just title, be presumed, provided there is some evidence to support the presumption.<sup>179</sup>

In some states it is expressly provided that the trust shall cease when the purpose of its creation no longer exists;<sup>180</sup> but even without such a statute, the courts in this country tend apparently to regard the legal title as no longer outstanding after the purpose of the trust is fulfilled. Sometimes they consider that, after the cessation of active duties on the part of the trustee, the Statute of Uses intervenes, and executes the legal title in the *cestui que trust*,<sup>181</sup> while

<sup>177</sup> Rhoads v. Rhoads, 43 Ill. 239; Seamans v. Gibbs, 132 Mass. 239; Claflin v. Claflin, 149 Mass. 19; Cuthbert v. Chauvet, 136 N. Y. 326; Gunn v. Brown, 63 Md. 96; Zabriskie's Ex'rs v. Wetmore, 26 N. J. Eq. 18; Kreb's Estate, 184 Pa. St. 222.

This doctrine has an intimate connection with the view, which has been adopted by a number of courts in this country, that the beneficiary of a trust may enjoy the benefits thereof without the corpus of the fund being liable for his debts. It has also important results upon the application of the Rule against Perpetuities to trusts. See post, § 466.

<sup>178</sup> 1 Ames, Trusts, 452, 453; Goodson v. Ellisson, 3 Russ. 583; Carney v. Byron, 19 R. I. 283; Smith v. Smith, 70 Mo. App. 443.

<sup>179</sup> 1 Perry, Trusts, §§ 350-356; England v. Slade, 4 Term R. 682; French v. Edwards, 21 Wall. (U. S.) 147; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Greenough v. Welles, 10 Cush. (Mass.) 580.

<sup>180</sup> 1 Stimson's Am. St. Law, § 1728; Chaplin, Exp. Trusts, § 524.

<sup>181</sup> 1 Perry, Trusts, § 320; Gosson v. Ladd, 77 Ala. 223; Parker v. Converse, 5 Gray (Mass.) 336; Meacham v. Steele, 93 Ill. 135; Steacy v. Rice, 27 Pa. St. 75, 67 Am. Dec. 447; Hooper v. Feigner, 80 Md. 262; Morgan v. Moore, 3 Gray (Mass.) 319; Glindrat v. Western Ry. Co., 96 Ala. 162; Wieters v. Timmons, 25 S. C. 488; Snelling v. Lamar, 32 S. C. 72; Speed v. St. Louis M. B. T. R. Co. (C. C. A.) 86

in other cases they have applied the principle which generally prevails in this country,—that the estate of the trustee shall be of such extent as is necessary for the carrying out of the trust, and no greater, and on this ground have regarded the legal title as no longer outstanding after the purpose of the trust is fulfilled.<sup>182</sup> This principle of regarding the trust as executed in the *cestui que trust* as soon as the necessities of the trust will allow has been applied in the case of trusts for the separate use of a married woman, the legal title being considered not to remain outstanding after the cessation of the purpose of the trust by the death either of the woman herself,<sup>183</sup> or of her husband.<sup>184</sup>

### § 102. Charitable trusts.

The question of what constitutes a "charity," as the word is used in the law, has usually been determined with reference to provisions of St. 43 Eliz. c. 4 (A. D. 1601), known as the "Statute of Charitable Uses," which in terms imposed on the court of chancery the duty of the supervision and enforcement of gifts for certain purposes therein named, and such purposes and those of an analogous character are considered "charitable." The meaning which the word has thus obtained is clearly and succinctly given by a high

Fed. 235; *Richardson v. Stodder*, 100 Mass. 523; *Frey v. Allen*, 9 App. D. C. 400; *Meacham v. Steele*, 93 Ill. 135. But see *Dakin v. Savage*, 172 Mass. 23.

<sup>182</sup> *Poor's Lessee v. Considine*, 6 Wall. (U. S.) 458; *Young v. Bradley*, 101 U. S. 782; *Schaffer v. Lauretta*, 57 Ala. 14; *Coulter v. Robertson*, 24 Miss. 278, 341; *Bacon's Appeal*, 57 Pa. St. 504; *Numsen v. Lyon*, 87 Md. 31; *Long v. Long*, 62 Md. 33, 65; *Noble v. Andrews*, 37 Conn. 346, 348; *Frey v. Allen*, 9 App. D. C. 400. See 1 *Perry, Trusts*, §§ 311, 312, 320.

<sup>183</sup> *Frey v. Allen*, 9 App. D. C. 400; *McNair v. Craig*, 36 S. C. 100; *Numsen v. Lyon*, 87 Md. 31; *Moore v. Stinson*, 144 Mass. 594.

<sup>184</sup> *Coughlin v. Seago*, 53 Ga. 250; *Roberts v. Moseley*, 51 Mo. 282; *Kuntzleman's Trust Estate*, 186 Pa. St. 142, 20 Am. St. Rep. 909.

authority as follows: "A charity, in a legal sense, may be defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called 'charitable' in the gift itself, if it is so described as to show that it is charitable in its nature."<sup>185</sup>

At one time it was supposed that, apart from the Statute of Charitable Uses, courts of equity had no jurisdiction over charities. But this view is now recognized to be erroneous, and it is agreed that, even before the statute, chancery exercised such jurisdiction, and, consequently, even in states where the Statute of Charitable Uses has not been adopted, courts of equity generally have power to enforce charitable trusts upon equitable principles peculiar to such trusts.<sup>186</sup>

— Description of beneficiaries.

From the very nature of a gift for charity, the individuals ultimately to receive the benefit thereof cannot be ascertained or named in the gift,<sup>187</sup> and, if the individuals to be benefited are so named, it cannot be supported as a charity.<sup>188</sup>

<sup>185</sup> *Jackson v. Phillips*, 14 Allen (Mass.) 539, 556, per Gray, J.

<sup>186</sup> *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127; *Gass v. Wilhite*, 2 Dana (Ky.) 170, 26 Am. Dec. 448; *Chambers v. City of St. Louis*, 29 Mo. 543; *Urmey's Ex'rs v. Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615; *Burr's Ex'rs v. Smith*, 7 Vt. 241, 29 Am. Dec. 154; *Protestant E. E. Soc. v. Churchman's Reps.*, 30 Va. 718.

<sup>187</sup> 2 *Pomeroy*, Eq. Jur. § 1018; *Russell v. Allen*, 107 U. S. 163; *Goring v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418.

<sup>188</sup> 1 *Perry*, Trusts, § 710. See, however, as to cases in which there

According to the rule more generally prevailing in the states of this country, a gift to a charity is not void because the charitable purposes to be subserved are indefinite and consequently the beneficiaries cannot be determined from the instrument itself, provided there is a trustee or other person named by the testator who is empowered to designate the beneficiaries, or distribute the fund.<sup>189</sup> If there is no such person named, or he refuses to act, or dies before acting, then the trust fails unless the object is specifically named, as in the case of a gift to a particular institution already in existence.<sup>190</sup> In a few states, however, it is held that, even though a trustee is named with power to appoint or distribute, and he is willing to carry out the trust, if the beneficiary is not designated with the same certainty as in the case of a private trust, the gift, if not to a particular institution, is void.<sup>191</sup>

Owing to the fact that, in the case of a charitable trust, there can be at no time ascertained individuals who are entitled to the *corpus* of the trust fund, or who can alien the beneficial interest in the property, a charitable trust is usually

is an element of definiteness in the beneficiaries of the charity, Gray, *Perpetuities*, Appendix A.

<sup>189</sup> *Hinckley's Estate*, 58 Cal. 457; *Treat's Appeal*, 30 Conn. 116; *Guillfoill v. Arthur*, 158 Ill. 600; *Bartlet v. King*, 12 Mass. 536, 7 Am. Dec. 99; *Simpson v. Welcome*, 72 Me. 496, 39 Am. Rep. 349; *Martin v. McCord*, 5 Watts (Pa.) 494, 30 Am. Dec. 342.

<sup>190</sup> *Fontain v. Ravenel*, 17 How. (U. S.) 382; *Jackson v. Phillips*, 14 Allen (Mass.) 539, 574.

<sup>191</sup> *Gambell v. Trippe*, 75 Md. 252, 32 Am. St. Rep. 388; *Trustees for First Soc. of M. E. Church v. Clark*, 41 Mich. 730; *Little v. Willford*, 31 Minn. 173; *Bible Soc. v. Pendleton*, 7 W. Va. 79. For a criticism of these decisions, see an article by Prof. J. B. Ames, in 5 Harv. Law Rev. 389. In New York, a statute was passed in 1893 allowing indefiniteness in the beneficiaries, altering the previous law. *Chaplin, Exp. Powers*, c. 10; *Dammert v. Osborn*, 140 N. Y. 43; *Allen v. Stevens*, 161 N. Y. 122.

Indefinite in point of duration, and consequently is not illegal, though it be, by its terms, perpetual.<sup>191a</sup>

— The *cy pres* doctrine.

By what is known as the *cy pres* doctrine, which is adopted in quite a number of the states of this country, if the general nature of the charitable purpose is pointed out, and it is lawful and valid at the time of the testator's death, and no intention is expressed to limit it to a particular institution or mode of application, and the scheme of the testator afterwards becomes illegal from a change in the law, or becomes impracticable from a change of circumstances, the fund, having once vested as a charity, will be applied by a court of equity in a way as near to the testator's particular intention as possible.<sup>192</sup> In those states where this doctrine does not prevail, the trust will in such case fail, and the fund will revert to the donor's heirs or representatives.<sup>193</sup>

<sup>191a</sup> Goodman v. Borough of Saltash, 7 App. Cas. 633; Russell v. Allen, 107 U. S. 163; Jackson v. Phillips, 14 Allen (Mass.) 539; Alden v. St. Peter's Parish in City of Sycamore, 158 Ill. 631; Mills v. Davison, 54 N. J. Eq. 659; Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n (Kan.) 64 Pac. 33; Yard's Appeal, 64 Pa. St. 95. This is frequently expressed by the statement that charities are not within the "rule against perpetuities," a use of the latter phrase which is calculated to cause confusion. See post, § 158.

<sup>192</sup> Russell v. Allen, 107 U. S. 163; Jackson v. Phillips, 14 Allen (Mass.) 539, 580; Hinckley's Estate, 58 Cal. 457; Adams Female Academy v. Adams, 65 N. H. 225; Doyle v. Whalen, 87 Me. 414; Barnard v. Adams, 58 Fed. 313. So, in the case of a trust for the purpose of promoting a sentiment in favor of slavery, and aiding fugitive slaves, the fund was, after the abolition of slavery, applied to the education and support of former slaves. Jackson v. Phillips, 14 Allen (Mass.) 539. And in the case of a trust for establishing beds in a hospital for insane patients, in case arrangements could not be made with the hospital management, the fund should, it was said, be applied in aid of insane persons in some other way. Hayden v. Connecticut Hospital, 64 Conn. 320.

<sup>193</sup> Tilden v. Green, 130 N. Y. 29, 27 Am. St. Rep. 437; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278.

This power of applying the property to a proximate purpose has always been exercised in England by the court of chancery as a part of its ordinary equitable jurisdiction, and as such it has been exercised in those states in this country where the doctrine prevails. In England, however, there is another and distinct power exercised by the court of chancery, under the name of *cy pres*, not, as in the other case, in the exercise of its equity jurisdiction, but in a ministerial capacity, as the keeper of the king's conscience. This prerogative power of the king is exercised in England in two classes of cases,—those in which the gift is for a purpose which is illegal at the time of the testator's death, and those in which there is a gift to charity in general terms, with no trustee named to specify the beneficiaries and carry it into effect, or the trustee for which dies before acting. In such cases, it being presumed that the donor intended the property to go to some charity, rather than that it should go back to his heirs or next of kin, the fund is applied to some other charitable purpose in the exercise of the royal prerogative.<sup>194</sup> The prerogative power thus exercised by the English court of chancery does not belong to any judicial tribunal in this country, and, so far as it may exist here, is vested in the legislative department of the government as successor to the powers of the king as *parens patriae*.<sup>195</sup>

Though the courts will not, in this country, enforce a gift to charity of an indefinite character unless there is a trustee

<sup>194</sup> 1 Perry, Trusts, §§ 718-722; Jackson v. Phillips, 14 Allen (Mass.) 539, 574.

<sup>195</sup> 1 Perry, Trusts, §§ 718-721, 729; Fountain v. Ravenel, 17 How. (U. S.) 369-384; Jackson v. Phillips, 14 Allen (Mass.) 539, 576; Moore's Heirs v. Moore's Devises & Executors, 4 Dana (Ky.) 365. In Late Corporations, etc., v. United States, 136 U. S. 1, such an exercise of the power by congress was upheld.



named by the testator to apply the gift,<sup>186</sup> if the object of the gift is clearly specified, as in the case of a trust for a particular institution, a court of equity, in pursuance of its general policy of not allowing a trust to fail for want of a trustee, will appoint a trustee to carry it into effect when no trustee is named, and also when the trustee refuses to act, or is not in existence, or is incapable of acting.<sup>187</sup>

### III. EQUITABLE CONVERSION.

When land is positively directed to be converted into money by means of a sale, or money is positively directed to be converted into land by investment therein, equity regards the conversion as having taken place, though actually it has not taken place, and the rights of persons claiming directly under the instrument or the author thereof are to be determined accordingly.

The person or persons entitled to the property in its converted form may, if *sui juris*, elect to take the property in its original or unconverted condition, this being frequently termed "reconversion."

In case of the conversion by order of court of property belonging to a person not *sui juris*, as an infant or lunatic, the court will usually regard the property, though actually converted, as unconverted; and likewise, upon a sale by order of court for a particular purpose, any surplus proceeds of sale will be treated for certain purposes as if they were land.

When land or money is settled in trust with directions that it be converted into money or land, and the purposes for which the direction is made totally fail, the beneficiary of the resulting trust is determined without reference to such directions. If the failure of purposes is but partial, such beneficiary is usually determined in the same way, provided the directions

<sup>186</sup> See ante, note 190.

<sup>187</sup> 2 Perry, Trusts, §§ 722, 731; *Jones v. Habersham*, 107 U. S. 174; *Sears v. Chapman*, 153 Mass. 400; *Johnson v. Mayne*, 4 Iowa, 180; *Mason's Ex'rs v. Trustees of M. E. Church*, 27 N. J. Eq. 47.

for conversion are contained in a will, while if contained in an instrument inter vivos, the beneficiary is determined with reference to the character of the property into which conversion is directed.

§ 103. The doctrine in general.

While a court of common law will not regard as land money directed to be turned into land, or as money land directed to be turned into money, until the conversion has actually occurred,<sup>198</sup> a different rule generally prevails in equity, upon the maxim that equity "regards that as done which ought to be done," and there "money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, —whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed."<sup>199</sup>

The most usual instance of the application of the doctrine arises in the case of a devise of land to a trustee, with directions for its sale, and in such case the equitable interest in the land becomes money, though the land is not sold, and it is thereafter subject to the rules applicable to personal estate, while, on the other hand, money bequeathed by one with directions that it be invested in land is subject in equity to the rules applicable to land.<sup>200</sup>

<sup>198</sup> *Teneick v. Flagg*, 29 N. J. Law, 25; *Foster's Appeal*, 74 Pa. St. 391, 15 Am. Rep. 541.

<sup>199</sup> *Fletcher v. Ashburner*, 1 Brown, Ch. 497, 1 White & T. Lead. Cas. Eq. 1118. See, on the subject of equitable conversion, 2 Story, Eq. Jur. §§ 790-793, 1212, 1214a; 3 Pomeroy, Eq. Jur. §§ 1159-1178; and notes to *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. 1123, 1157.

<sup>200</sup> *Craig v. Leslie*, 3 Wheat. (U. S.) 564; *Rankin v. Rankin*, 38 Ill. (254)

The doctrine is also applied to marriage settlements, by which property is directed to be converted,<sup>201</sup> as well as to other conveyances to trustees for the benefit of the grantor or others.<sup>202</sup>

"Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership, and to adjust the equities of the partners, but the principle of equitable conversion has no further application."<sup>203</sup> In England, the conversion is carried further than in this country, and the land passes to the personal representatives as personalty, and not to the heir.<sup>204</sup>

A frequent application of the principle is also seen in the case of contracts for the sale of land, as will appear in a subsequent part of this chapter.<sup>205</sup>

293, 87 Am. Dec. 205; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Lorillard v. Coster*, 5 Paige (N. Y.) 172, 216; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; *Tayloe v. Johnson*, 63 N. C. 381; *Morrow v. Brenizer*, 2 Rawle (Pa.) 185; *Proctor v. Ferebee*, 1 Ired. Eq. (N. C.) 143, 36 Am. Dec. 34.

<sup>201</sup> *Williams, Settlements*, 56, 125; *In re Greaves' Settlement Trusts*, 23 Ch. Div. 313; *In re Cleveland's Settled Estates* [1893] 3 Ch. 244; *Collins v. Champ's Heirs*, 15 B. Mon. (Ky.) 122, 61 Am. Dec. 179.

<sup>202</sup> *Turner v. Davis*, 41 Ark. 270; *Paisley v. Holzshu*, 83 Md. 325; *Hunter v. Anderson*, 152 Pa. St. 386; *Zane v. Sawtell*, 11 W. Va. 43; *Hamilton v. Miller*, 31 Ohio St. 87.

<sup>203</sup> *Riddle v. Whitehill*, 135 U. S. 621, 635. To the same effect, see *Lang's Heirs v. Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Strong v. Lord*, 107 Ill. 25; *Shearer v. Shearer*, 98 Mass. 107; *Foster's Appeal*, 74 Pa. St. 391, 15 Am. Rep. 553; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *George, Partnership*, 127.

<sup>204</sup> It is so provided by the Partnership Act (53 & 54 Vict. c. 39, §§ 20, 23 [A. D. 1890]), but, by the preponderance of authority, the law was the same before such act. See *Lindley, Partnership* (6th Ed.) 352.

<sup>205</sup> See post, § 111.

## § 104. Results of application of doctrine.

In case of a conversion of land into money by directions for sale, if one entitled to share in the proceeds of sale die before the sale actually takes place, the property will pass to his personal representatives, as if the sale had taken place before his death, and not to his heirs;<sup>206</sup> and so, under this doctrine, money which is directed to be converted into land will pass as such to the heirs,<sup>207</sup> and will pass under a general devise of all the lands of the person entitled, and not under a general bequest of personal estate,<sup>208</sup> while land directed to be sold will pass under a general gift of personalty, and not under a general devise of lands.<sup>209</sup>

The conversion of land into money by directions for its sale in a will may also affect the validity of the will, or of a devise therein.<sup>210</sup>

The effects of conversion are, however, it seems, limited to the determination of the interests of persons "who claim or are entitled to the property under or through the instrument, or directly from or under the author of the instrument."<sup>211</sup>

<sup>206</sup> *Burnsides' Adm'r v. Wall*, 9 B. Mon. (Ky.) 318; *Hand v. Marcy*, 28 N. J. Eq. 59; *Hood v. Hood*, 85 N. Y. 561; *Brothers v. Cartwright*, 2 Jones' Eq. (N. C.) 113, 64 Am. Dec. 563; *Hammond v. Putnam*, 110 Mass. 232.

<sup>207</sup> 3 Pomeroy, Eq. Jur. § 1165; *Scudamore v. Scudamore*, Prec. Ch 543, 6 Gray's Cas. 510; *Hawley v. James*, 5 Paige, 318, 443.

<sup>208</sup> 1 Jarman, Wills, 548; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, 12 Ves. 419, 17 Ves. 77.

<sup>209</sup> 3 Pomeroy, Eq. Jur. § 1164; *Stead v. Newdigate*, 2 Mer. 521.

<sup>210</sup> *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Dodge v. Williams*, 46 Wis. 70. So in *Craig v. Leslie*, 3 Wheat. (U. S.) 563, a gift by will of land to be sold, and the proceeds paid over to an alien named, was valid, though aliens could not acquire and hold land.

<sup>211</sup> 3 Pomeroy, Eq. Jur. § 1166. And see *Bigelow, Wills*, 333. In England, the fiscal duties on transfers inter vivos and by will are determined with reference to this doctrine. *Notes to Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. (7th Eng. Ed.) 349.

## § 105. Imperative direction necessary.

In order that the doctrine may apply, it is necessary that there be an absolute obligation on the part of the trustees to convert, either immediately or at a future time, and it is not sufficient that there is a request or expression of desire to that effect, or a power to convert, with a discretion in the trustee to whom the power is given, or in other persons, as to whether it shall be exercised.<sup>212</sup> The doctrine is not inapplicable, however, provided the direction is imperative, merely because the conversion is not to take place until some specified future time,<sup>213</sup> or because the time or manner of conversion is within the discretion of the person directed to make it.<sup>214</sup>

An imperative direction in terms to convert is not necessary, it being sufficient if an absolute intention that conversion shall take place is apparent from the whole instrument.<sup>215</sup> The mere fact, however, that a conversion is necessary in order to carry out the provisions of the will is not

<sup>212</sup> 3 Pomeroy, Eq. Jur. § 1160; Hyett v. Mekin, 25 Ch. Div. 735; Jancs v. Throckmorton, 57 Cal. 368; Hayward v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120; Perot's Appeal, 102 Pa. St. 235, 255; Wheless v. Wheless, 92 Tenn. 293; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117; Penfield v. Tower, 1 N. Dak. 216.

<sup>213</sup> Massey v. Modawell, 73 Ala. 421; Reiff v. Strite, 54 Md. 298; McClure's Appeal, 72 Pa. St. 414; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117; Collier v. Grimesey, 36 Ohio St. 17. And see cases cited post, note 220.

<sup>214</sup> Stagg v. Jackson, 1 N. Y. 206; Bell v. Bell, 25 S. C. 149; Carr v. Branch, 85 Va. 597; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117. See, also, cases cited in note 219.

<sup>215</sup> 1 Jarman, Wills, 552; 3 Pomeroy, Eq. Jur. § 1160; Earlom v. Saunders, Amb. 241; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117; Davenport v. Kirkland, 156 Ill. 169; Power v. Cassidy, 79 N. Y. 613, 35 Am. Rep. 550; Delafield v. Barlow, 107 N. Y. 535; Fahnestock v. Fahnestock, 152 Pa. St. 56, 34 Am. St. Rep. 623; Clarke v. Clarke, 46 S. C. 230; Proctor v. Ferebee, 1 Ired. Eq. (N. C.) 143, 36 Am. Dec. 34; Ramsey v. Hanlon, 33 Fed. 425.

sufficient to effect a constructive conversion if an intention that a conversion shall take place does not clearly appear.<sup>216</sup>

### § 106. Time of conversion.

In the case of a conversion by will, the conversion dates, as a rule, from the testator's death,<sup>217</sup> and, in the case of a conveyance or contract *inter vivos*, from the time of its execution and delivery,<sup>218</sup> and these rules are not affected by the fact that the trustees are given a discretion as to the time of sale.<sup>219</sup> Whether the fact that the instrument expressly defers the time for actual conversion likewise defers the equitable or "notional" conversion till that time is a subject upon which the decisions are not in unison.<sup>220</sup>

### § 107. Election against conversion.

Though there be such a trust or direction for conversion

<sup>216</sup> Bigelow, Wills, 335; Evans v. Ball, 47 Law T. (N. S.) 165; Neely v. Grantham, 58 Pa. St. 433. But see Davenport v. Kirkland, 156 Ill. 169.

<sup>217</sup> 3 Pomeroy, Eq. Jur. § 1162; Kane v. Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Hammond v. Putnam, 110 Mass. 232; Brolasky v. Gally's Ex'rs, 51 Pa. St. 509; Reiff v. Strite, 54 Md. 298; Wheless v. Wheless, 92 Tenn. 293.

<sup>218</sup> Griffith v. Ricketts, 7 Hare, 299; Loughborough's Ex'rs v. Loughborough, 14 B. Mon. (Ky.) 441; Keep v. Miller, 42 N. J. Eq. 100; Wheless v. Wheless, 92 Tenn. 293.

<sup>219</sup> In re Raw, 26 Ch. Div. 601; Lent v. Howard, 89 N. Y. 169; Wurts' Ex'rs v. Page, 19 N. J. Eq. 365; Tazewell v. Smith's Adm'r, 1 Rand. (Va.) 313, 10 Am. Dec. 533.

<sup>220</sup> The following cases support the view that the conversion occurs immediately: Allen v. Watts, 98 Ala. 384; Cropley v. Cooper, 19 Wall. (U. S.) 167; Ramsey v. Hanlon, 33 Fed. 425; Leiper v. Thomson, 60 Pa. St. 177; Hocker v. Gentry, 3 Metc. (Ky.) 463; In re Thomman, 161 Pa. St. 444; Clarke v. Franklin, 4 Kay & J. 257, 6 Gray's Cas. 536. That it does not occur till the time named for actual conversion, see Savage v. Burnham, 17 N. Y. 561; Underwood v. Curtis, 127 N. Y. 523; Brothers v. Cartwright, 2 Jones, Eq. (N. C.) 113, 64 Am. Dec. 563; Harcum's Adm'r v. Hudnall, 14 Grat. (Va.) 369; De Wolf v. Lawson, 61 Wis. 469, 50 Am. Rep. 148 (258)

that the doctrine of equitable conversion may apply, a person absolutely entitled to the equitable interest in the property, if *sui juris*, may elect to take the property in its actual state; the theory being that, since such person could "reconvert" the property, after an actual conversion, equity will, upon a manifestation of his desire in this respect, consider the reconversion as effected.<sup>221</sup> But a person entitled to a share only in money to be derived from a sale directed to be made of land cannot, without the concurrence of the other persons interested, elect to take his share in land, since this would affect disadvantageously the sale of the balance.<sup>222</sup>

The election must, of course, be before the actual conversion of the property.<sup>223</sup> The question whether there has been an election in this regard is one of intention, to be determined by the acts and declarations of the party or parties entitled to elect.<sup>224</sup> Accordingly, a conveyance of land, directed to be sold, by the persons entitled to the proceeds, is considered to show an election in favor of recon-

<sup>221</sup> 3 Pomeroy, Eq. Jur. § 1175; notes to *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. 1151, 1168; *Meek v. Devenish*, 6 Ch. Div. 566, 6 Gray's Cas. 543; *In re Cotton's Trustees*, 19 Ch. Div. 624; *Craig v. Leslie*, 3 Wheat. (U. S.) 564; *Morrow v. Brenizer*, 2 Rawle (Pa.) 185; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Mellen v. Mellen*, 139 N. Y. 210, 220; *Harcum's Adm'r v. Hudnall*, 14 Grat. (Va.) 369.

<sup>222</sup> *Holloway v. Radcliffe*, 23 Beav. 163; *McDonald v. O'Hara*, 144 N. Y. 566; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Evans' Appeal*, 63 Pa. St. 183; *De Vaughn v. McLeroy*, 82 Ga. 687. But it has been decided that one entitled to a share in land to be purchased under directions to a trustee may elect to take his share in money. *Seeley v. Jago*, 1 P. Wms. 389, 6 Gray's Cas. 510.

<sup>223</sup> *Cropley v. Cooper*, 7 D. C. 226, affirmed 19 Wall. (U. S.) 167; *Allison v. Wilson's Ex'rs*, 13 Serg. & R. (Pa.) 330.

<sup>224</sup> 3 Pomeroy, Eq. Jur. § 1177; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Harcum's Adm'r v. Hudnall*, 14 Grat. (Va.) 369.

version of the proceeds of sale into land,<sup>225</sup> and the same effect has been given to an action brought to recover the land as such.<sup>226</sup>

§ 108. Conversion by paramount authority.

The doctrine of conversion thus far considered involves the treatment of property as converted before actual conversion takes place. In some cases, however, where property is actually converted under either statutory or judicial authority, it will be treated as not converted, but as retaining its original form.<sup>227</sup> This doctrine has been applied in the case of the property of persons not *sui juris*, as infants or lunatics, which, though actually converted by order of court, either by sale of land or investment of money in land or in improvements thereon, has been regarded as retaining its original character as between such owners' heirs and personal representatives,<sup>228</sup> unless, it seems, the conversion would be for the benefit of the infant or lunatic.<sup>229</sup>

Likewise, in the case of a sale of land by order of court for any purpose, equity will regard the land as converted into money only to the extent necessary for the purpose of

<sup>225</sup> *Ridgeway v. Underwood*, 67 Ill. 419; *Swan v. Goodwin*, 2 Dav. (Ky.) 298; *Beal v. Stehley*, 21 Pa. St. 376.

<sup>226</sup> *De Vaughn v. McLeroy*, 82 Ga. 687.

<sup>227</sup> 3 *Pomeroy*, Eq. Jur. § 1167; notes to *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. 1142.

<sup>228</sup> *Lewin*, Trusts, 1096, 1101; notes to *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. 1143 et seq.; *Foster v. Foster*, 1 Ch. Div. 588; *Wetherill v. Hough*, 52 N. J. Eq. 683; *Collins v. Champ's Heirs*, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179; *Williams' Case*, 3 Bland, Ch. (Md.) 186; *Wood v. Reeves*, 5 Jones, Eq. (N. C.) 271. See *Hay's Appeal*, 52 Pa. St. 449. It is so provided by statute in New York in regard to an infant's lands. *Wells v. Seeley*, 47 Hun (N. Y.) 109.

<sup>229</sup> Notes to *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq. (7th Eng. Ed.) 365; *Ex parte Phillips*, 19 Ves. 123; *In re Mary Smith*, 10 Ch. App. 79; *Lloyd v. Hart*, 2 Pa. St. 473, 45 Am. Dec. 612.



the conversion, and the surplus will be regarded as retaining its previous character, in order to determine the persons entitled thereto.<sup>220</sup>

When land is taken for public purposes under the power of eminent domain, and the land is held in trust, or belongs to an infant or a lunatic, the sum awarded as compensation will be regarded as land.<sup>221</sup>

### § 109. Resulting interests under trusts for conversion.

We have previously considered the rule that, upon the total or partial failure of a gift in trust, there will be a resulting trust in favor of the testator's representatives or heirs, or, in the case of a conveyance *inter vivos*, to the grantor himself.<sup>222</sup> The question now arises whether, if, by the terms of the gift, there were positive directions for conversion, the property will result in its original form, or in that into which it was to be converted, and to whom, as a consequence, it will result.

<sup>220</sup> 3 Pomeroy, Eq. Jur. § 1167; Fletcher v. Ashburner, 1 White & T. Lead. Cas. Eq. 1150; Sayers' Appeal, 79 Pa. St. 428; Pennell's Appeal, 20 Pa. St. 515; Lerch v. Oberly, 18 N. J. Eq. 575; Turner v. Dawson, 80 Va. 841. But see Jones v. Jones, 1 Bland, Ch. (Md.) 443, 18 Am. Dec. 327; Jones v. Walkup, 5 Sneed (Tenn.) 135.

As to the time of a conversion effected by an order for the sale of land, it is held in this country that it takes place only on the ratification of the sale and compliance by the purchaser with the terms thereof. Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717; Early v. Dorsett, 45 Md. 462; In re Biggert, 20 Pa. St. 17; Jones v. Walkup, 5 Sneed (Tenn.) 135. In England, it is held to date from the order for sale. Hyett v. Mekin, 25 Ch. Div. 735.

<sup>221</sup> 3 Pomeroy, Eq. Jur. § 1167; Gibson v. Cooke, 1 Metc. (Mass.) 75; Simonds v. Simonds, 112 Mass. 157; Wetherill v. Hough, 52 N. J. Eq. 683; Durando v. Durando, 23 N. Y. 331. And see Holland v. Cruft, 3 Gray (Mass.) 162. In England, the character of the fund realized from the land in such cases seems to be determined by the wording of the particular act. See notes to Fletcher v. Ashburner, 1 White & T. Lead. Cas. Eq. 1151.

<sup>222</sup> See ante, § 93.

Where the purpose for which land is directed to be converted into money, or for which money is directed to be converted into land, entirely fails, whether the direction is contained in a will or in an instrument *inter vivos*, the land or the money results to the donor or his successors in interest in its original form, the direction for conversion being in such case utterly ineffective for any purpose; and the heir or the personal representative takes, according as it may be, real property or personalty.<sup>233</sup>

— Partial failure of disposition by will.

In the case of a partial failure of the purposes for which a direction to convert was given by will, a conversion is still necessary for the purposes which have not failed. In such case, if the conversion directed was of land into money, the surplus undisposed of will generally result to the heir or other person entitled to testator's land, and not to the person entitled to his personalty,<sup>234</sup> and the same result generally follows if the purpose for which the sale is directed exhausts only part of the beneficial interest; the surplus, whether the sale actually takes place or not, being regarded as still impressed with the character of land for the purpose of determining the person entitled to receive it.<sup>235</sup>

<sup>233</sup> 3 Pomeroy, Eq. Jur. § 1170; 1 Jarman, Wills, 585 et seq.; Ackroyd v. Smithson, 1 White & T. Lead. Cas. Eq. 1181, 1187, 1197, notes; Ripley v. Waterworth, 7 Ves. Jr. 425; Read v. Williams, 125 N. Y. 560, 21 Am. St. Rep. 748; Hawley v. James, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; Rizer v. Perry, 58 Md. 112; Roy v. Monroe, 47 N. J. Eq. 356; Moore v. Robbins, 53 N. J. Eq. 137; Appeal of Luffberry, 125 Pa. St. 513.

<sup>234</sup> 1 Jarman, Wills, 587; Ackroyd v. Smithson, 1 Brown, Ch. 503, 1 White & T. Lead. Cas. Eq. 1171; Cogan v. Stephens, 1 Beav. 482, note; Craig v. Leslie, 3 Wheat. (U. S.) 563; Wood v. Keyes, 8 Paige (N. Y.) 365.

<sup>235</sup> 1 Jarman, Wills, 585; Hilton v. Hilton, 2 MacArthur, D. C. 70; Richards v. Miller, 62 Ill. 417; Cronise v. Hardt, 47 Md. 433; Cook's Ex'r v. Cook's Adm'r, 20 N. J. Eq. 375; Burr v. Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

The heir or general devisee, however, taking such resulting portion, takes it, not as land, but as money, so that on his death it will pass to his personal representatives, and not to his heirs.<sup>236</sup>

If there appear an intention on the part of the testator that the conversion take place not only for the purposes named in the will, but for all purposes whatever, then the surplus will result to the personal representative, and such an intention, it is said, is more easily and readily inferred in this country than in England.<sup>237</sup>

In the case of a direction in a will for the conversion of money into land, any undisposed-of portion of the interest will result to the personal representative for the next of kin or residuary legatee,<sup>238</sup> and will belong to them as realty or personalty, according to its nature in the view of a court of equity at the time it results.<sup>239</sup>

— Partial failure of disposition *inter vivos*.

In the case of a partial failure of the purpose for which a conversion was directed by an instrument *inter vivos*, even though conversion has not actually taken place, the surplus results to the grantor or settlor in its converted character,

<sup>236</sup> 1 Jarman, Wills, 596; 3 Pomeroy, Eq. Jur. § 1171; Ackroyd v. Smithson, 1 White & T. Lead. Cas. Eq. 1204; Smith v. Claxton, 4 Madd. 484; Wright v. Wright, 16 Ves. Jr. 188; Cronise v. Hardt, 47 Md. 433; Newby v. Skinner, 1 Dev. & B. Eq. 488. 31 Am. Dec. 397; Pennell's Appeal, 20 Pa. St. 515. And see Holland v. Adams, 3 Gray (Mass.) 188, 191.

<sup>237</sup> 3 Pomeroy, Eq. Jur. § 1171, note; 1 Jarman, Wills, 598, Bigelow's note. See Craig v. Leslie, 3 Wheat. (U. S.) 563; Read v. Williams, 125 N. Y. 560, 21 Am. St. Rep. 748; Roy v. Monroe, 47 N. J. Eq. 356; Hand v. Marcy, 28 N. J. Eq. 59.

<sup>238</sup> Cogan v. Stephens, 1 Beav. 482, note, 5 Law J. Ch. 17; Phillips v. Ferguson, 85 Va. 509, 17 Am. St. Rep. 78; Hawley v. James, 5 Paige (N. Y.) 318.

<sup>239</sup> Lewin, Trusts (10th Ed.) 166; Curtels v. Wormald, 10 Ch. Div. 172, 6 Gray's Cas. 818.

or, in case of his death, to his legal successor in interest, as determined by such character; the rule thus differing from that usually applicable in the case of a partial conversion by will.<sup>240</sup>

#### IV. INTERESTS ARISING UNDER CONTRACTS OF SALE

A contract for the sale of land, of which equity would decree specific performance, is there regarded as making the vendor a trustee for the vendee as regards the land, and the vendee a trustee for the vendor as regards the purchase money.

Such a contract also, in equity, converts the land into money, and the money into land, so that thereafter the vendor's interest is personalty, and the vendee's interest is land, and, on the death of either, his interest passes to his heirs or personal representatives accordingly.

#### § 110. Equitable title vested in vendee.

On the making of an executory contract for the sale of land, of which specific performance would be decreed, a court of equity, regarding as done that which ought to be done, thereafter considers the equitable estate as vested in the purchaser, unless an intention to the contrary appears, and the vendor is regarded as holding the legal title in trust for the benefit of the purchaser, while the purchaser is regarded as the trustee of the vendor for the unpaid purchase money.<sup>241</sup>

<sup>240</sup> 3 Pomeroy, Eq. Jur. §§ 1173, 1174; Ackroyd v. Smithson, 1 White & T. Lead. Cas. Eq. 1186; Griffith v. Ricketts, 7 Hare, 299; Clarke v. Franklin, 4 Kay & J. 257, 6 Gray's Cas. 536; Bostwick v. Frankfield, 74 N. Y. 207, 214; Douglas County Com'rs v. Union Pacific Ry. Co., 5 Kan. 615.

<sup>241</sup> Sugden on Vendors, 175; 2 Story, Eq. Jur. § 790; 1 Perry, Trusts, §§ 122, 231; 3 Pomeroy, Eq. Jur. §§ 368, 1261; Shaw v. Foster, L. R. 5 H. L. 321; McKay v. Carrington, 1 McLean, 50, Fed. Cas. No. 8,841; Keep v. Miller, 42 N. J. Eq. 100; Haughwout v. Murphy, 22 N. J. Eq. 531; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Williams v. Haddock, 145 N. Y. 144; Felch v. Hooper, 119 Mass. 52; Dorsey v. Hall, 7 Neb. 464; Lombard v. Chicago Sinai Congregation, (264)

Accordingly, on the death of the vendor, his legal title alone passes to his heir, who may be compelled to make a conveyance in conformity with the contract, as the original vendor would have been.<sup>242</sup> And so any person who thereafter takes a conveyance of the land from the vendor will, if he has notice of the contract, take it subject to the same equity in favor of the purchaser.<sup>243</sup>

As a result of this doctrine, in case there is any deterioration of the property, or injury thereto, as by fire, not arising from the fault of the vendor, the loss will fall upon the vendee, and not on the vendor, and any increase in the value thereof will inure to his benefit.<sup>244</sup> On the same principle,

64 Ill. 481; *Baum v. Grigsby*, 21 Cal. 175, 81 Am. Dec. 153; *Swepton v. Rouse*, 65 N. C. 34, 6 Am. Rep. 735; *Siter's Appeal*, 26 Pa. St. 180; *Wehn v. Fall*, 55 Neb. 547.

<sup>242</sup> *Masterson v. Pullen*, 62 Ala. 145; *Thomson v. Smith*, 63 N. Y. 301; *Hill v. Ressegleu*, 17 Barb. (N. Y.) 162; *Morgan's Heirs v. Morgan*, 2 Wheat. (U. S.) 290.

In some states, the executor or administrator is authorized by statute to make a conveyance of land to one to whom his decedent had contracted to sell it. *White v. Hooper*, 6 Jones, Eq. (N. C.) 152; *Park v. Marshall*, 4 Watts (Pa.) 332; *Bartlett v. Watson*, 3 Sneed (Tenn.) 287; *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48; *Adams v. Harris*, 47 Miss. 144.

<sup>243</sup> 1 Pomeroy, Eq. Jur. § 368; 1 Leake, 303; *Barnes v. Wood*, L. R. 8 Eq. 424; *Morris v. Hoyt*, 11 Mich. 9; *Seager v. Burns*, 4 Minn. 141; *Glover v. Fisher*, 11 Ill. 666; *Linscott v. Buck*, 33 Me. 530; *Derr v. Dellinger*, 75 N. C. 300; *Champion v. Brown*, 6 Johns Ch. (N. Y.) 403, 10 Am. Dec. 348; *Cox v. Cox*, 5 W. Va. 335.

<sup>244</sup> *Lewin, Trusts*, 148; *Paine v. Meller*, 6 Ves. Jr. 349; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 532; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 479; *Snyder v. Murdock*, 51 Mo. 175; *Dunn v. Yakish* (Okla.) 61 Pac. 926; *Reed v. Lukens*, 44 Pa. St. 200, 34 Am. Dec. 425; *Marks v. Tichenor*, 85 Ky. 536. See articles, 1 Col. Law Rev. 1, 15 Harv. Law Rev. 733. But see *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688; *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325; *Powell v. Dayton*, S. & G. R. R. Co., 12 Or. 488. *Thompson v. Gould*, 20 Pick. (Mass.) 134. And see article, 9 Harv. Law Rev. 106.

If the delay in conveying the legal title is due to the fault of the

it has occasionally been decided that the vendor, if he remains in possession, is accountable to the purchaser for the rents and profits received by him, or which, by proper management, he should have received, while he is entitled to credit for all proper expenditures.<sup>245</sup>

### § 111. Conversion of the land and purchase money.

A contract for the sale of land of which specific performance would be decreed has also the result, in accordance with the rule previously discussed, of effecting an equitable conversion of the vendor's interest in the land into money, and of the purchaser's interest in the money to be paid by him into land.<sup>246</sup>

In order to effect a conversion, the contract must be such as would be specifically enforced by a court of equity.<sup>247</sup>

In the case of a contract of sale at the option of the purchaser, the conversion does not take place till the exercise of the option, so that, on the vendor's death prior thereto, it would vest in his heir or devisee, but, in case the option is eventually exercised, conversion then takes place and operates retrospectively, so as to give the property to the personal representative.<sup>248</sup>

vendor, as when his title is imperfect, any loss falls on him. *Phin- izey v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 307; *Smith v. Canaler*, 83 Ky. 367; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477. *Christian v. Cabell*, 22 Grat. (Va.) 82.

<sup>245</sup> 1 Leake, 303; *Ashurst v. Peck*, 101 Ala. 499.

<sup>246</sup> 1 Pomeroy, Eq. Jur. § 372; *Hampson v. Edelen*, 2 Har. & J. Md. 66, 3 Am. Dec. 530; *Lewis v. Smith*, 9 N. Y. 502, 510, 61 Am. Dec. 706; *Masterson v. Pullen*, 63 Ala. 145; *Henson v. Ott*, 7 Ind. 512; *Leiper's Appeal*, 35 Pa. St. 420, 78 Am. Dec. 347; *Bender v. Luckenbach*, 162 Pa. St. 18; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1.

<sup>247</sup> 3 Pomeroy, Eq. Jur. § 1161; 1 Jarman, Wills, 52; *Mills v. Harris*, 104 N. C. 626; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1.

<sup>248</sup> 3 Pomeroy, Eq. Jur. § 1163; *Lawes v. Bennett*, 1 Cox, 167; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526. See *Edwards v. West*, 7 Ch. Div. 858; *Townley v. Bedwell*, 14 Ves. 526, 6 Gray's Cas. 526.

## § 112. Succession on death of party.

On the death of the vendor, his interest in the contract, and the right to compel performance thereof, passes to his personal representative, who is also entitled to the purchase money upon payment thereof.<sup>249</sup>

A contract for the sale of land made by one who has previously devised the land, since it changes the land into personalty, in effect revokes the devise, nor does it operate upon his interest in the purchase money.<sup>250</sup> Likewise, a devise of land which the vendor has previously contracted to convey will, it has been held, pass the legal estate in the land only, unless an intention to pass the purchase money also appear.<sup>251</sup> In case the purchaser die before the acquisition of the legal title, his interest under the contract of sale being regarded as land, it passes to his heirs or general devisees, who are entitled to have it completed at the expense of the personal estate.<sup>252</sup>

<sup>249</sup> 1 Leake, 306; Story, Eq. Jur. §§ 789, 790, 1212, 1213; Farrar v. Earl of Winterton, 5 Beav. 1; Miller's Adm'r v. Miller, 25 N. J. Eq. 354; Burger v. Potter, 32 Ill. 66; Robinson v. Appleton, 124 Ill. 276; Bender v. Luckenbach, 162 Pa. St. 18.

<sup>250</sup> 1 Leake, 308; 1 Jarman, Wills, 129; Farrar v. Earl of Winterton, 5 Beav. 1; Blair v. Snodgrass, 1 Sneed (Tenn.) 1; Donohoo v. Lea, 1 Swan (Tenn.) 119. But see *In re Lefebvre's Estate*, 100 Wis. 192, to the effect that the purchase money will pass under the devise.

<sup>251</sup> 1 Jarman, Wills, 654; 1 Leake, 308; Wall v. Bright, 1 Jac. & W. 494; Newport Water Works v. Sisson, 18 R. L. 411. That the purchase money will pass unless the contrary appears, see *Wright's Heirs v. Minshall*, 73 Ill. 584.

<sup>252</sup> 1 Jarman, Wills, 51; 1 Leake, 309; Buckmaster v. Harrop, 7 Ves. 341; Champion v. Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; Buck v. Buck, 11 Paige (N. Y.) 170; House v. Dexter, 9 Mich. 246; Young v. Young, 45 N. J. Eq. 27; Burank v. Babcock, 3 N. Y. St. Rep. 458; Williams v. Hassell, 73 N. C. 174.

## **CHAPTER VI.**

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#### I. REVERSIONS.

A reversion, or estate in reversion, is the residue of an estate left in the grantor or in his heirs, to commence in possession after the determination of a lesser estate created by him. It can arise only by operation of law.

A reversion is freely transferable, and lesser estates may be created therefrom.

#### § 113. The nature of reversions.

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not change the estate of the grantor, which retains its character of a present vested estate in fee simple, fee tail, for life or for years, as the case may be, but it merely postpones his possession and enjoyment of the land till the termination of the lesser estate.<sup>1</sup> This right to have the possession and enjoyment return or revert to him gives his interest, considered with respect to the lesser estate created by him, the name of "reversion," while the lesser estate is, as regards the reversion, termed the "particular" estate, it being but a part (*particula*) of the grantor's estate.<sup>2</sup>

Regardless of the number of lesser estates created out of a greater estate by the owner thereof, if any residue remains in the latter, that residue constitutes a reversion. Accordingly, if one seised in fee convey to A. for life, remainder to B. for life, remainder to twenty other persons for life, he still has an estate in fee in reversion after the termination of the lesser estates.<sup>3</sup>

In discussing the subject of estates for years, we had occasion to refer to the reversion arising on the creation of such an estate,—that is, the lessor's interest in the land subject to the lease.<sup>4</sup> Such a reversion after an estate for years occurs with great frequency, and may be the result of the creation of an estate for years by the owner of any greater estate. Thus, it arises not only on a lease for years by the owner of a fee-simple estate or estate tail, but also if the owner of a life estate make a lease for any number, even a thousand, years, since an estate for life is in theory greater than an estate for years.<sup>5</sup> It also arises upon the making by a lessee for years of a lease for a less term,—that is, a sublease.<sup>6</sup>

<sup>1</sup> Edwards, Prop. Land, 112.

<sup>2</sup> 2 Bl. Comm. 165; Williams, Real Prop. 241.

<sup>3</sup> 2 Cruise, Dig. tit. 17, § 2; Williams, Real Prop. 251.

<sup>4</sup> See ante, § 37a.

<sup>5</sup> Co. Litt. 46a; 1 Leake, 316.

<sup>6</sup> See ante, § 48.

A reversion also arises when a tenant in fee simple makes a gift in fee tail, or a tenant in fee simple or in fee tail makes a lease for life, the estate created in each of these cases being less than that of the grantor.<sup>7</sup>

There is, as stated in connection with estates for years, an "imperfect" tenure between the owner of a reversion and the particular estate, this differing from the perfect tenure which could be created before the statute of *Quia Emptores*, in that the services, almost invariably a rent at the present time, are incident to the reversion, while in the perfect tenure the services were incident to the lord's seignory.<sup>8</sup>

§ 114. Reversions arise only by operation of law.

By the very terms of its definition, a reversion arises only by operation of law, and cannot be created by act of the party, though it arises as a consequence of such act.<sup>9</sup> If, upon creating a lesser estate, the grantor does attempt to limit a reversion to himself or his heirs, such limitation is, by the common law, null and void, it being merely a statement of what is done by the law.<sup>10</sup> This rule had certain results at the common law in determining the course of descent of the land,<sup>11</sup> and it might now, under some of the state statutes of descent, have results of a similar character.<sup>12</sup> In England, it has been changed by a statute to the effect that, upon a limitation to the person or heirs of the person conveying or devising the land, the person or persons in favor of whom such limitation

<sup>7</sup> Co. Litt. 45b, 46b; 2 Bl. Comm. 175; 1 Leake, 315, 316; Challis, Real Prop. 241.

<sup>8</sup> 1 Leake, 42, 317; Williams, Real Prop. 117, 243; Gray, Perpetuities, § 22; 1 Washburn, Real Prop. 315.

<sup>9</sup> Williams, Real Prop. 243; Challis, Real Prop. 59.

<sup>10</sup> Co. Litt. 22b; 2 Bl. Comm. 176; 1 Leake, 315; King v. Scoggin, 92 N. C. 102; Miller v. Fleming, 18 D. C. 139; Loring v. Eliot, 16 Gray (Mass.) 563, 572; King v. Dunham, 31 Ga. 743.

<sup>11</sup> 2 Bl. Comm. 176; Challis, Real Prop. 125.

<sup>12</sup> See post, § 432.

is made shall be considered to have acquired the land as a purchaser.<sup>13</sup>

§ 115. The transfer of reversions.

A reversion, whether it be after a particular estate of freehold, or after an estate for years, may be aliened by the owner thereof,<sup>14</sup> and he may create other lesser estates therefrom, which estates will, however, be subject to the particular estate first created.<sup>15</sup>

At common law, in the case of a reversion after a particular estate of freehold, since the seisin was in the tenant of the particular estate, the reversion lay in grant, and not in livery.<sup>16</sup>

A grant of a reversion carries with it any rights incident thereto, such as that to rent, unless this be expressly excepted in the grant.<sup>17</sup>

## II. RIGHTS OF REVERTER.

Rights of reverter include the possibility of reverter after a determinable or conditional fee, the right of one who has given land to a corporation to possession thereof on corporate dissolution, and, in some jurisdictions, rights by way of escheat.

§ 116. Possibilities of reverter.

Reference has already been made to the right known as the

<sup>13</sup> 3 & 4 Wm. IV, c. 106, § 3 (A. D. 1833). See 1 Leake, 315; Challis, Real Prop. 85; 2 Jarman, Wills, 906.

<sup>14</sup> Co. Litt. 49a; 2 Bl. Comm. 175, 317; and see citations ante, § 47.

<sup>15</sup> Co. Litt. 215a; 2 Preston, Abstracts, 84; *Attoe v. Hemmings*, 2 Bulst. 281; *Wright v. Burroughes*, 3 C. B. 685. Thus, an owner of a fee simple in reversion after a life estate may create another life estate therein, which cannot, however, take effect till the termination of the first life estate.

<sup>16</sup> 2 Bl. Comm. 317; 4 Kent, Comm. 354; Williams, Real Prop. 243; *Doe d. Were v. Cole*, 7 Barn. & C. 243, 1 Gray's Cas. 443. See ante, § 16.

<sup>17</sup> Co. Litt. 144a, 151a, b; 2 Bl. Comm. 176; Williams, Real Prop. 247. See ante, § 47.

“possibility of reverter” after a determinable fee,<sup>18</sup> which, though not constituting an estate, has the same effect as a reversion in giving the grantor or his heirs a right of possession upon the termination of the estate created by him. Of a similar character is the possibility of reverter which exists in any jurisdiction where the common-law estate in fee simple conditional is still recognized, owing to the failure to adopt the statute *De Donis Conditionalibus*.<sup>19</sup>

The right of re-entry for breach of a condition annexed to an estate in fee simple, already considered,<sup>20</sup> is frequently referred to as a “possibility of reverter,” but, not being a reversionary right,<sup>21</sup> it might, more correctly, it seems, so long as the condition has not been broken, be described as a “contingent right of re-entry.”<sup>22</sup>

—Reverter on dissolution of corporation.

It is stated by Lord Coke and other common-law writers that, upon the dissolution of a corporation, land belonging thereto reverts to the grantor, and does not escheat to the lord, and this principle has been applied in perhaps two cases in this country in the case of a corporation of a charitable nature not having any stockholders.<sup>22a</sup>

<sup>18</sup> See ante, § 81.

<sup>19</sup> As in South Carolina. *Gray, Perpetuities*, § 14, and note; *Bedon v. Bedon*, 2 Bailey (S. C.) 231; *Deas v. Horry*, 2 Hill, Ch. (S. C.) 244.

In England, a conditional fee may exist in copyhold land, and in that case there is a possibility of reverter on failure of the heirs of the body named in the creation thereof. *Challis, Real Prop.* 64, 209. And see *Pemberton v. Barnes* (1899) 1 Ch. 544.

<sup>20</sup> See ante, §§ 64-77.

<sup>21</sup> *Gray, Perpetuities*, § 300.

<sup>22</sup> See *Finch's Cas.* 866.

<sup>22a</sup> *Co. Litt.* 13b; 1 Bl. Comm. 484; 2 Kent, Comm. 307; *Late Corporations, etc., v. United States*, 136 U. S. 1; *Mott v. Danville Seminary*, 129 Ill. 403; *White v. Campbell*, 5 Humph. (Tenn.) 38 (dictum); *Folger v. Chase*, 18 Pick. (Mass.) 63 (dictum); *Bingham v. Weidenwax*, 1 N. Y.

## § 117. Rights by way of escheat.

By the feudal doctrine of escheat, on the failure of heirs or of inheritable blood to the tenant, the lord could resume possession of the land.<sup>23</sup> This right of escheat was, before the statute *Quia Emptores*, when the donor was also usually the lord, so similar in its effect to the donor's right to have the land revert after the failure either of an estate for life, of a common-law conditional fee, or of a determinable fee, that the terms "revert" and "escheat" seem to have frequently been used indiscriminately.<sup>24</sup> After the passage of that statute, the terms became differentiated, and "escheat" came to be confined to estates in fee simple. It is, however, in England, a right of reverter, though the lord is not considered to have a "possibility of reverter."<sup>25</sup> In this country, a right of escheat exists in the state, but this is generally not based on the feudal theory that the state is the lord paramount and original grantor, and hence the subject cannot well be considered in this place, but will be treated in a subsequent chapter as one of the modes of transfer of land.<sup>26</sup>

## III. REMAINDERS.

A remainder, or estate in remainder, is, at common law, an

509 (dictum). See, also, citations, Gray, *Perpetuities*, § 51. The correctness of the principle, as stated by Lord Coke, is vigorously questioned in Gray, *Perpetuities*, §§ 44-51, and a case is there cited to the contrary. *Johnson v. Norway*, Winch. 37, Hargrave's note to Co. Litt. 13b. In *People v. Trustees*, 38 Cal. 166, it was held not to apply to land purchased for value by the corporation, as distinguished from that given to it. The principle has, moreover, never been applied in equity to pecuniary stock corporations, which were unknown until after the time of Lord Coke, and land belonging to them, is, like other assets, distributed among the stockholders, after payment of debts. 2 Clark & Marshall, *Priv. Corp.* § 228b; 2 Morawetz, *Priv. Corp.* (2d Ed.) § 1032.

<sup>23</sup> See ante, § 10.

<sup>24</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 22.

<sup>25</sup> Challis, *Real Prop.* (2d Ed.) 33.

<sup>26</sup> See post, § 463.



estate expressly limited to take effect in possession immediately upon the expiration of another estate (the particular estate) created by the same instrument, and not in derogation thereof. At common law, no other class of future estate could be created by express limitation.

A remainder is vested, provided the person entitled thereto is certain and in being, and it is subject to no condition precedent which would prevent its taking effect in possession if the particular estate were to terminate immediately. A remainder is contingent if the person entitled thereto is uncertain or not in being, or it is subject to a condition precedent. A remainder which was previously contingent becomes vested upon the ascertainment or birth of the remainderman, or the happening of the condition precedent.

The language of an instrument is always, if possible, construed as creating a vested, rather than a contingent, remainder.

A contingent remainder must be preceded by a particular estate of freehold, and if, for any reason, such preceding estate terminates or is destroyed before the remainder vests, the remainder fails.

Upon failure of a contingent remainder in fee simple, the grantor is entitled to possession of the land, unless there be an alternative limitation of another remainder, to take effect on such failure. Remainders thus limited, one to take effect if the other does not, are known as "alternative remainders," or "remainders on a contingency with a double aspect."

Cross-remainders arise when lands are limited for concurrent particular estates to two or more persons, with a remainder, in the share of any such person, after the termination of his particular estate, to the tenants of all the particular estates still existent, for such time as each of their estates continues, so that the ulterior remainderman or reversioner is not let into possession till the determination of all the particular estates.

A remainder cannot, by the weight of authority, be limited to the child or remoter descendants of an unborn child of the person to whom a previous particular estate is given.

A vested remainder, upon the failure or premature termination

of the particular estate, immediately takes effect in possession, in the absence of evidence of a contrary intention, it being then said to be "accelerated."

A vested remainder may be transferred by conveyance *inter vivos*, by will, or by descent, as any other estate. A contingent remainder cannot be conveyed *inter vivos* at common law, but may in equity, or by estoppel; and in some states, either by statute or otherwise, it may be conveyed as if vested. A contingent remainder may pass by will or descent, provided the remainderman be ascertained and in being.

§ 118. The nature of remainders.

In contradistinction to the term "revert," which, coming into use in early times, gave rise to the term "reversion," the word "remain," or its Latin equivalent, was used to describe the course of the residue of an estate after the creation of a particular estate therefrom, if, instead of "coming back" to the grantor, it "stayed out" or "remained" to another person, to take effect in possession in his favor after the termination of the particular estate. The word, thus used, gave rise to the term "remainder," as descriptive of the residue which thus remained out, and later the term "remainderman" was used to describe the person to whom it remained.<sup>27</sup>

Since the residue after a particular estate, if not expressly disposed of at the time of the creation of the particular estate, necessarily constitutes a reversion, it follows that a remainder, an estate which does not revert, must be created by express language. In other words, while a reversion is always created by act of the law, a remainder is always created by express grant or devise.<sup>28</sup>

Successive rights of enjoyment analogous to particular estates and remainders may be created in land the legal title to which is outstanding in a trustee, and such a right of future en-

<sup>27</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 21.

<sup>28</sup> Williams, *Real Prop.* 243; *Dennett v. Dennett*, 40 N. H. 504.

joymment of this character is almost invariably spoken of as a remainder, or "equitable remainder,"<sup>20</sup> though it is not, strictly speaking, entitled to that appellation, since, as will be seen later,<sup>21</sup> the requirement of a particular estate, on which the doctrine of remainders is based, has no application to future equitable interests.<sup>21</sup>

The nature of a remainder may be illustrated by the following examples: Where the owner of an estate in fee simple grants the land to A. for life, and, after the latter's death, to B. for life, the estate of B. is, as regards the estate of A., a remainder, and there is a reversion, after B.'s death, in the grantor. So there may be a grant to A. for life, and, after A.'s death, to B. in fee simple, and in such a case there is no residue or reversion in the grantor, but there is a remainder in fee in B.

A number of remainders may be created, one to follow another, as on a grant to A. for life, and, on its termination, to B. for life, and, after B.'s death, to C. for life, and, after C.'s death, to D. in fee. Here the estates of B., C., and D. are all remainders. So an indefinite number of remainders may be created in different people for their lives, only a few of which, however, and possibly only one, may vest in possession, since the lives are not apt to terminate in the order in which the remainders are limited.<sup>22</sup>

<sup>20</sup> *Challis*, Real Prop. (2d Ed.) 111; *Mallory v. Mallory*, 72 Conn. 494; *Hawkins v. Bohling*, 168 Ill. 214; *Woodman v. Woodman*, 89 Me. 123; *Cowell v. Hicks* (N. J. Ch.) 30 Atl. 1091; *Clarkson v. Pell*, 17 R. I. 646.

<sup>21</sup> See post, § 123.

<sup>22</sup> *Gray*, Perpetuities, §§ 323-325; 1 *Hayes*, Conveyancing, (5th Ed.) 84, note; *Lewis*, Perpetuity, 424; *Abbiss v. Burney*, 17 Ch. Div. 211.

In determining the existence and duration of these "equitable remainders," the language used is construed in the same way as in the case of legal limitations. 1 *Leake*, 469; *Weehawken Ferry Co. v. Slisson*, 17 N. J. Eq. 475.

<sup>23</sup> See *Williams*, Real Prop. 251; 2 *Cruise*, Dig. tit. 16, c. 1, §§ 1-3.

In New York, however, and other states which have adopted its statutes in this regard, it is provided that, where a remainder is limited on

— Limitation on failure of issue.

In discussing the subject of estates tail, the effect of a devise to A., with a limitation over to B. on the "failure of issue" of A., or similar words, as creating an estate tail in A., was considered.<sup>23</sup> When an estate tail is thus created in A., the estate which B. will take on the failure of issue of A. is an estate in remainder, after the fee tail in A., since it is limited by the same instrument, and is to commence on the termination of A.'s estate.<sup>24</sup>

§ 119. The particular estate—(a) Necessity.

There was, at common law, a very stringent requirement to the effect that every act of parties was void, the effect of which was to place the seisin or immediate freehold in abeyance,—that is, which would have the effect of leaving the freehold without a tenant; this being based on the necessity that there be some person against whom an action concerning the land could be brought, who could meet adverse claims thereto, and who could render the feudal services to the lord.<sup>25</sup> From this requirement, and likewise from the nature of livery of seisin, by which alone an estate of freehold could be created, and which must take effect immediately or not at all, it resulted that at common law there could be no conveyance of an estate

more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled shall be void. 1 Rev. St. p. 723, § 17; N. Y. Real Prop. Law, § 33; Comp. Laws, Mich. 1897, § 8799; Gen. St. Minn. 1894, § 4378.

<sup>23</sup> See ante, § 25.

<sup>24</sup> Marsden, Perpetuities, c. 10; Lewis, Perpetuity, 177; Doe d. Ellis v. Ellis, 9 East, 382; Willis v. Bucher, 3 Wash. C. C. 369, Fed. Cas. No. 17,769; Richardson v. Richardson, 80 Me. 585; Allen v. Trustees of Ashley School Fund, 102 Mass. 263; Dorr v. Johnson, 170 Mass. 540; Taylor v. Taylor, 63 Pa. St. 481; Morehouse v. Cotheal, 21 N. J. Law, 480. See post, § 156.

<sup>25</sup> 1 Leake, 47; Challis, Real Prop. 78; 4 Kent, Comm. 259.

of freehold to commence in the future, and any such attempted conveyance was void.<sup>36</sup>

The creation of an estate in remainder after a particular estate was not regarded as a violation of this rule, since the tenant of the particular estate received the livery of seisin, and held the seisin, so long as his estate endured, in behalf of the tenant or tenants in remainder, these latter participating in the seisin, as it were, in the order of their succession, and all the successive estates constituting, so far as the requirements of seisin were concerned, but one estate.<sup>37</sup>

The rule forbidding the abeyance of the freehold rendered it necessary, however, not only that there be a particular estate, but also that the remainder begin immediately upon the termination of the particular estate, since otherwise there would be a period of time during which there would be an abeyance. Consequently, in a conveyance to A. for life, and, after the lapse of a day from his death, then to B. in fee or for life, the limitation to B. is void at common law.<sup>38</sup>

— (b) Character of estate.

The particular estate after which a remainder may be limited may be an estate tail<sup>39</sup> or an estate for life, this latter being the ordinary case.<sup>40</sup>

A freehold estate limited to commence upon the termination of a term of years, though commonly referred to as a

<sup>36</sup> Co. Litt. 217a; 2 Bl. Comm. 165; Challis, Real Prop. 80, 81; Barwick's Case, 5 Coke, 94b; Buckler v. Hardy, Cro. Eliz. 585, 5 Gray's Cas. 44.

<sup>37</sup> Co. Litt. 49b, 143a; 2 Bl. Comm. 166; Challis, Real Prop. c. 11; 1 Leake, 41, 42.

<sup>38</sup> 2 Bl. Comm. 168; 1 Leake, 318; Challis, Real Prop. 62, 63, 81; Fearn, Cont. Rem. 307.

<sup>39</sup> Litt. 215; Co. Litt. 143a; Gray, Perpetuities, § 111; Fearn, Cont. Rem., Butler's note, c. 1; Webb v. Hearing, Cro. Jac. 415, 5 Gray's Cas. 47; Taylor v. Taylor, 63 Pa. St. 481. See cases cited ante, note 34.

<sup>40</sup> Fearn, Cont. Rem. 2, and Butler's note; Williams, Real Prop. 250.

remainder,<sup>41</sup> is not a "remainder," in the strict sense of the word, since the limitation of such estate of freehold takes immediate effect, subject to the term, the presence of which in no way affected the seisin, even at common law.<sup>42</sup>

An estate in remainder can be limited only after the regular termination of the particular estate, and cannot take effect in derogation of it, upon its termination by condition subsequent, this being a result of the common-law rules that only the grantor or his heirs can take advantage of a condition, and that the seisin could pass from one person to another only by livery of seisin. Thus, in the case of a limitation to A. for life, and, on the marriage of A., then in remainder to B., the remainder is void.<sup>43</sup> A remainder may, however, be limited after an estate in tail or for life on special limitation, as in the case of a limitation to A. during her widowhood, and, on her death or marriage, then to B.<sup>44</sup>

There can be no remainder after an estate in fee simple, since it could only take effect in derogation of the estate previously limited;<sup>45</sup> nor can there be one after what we have referred to in a previous part of this work as a determinable, base, or qualified fee.<sup>46</sup>

The remainder and the particular estate must be created or pass out of the grantor simultaneously and by the same in-

<sup>41</sup> See Litt. § 60; 4 Kent, Comm. 198.

<sup>42</sup> Challis, Real Prop. 77; 1 Leake, 320.

<sup>43</sup> Challis, Real Prop. 62; 1 Leake, 318; Fearne, Cont. Rem. 14, 361.

<sup>44</sup> Fearne, Cont. Rem. 13, and Butler's note; Challis, Real Prop. 63; 1 Leake, 317, 318.

<sup>45</sup> 2 Bl. Comm. 164; Fearne, Cont. Rem. 12; 4 Kent, Comm. 200; Macumber v. Bradley, 28 Conn. 445; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Horton v. Sledge, 29 Ala. 478; Goodrich v. Harding, 3 Rand. (Va.) 280.

<sup>46</sup> Co. Litt. 18a; Challis, Real Prop. 64; 2 Cruise, Dig. tit. 16. c. 1, §§ 5, 6; Fearne, Cont. Rem. 12, and Butler's note; Proprietors of Church in Brattle Square v. Grant, 3 Gray (Mass.) 142; Hennessy v. Patterson, 85 N. Y. 91, Finch's Cas. 868. That a remainder cannot be limited after a common-law conditional fee, see Selman v. Robertson, 46 S. C. 262.

strument, since, if the particular estate were first created, the residue after such estate would be a reversion, and not a remainder; and if the remainder were first created, it would be void, as previously stated, for want of a particular estate to support it.<sup>47</sup>

— (c) Relaxation of common-law requirements.

The common-law requirements in connection with the creation of future estates, to the effect that this can be only by way of remainder, and that the remainder must take effect immediately on the termination of the particular estate, and not before, have to a very considerable extent lost their practical importance at the present day, for, even apart from the statutory provisions in various states allowing the creation of a future estate with or without a precedent estate to support it,<sup>48</sup> a limitation of a future estate in a conveyance *inter vivos*, if not answering to the requirements of a remainder at common law, can, in almost every case, as we shall presently see, be supported as a future use, and, when contained in a will, as an executory devise.<sup>49</sup> It is, however, most desirable to have a thorough acquaintance with these requirements, since this is assumed in all discussions of the subject of future estates, and they are intimately connected with rules which still, in many jurisdictions, are of importance with regard to that class of remainders termed "contingent remainders."

In two or three states, in which the Statute of Uses is not in force, it has been decided that, since livery of seisin is obsolete, the common-law rules based upon abeyance of the seisin do not control, and that, apart from any express statutory authorization, future estates can be created by conveyance *inter vivos*, unsupported by any precedent estate.<sup>50</sup>

<sup>47</sup> Litt. § 721; Co. Litt. 378a; 2 BL Comm. 167; Fearn, Cont. Rem. 302.

<sup>48</sup> See post, § 150.

<sup>49</sup> See post, § 134.

<sup>50</sup> Bunch v. Nicks, 50 Ark. 367; Gorham v. Daniels, 23 Vt. 600; Abbott

**§ 120. Vested and contingent remainders distinguished—(a)  
Ascertainment of remaindermen.**

That a remainder cannot be vested<sup>51</sup> unless there be some certain person or persons in being in whom it can be regarded as vested, is a proposition as to which, upon principle, it would seem that there could be little doubt,<sup>52</sup> and that such is the law is recognized by the most authoritative writers, and by numerous decisions.<sup>53</sup> In a few cases, however, in this country, the courts have failed to recognize this certainty of the remainderman as an essential characteristic of a vested remainder, the error arising from oversight, apparently, and not

*v. Holway*, 72 Me. 298. See *Wyman v. Brown*, 50 Me. 189, *Finch's Cas.* 909; *Savage v. Lee*, 90 N. C. 320. See *Gray, Perpetuities*, §§ 67, 68.

<sup>51</sup> A remainder was originally said to be "vested" because the remainderman was considered to be "invested" with an actual portion of the fee, though the time of the falling into possession was uncertain. In the case of a remainder subject to a condition precedent, that is, one which was "contingent," the remainderman could not be regarded as invested with a portion of the fee, and in this way the terms "vested" and "contingent" came to be used in opposition to each other as descriptive of different classes of remainders. *Hawkins, Wills*, 221. See *Gray, Perpetuities*, § 100.

In some decisions, the term "vested" is applied to an interest to which one has such a title or claim that he may transfer or devise it. See *Gray, Perpetuities*, § 118, and authorities cited. Thus, in some cases in Massachusetts a "vested interest in a contingent remainder" is spoken of, meaning an interest which is transferable or transmissible. *Cummings v. Stearns*, 161 Mass. 506; *Shaw v. Eckley*, 169 Mass. 119. This secondary use of the term "vested" is liable to cause confusion, and must be carefully distinguished from its use to describe an estate or interest not subject to a condition precedent.

<sup>52</sup> "A vested remainder is *ex vi termini* vested in somebody." *Gray, Perpetuities*, § 108, note.

<sup>53</sup> *Mr. Fearn*, in his work on *Contingent Remainders* (page 9), states as one class of such remainders, "where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made." See, also, 2 Bl. Comm. 168, 169; 1 Leake, 322; *Ducker v. Burnham*, 146 Ill. 9; *Starnes v. Hill*, 112 N. C. 1; *Robinson v. Palmer*, 70 Me. 246; and the cases cited post, notes 55-59.



from any purpose of departing from the established line of distinction on the subject.<sup>54</sup>

A very common instance of a remainder contingent because of uncertainty in the remainderman is presented by the limitation of a remainder to the heirs, or to the heirs of the body, of a living person named, in which case the heirs cannot be ascertained till such person's death, on the principle that there can be no heir to a living person, as expressed in the maxim, *Nemo est hæres viventis*.<sup>55</sup>

<sup>54</sup> *Croxall v. Shererd*, 5 Wall. (U. S.) 233; *Kumpe v. Coons*, 63 Ala. 448; *Gindrat v. Western Railway*, 96 Ala. 162; *Smith v. West*, 103 Ill. 332; *Davidson v. Koehler*, 76 Ind. 398; *Wood v. Robertson*, 113 Ind. 323. The error in the previous decisions is recognized in *Smaw v. Young*, 109 Ala. 528, but the court refused to overrule them on the ground that they had established a rule of property. The Illinois decision is, it seems, overruled by subsequent cases, such as *Temple v. Scott*, 143 Ill. 290; *Chaplin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213.

It has been sometimes stated that the case of *Moore v. Littel*, 41 N. Y. 66, *Finch's Cas.* 894, settled the construction of the New York statute as making the ascertainment of the person who is to take unnecessary to render the remainder vested, provided there is a person in existence who would be entitled to take if the precedent estate were at any time to cease. But it seems that, in view of later decisions, uncertainty of the remainderman renders the remainder contingent in that state, as elsewhere. See *Hennessy v. Patterson*, 85 N. Y. 91, *Finch's Cas.* 868; *Purdy v. Hoyt*, 92 N. Y. 447, 454; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570. See, also, articles by Stewart Chaplin, Esq., in 1 *Columbia Law Rev.* 279, and by Everett P. Wheeler, Esq., *Id.* 347.

The occasional failure to recognize the requirement that the remainderman must be certain is in part due, it appears, to the language of the New York Revised Statutes, in which it was stated that a remainder is vested "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate," and Chancellor Kent's erroneous statement that this definition "appears to be accurately and fully expressed." 4 Kent, Comm. 202.

<sup>55</sup> *Co. Litt.* 378a; *Boraston's Case*, 3 Coke, 20a; *Challis*, *Real Prop* 103; *Richardson v. Wheatland*, 7 Metc. (Mass.) 169; *Bennett v. Morris*, 5 Rawle (Pa.) 9; *Preston v. Brant*, 96 Mo. 552; *Sharman v. Jackson*, 30 Ga. 224; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570; *Alverson v.*

A limitation to A. for life, with remainder to his eldest son, is a contingent remainder until a son be born, when it becomes vested, because the remainderman then, and not till then, is in being; but if, in such case, the remainder were to the eldest son "living at the death of A.," the remainder would be contingent till the death of A., because, till then, the person in whom the remainder is to vest is not ascertained, owing to the possibility of the death of A.'s eldest son during A.'s life.<sup>56</sup>

A gift in remainder to those of a class of persons who may be surviving at a future time, as at the termination of the particular estate, is contingent because, till then, the remaindermen cannot be ascertained.<sup>57</sup> So, a gift to A. for life, with a remainder to his children or his issue living at his death, creates a contingent remainder, since the remaindermen can-

Randall, 13 R. L. 71; Zuver v. Lyons, 40 Iowa, 510; Smith v. Collins, 17 R. L. 432; Wallace v. Minor, 86 Va. 550.

The word "heirs" may, however, mean heirs "apparent,"—that is, particular persons who, at the time of the execution of the instrument, would inherit if the death immediately occurred, and then, of course, the element of uncertainty is absent, and the remainder may be a vested one. Richardson v. Wheatland, 7 Metc. (Mass.) 169; Alverson v. Randall, 13 R. L. 71; Williamson v. Williamson, 18 B. Mon. (Ky.) 329; Wallace v. Minor, 86 Va. 550.

If the limitation in remainder is to the heirs of a person other than the tenant of the particular estate, and he dies before the latter, then his heirs are ascertainable, and the remainder immediately vests. Preston v. Brant, 96 Mo. 552; Ryan v. Monaghan, 99 Tenn. 338.

<sup>56</sup> Williams, Real Prop. 268; Edwards, Prop. Land, 132.

<sup>57</sup> Strobe v. McCormick, 158 Ill. 142; Madison v. Larmon, 170 Ill. 65; Whitesides v. Cooper, 115 N. C. 570; Robinson v. Palmer, 90 Me. 246; Paul v. Frierson, 21 Fla. 529; Temple v. Scott, 143 Ill. 290; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Smith v. Rice, 130 Mass. 441; Emison v. Whittlesey, 55 Mo. 254; Smith v. Block, 29 Ohio St. 488; Small v. Small, 90 Md. 550; Jackson v. Everett (Tenn.) 58 S. W. 340; Spear v. Fogg, 87 Me. 182; Rhode Island Hospital Trust Co. v. Harris, 20 R. L. 408; Paget v. Melcher, 156 N. Y. 399. As to when words of survivorship are to be referred to a future time, rather than to testator's death, see post, § 143.

not be ascertained till A.'s death,<sup>58</sup> as does a gift to A. for life, and, after his death, to the children of B., "if he leave any him surviving"; the remainder in the latter case not vesting until B.'s death, leaving children.<sup>59</sup>

— Provision for death of remainderman.

In a certain class of cases, though the persons who will obtain possession as remaindermen cannot be ascertained till the termination of the particular estate, the remainder is regarded as vested, owing to the form of the limitation. This occurs in the case of a limitation in remainder to a certain person or persons, with a provision that, on the death of any such person before the termination of the particular estate, the property, or his share thereof, shall pass to another. In such case, the remainder is regarded as vested, because limited to an ascertained person, and the limitation over on his death during the particular estate is regarded as a condition subsequent divesting the estate, and not as a condition precedent to its vesting, though, in fact, the condition, if it ever has any effect at all, will prevent the remainderman from coming into possession. This view is due, it appears, to the policy of the law in favoring vested interests, but it is to be observed that it can apply only when the language in terms gives a vested interest liable to be divested, and, if the conditional language is incorporated in the original gift, though the result otherwise may be the same, the remainder is contingent.<sup>60</sup>

Thus, while a devise to A., testator's wife, for life, with remainder to such of testator's children as may be living at the time of A.'s death, will create a contingent remainder,<sup>61</sup> a

<sup>58</sup> *Faber v. Police*, 10 S. C. 376; *Teets v. Weise*, 47 N. J. Law, 154; *Mercantile Trust & Deposit Co. v. Brown*, 71 Md. 166.

<sup>59</sup> *Price v. Hall*, L. R. 5 Eq. 399, 5 Gray's Cas. 76.

<sup>60</sup> *Gray, Perpetuities*, §§ 104-108; *Clark v. Cox*, 115 N. C. 93; *Robinson v. Palmer*, 30 Me. 246; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135.

<sup>61</sup> *Olney v. Hull*, 21 Pick. (Mass.) 311; *Thomson v. Ludington*, 104

devise to A. for life. with a remainder to B., C., and D., the children of testator, with a provision that the share of any one of such children who may die before A. shall go to the survivors, gives a vested remainder to B., C., and D., which is divested, as to the share of either, by his death before A.<sup>62</sup> It will be noticed that in these two cases the results are the same, —that is, the property goes to the children who survive A.; but, because in one case the limitation is in form upon a contingency as regards the persons to take, the remainder is contingent, while in the other it is vested, because the remaindermen are named, and the contingency is not incorporated into the original gift.<sup>63</sup> On the same principle, in the case of a devise to A. for life, and, after her death, to the testator's children, with a provision that, in case a child die before the death of A., his children shall take his share, testator's children take vested remainders;<sup>64</sup> while, if the limitation be to such of testator's children as survive A., and, in case of the death of a child before A., his children to take his share, the remainders to testator's children are contingent.<sup>65</sup>

— (b) Happening of contingency.

A remainder which is contingent, not in respect to uncertainty of the remainderman, but as being subject to a condition precedent, cannot, so long as this condition exists, take effect in possession, even were the particular estate to be immediately terminated or cut off in some way, while, so soon as the condition

Mass. 193; *Robinson v. Palmer*, 90 Me. 246; *Smith v. Block*, 29 Ohio St. 488; *Whitesides v. Cooper*, 115 N. C. 570, *Finch's Cas.* 377.

<sup>62</sup> *Blanchard v. Blanchard*, 1 Allen (Mass.) 223, 5 Gray's Cas. 85; *Jeffers v. Lampson*, 10 Ohio St. 101; *Collins v. Collins*, 40 Ohio St. 353; *Harrison v. Foreman*, 5 Ves. Jr. 207.

<sup>63</sup> See 4 Kent, Comm. 203, notes by Mr. Justice Holmes; *Gray, Perpetuities*, § 108.

<sup>64</sup> *McArthur v. Scott*, 118 U. S. 340; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223, 5 Gray's Cas. 85; *Kemp v. Bradford*, 61 Md. 330.

<sup>65</sup> *Whitesides v. Cooper*, 115 N. C. 570, *Finch's Cas.* 377.

is satisfied or performed, the estate thereby becoming vested, it can immediately take effect in possession if the particular estate were removed from out of the way. Accordingly, it is frequently stated that the capacity of a remainder to take effect immediately in possession if the particular estate were to terminate, is the criterion of a vested, as distinguished from a contingent, remainder.<sup>66</sup>

In the case of a limitation to A. for life, with a remainder to B., provided B. survive A., B. takes a contingent remainder, since his interest is subject to the condition precedent of his survival of A., which would prevent it from immediately vesting in possession in case A.'s life estate should for some reason terminate before A.'s death.<sup>67</sup> So, a limitation to A. for life, with a remainder to B. if B. survive C., gives B. a remainder contingent on his surviving C., and it becomes vested in him only in case C. die before him,—that is, on a satisfaction of the condition precedent.<sup>68</sup>

A conveyance to A. for life, and, after her death, to her children, and, if she die without children, then to B., has been held to give B. a contingent remainder, since the contingency of A.'s dying without children cannot be settled till her death, and, until this has occurred, the remainder cannot vest in pos-

<sup>66</sup> Fearn, Cont. Rem. 215; 4 Kent, Comm. 203; Williams, Real Prop. 268; *Poor's Lessee v. Considine*, 6 Wall. (U. S.) 458; *Schuyler v. Hanna*, 31 Neb. 307; *Hoover v. Hoover*, 116 Ind. 498; *Kennard v. Kennard*, 63 N. H. 303.

This statement is, however, to be understood with the qualification that the remainderman must be certain and in being to render the remainder vested, and furthermore it is to be observed that the termination of the particular estate thus referred to is not its regular expiration, but its destruction by some extrinsic cause, such as forfeiture, merger, and the like.

<sup>67</sup> 2 Bl. Comm. 170; *Doe d. Planner v. Scudamore*, 2 Bos. & P. 289; *Watson v. Adams*, 103 Ga. 733; *Bamforth v. Bamforth*, 123 Mass. 280; *Starnes v. Hill*, 112 N. C. 1; *Shaw v. Eckley*, 169 Mass. 119; *Phayer v. Kennedy*, 169 Ill. 360. But see, to the contrary, *Finch v. Lane*, L. R. 10 Eq. 501; *McDonald v. Taylor*, 107 Ga. 43.

<sup>68</sup> 1 Leake, 325; *Boraston's Case*, 3 Coke, 20a.

session, even if the particular estate were previously terminated.<sup>69</sup>

— (c) Uncertainty of enjoyment immaterial.

It is to be noted that a remainder is not contingent because it is uncertain whether it will ever vest in possession, since every remainder, in life or in tail, is liable to terminate, by the death of the remainderman, or his death without issue, before the termination of the particular estate.<sup>70</sup> For instance, in the case of a limitation of an estate to A. for life, with a remainder to B. for life, B. may never be entitled to possession, because he may die before A., but nevertheless his remainder is vested.<sup>71</sup> And so, though the estate in remainder be subject to a condition subsequent which may cause it to terminate before the termination of the particular estate, it will be a vested remainder if the remainderman is ascertained and

<sup>69</sup> *Doe d. Comberbach v. Perryn*, 3 Term R. 484; *Morse v. Proper*, 82 Ga. 13, Finch's Cas. 882; *Loring v. Arnold*, 15 R. I. 428; *In re Boyd's Estate* (Pa.) 49 Atl. 297; *Clark v. Cox*, 115 N. C. 93; *Watson v. Smith*, 110 N. C. 6; *Goodright v. Dunham*, 1 Doug. 265.

In New Hampshire, it has been decided that a devise to A. for life remainder to her children, if any she has, and, if she has none, to B., gives B. a vested remainder, subject to be divested by the birth of a child to A. *Cole v. American Baptist Home Mission Soc.*, 64 N. H. 445, 458; *Parker v. Ross*, 69 N. H. 213. These decisions are apparently based on a construction of the instrument as showing an intent that the death of A. shall not be a condition precedent to the taking effect in possession of B.'s rights as remainderman, and, so considered, are not in conflict with the decisions previously cited.

<sup>70</sup> *Fearne*, Cont. Rem. 215; 4 Kent's Comm. 203; *Smith v. Packhurst*, 3 Atk. 135, 5 Gray's Cas. 55; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Leighton v. Leighton*, 58 Me. 63; *Doe d. Poor's Lessee v. Con- sidine*, 6 Wall. (U. S.) 458; *Kennard v. Kennard*, 63 N. H. 303; *Schuyler v. Hanna*, 31 Neb. 307; *Downing v. Birney*, 117 Mich. 675; *Lehndorf v. Cope*, 122 Ill. 317; *Amos v. Amos*, 117 Ind. 19.

<sup>71</sup> *Fearne*, Cont. Rem. 216; *Gray*, Perpetuities, § 102; *Allen v. May- field*, 20 Ind. 293; *Kemp v. Bradford*, 61 Md. 330; *Lyons v. Weeks*, 22 Misc. Rep. (N. Y.) 714; *Welliver v. Jones*, 166 Ill. 80; *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 431.

in being, and it is not subject to a condition precedent.<sup>73</sup> Nor does the fact that the remainder may be divested by the exercise of a power of appointment by the owner of the particular estate or another render the remainder contingent.<sup>73</sup>

A remainder after an estate tail, even though it be only for life, is vested, although the probability of the remainder vesting in possession in such case may be remote, and though it may be destroyed by a conveyance in fee simple made to bar the entail.<sup>74</sup>

### § 121. Presumption in favor of vesting.

It has been previously stated that an instrument will not be construed as creating an estate on condition, if this can be avoided, and, furthermore, that a condition will be construed as subsequent, rather than precedent.<sup>75</sup> As a result of these principles, and also of the possibility of the destruction of a contingent remainder by the act of the particular tenant, as subsequently explained, a thing which the courts have always sought to avoid, it is a well-settled rule that a limitation will

<sup>73</sup> Gray, *Perpetuities*, § 102; *Edwards v. Hammond*, 3 Lev. 132, 5 Gray's Cas. 52; *Doe d. Poor's Lessee v. Considine*, 6 Wall. (U. S.) 458; *Gingrich v. Gingrich*, 146 Ind. 227; *Chewning v. Shumate*, 106 Ga. 751; *Watson v. Cressey*, 79 Me. 381; *Kelso v. Lorillard*, 85 N. Y. 177. See, also, ante, notes 60-65.

<sup>74</sup> *Challis*, *Real Prop.* 57; *Fearne's Cont. Rem.* 226 et seq.; Gray, *Perpetuities*, § 112; *Doe d. Willis v. Martin*, 4 Term R. 39, 5 Gray's Cas. 62; *Cunningham v. Moody*, 1 Ves. Sr. 174, *Finch's Cas.* 389; *Moore v. Weaver*, 16 Gray (Mass.) 805; *Sandford v. Blake*, 45 N. J. Eq. 247; *Harvard College v. Balch*, 171 Ill. 275; *Welsh v. Woodbury*, 144 Mass. 542; *Thorington v. Thorington*, 111 Ala. 237; *Woodman v. Woodman*, 39 Me. 128; *Van Arte v. Fisher*, 117 N. Y. 401.

<sup>75</sup> Gray, *Perpetuities*, § 111; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, *Finch's Cas.* 926; *Dorr v. Johnson*, 170 Mass. 540; *Smith's Appeal*, 23 Pa. St. 9. See, however, *St. John v. Dann*, 66 Conn. 401, and *Horton v. Upham*, 72 Conn. 29, to the effect that a remainder after an estate tail is contingent.

<sup>76</sup> Ante, §§ 68, 69.

never be construed as creating a contingent remainder if it can possibly be construed as creating a vested one.<sup>76</sup>

This rule has been applied in connection with a very considerable number of expressions implying futurity of time, or contingency, which are regarded as specifying the time at which, or conditions under which, the remainderman may take possession, and not as deferring the vesting of the remainder. Thus, in the case of a limitation to A. for life, and "on," "at," "from," "after," or "in the event of" A.'s death, to B., the words in quotations are construed to refer to the time for taking possession, and not to the vesting, and the remainder is accordingly vested.<sup>77</sup> So, in the case of a limitation to A. and B., and to testator's daughters, "if they overlive" A. and B., the daughters took a vested remainder.<sup>78</sup>

On the same principle, when, after a life estate to A., a fee is limited to B., if he live to a certain age, and, if he fail to reach such age, then over to another, B. takes *prima facie* a vested remainder in fee, liable to be divested by his death before the age named, and not a remainder contingent on his reaching such age.<sup>79</sup> But a gift to A. for life, with a remainder

<sup>76</sup> 1 Jarman, Wills, 756 et seq.; 4 Kent, Comm. 204; Smith's Appeal, 23 Pa. St. 9; Doe d. Barnes v. Provoost, 4 Johns. (N. Y.) 61; Ellwood v. Plummer, 78 N. C. 392; Rood v. Hovey, 50 Mich. 395; Straus v. Rost, 67 Md. 465; Bigley v. Watson, 98 Tenn. 353; Davidson v. Bates, 111 Ind. 391; Chew v. Keller, 100 Mo. 362; Clanton v. Estes, 77 Ga. 352; Bunting v. Speck, 41 Kan. 424; Grimmer v. Friederich, 164 Ill. 245.

<sup>77</sup> Doe d. Poor's Lessee v. Considine, 6 Wall. (U. S.) 458; Pike v. Stephenson, 99 Mass. 188; Corse v. Chapman, 153 N. Y. 466; McNeely v. McNeely, 82 N. C. 183; Womrath v. McCormick, 51 Pa. St. 504; Bruce v. Blissell, 119 Ind. 525; Amos v. Amos, 117 Ind. 37; Chew v. Keller, 100 Mo. 362; Ballentine v. Wood, 42 N. J. Eq. 552.

In New Hampshire, it was formerly held (Hall v. Nute, 38 N. H. 422; Hayes v. Tabor, 41 N. H. 521) that a devise to A. for life, and, "after" A.'s death, to B., gave B. a contingent remainder. These peculiar decisions have since been overruled. Parker v. Ross, 69 N. H. 213.

<sup>78</sup> Webb v. Hearing, Cro. Jac. 415, 5 Gray's Cas. 47.

<sup>79</sup> 1 Jarman, Wills, 767; Edwards v. Hammond, 3 Lev. 132, 5 Gray's Cas. 52; Blanchard v. Blanchard, 1 Allen (Mass.) 223, 5 Gray's Cas. 85;



to her children who shall attain the age of twenty-one, gives a contingent remainder merely, which cannot vest till a child attains that age, since, until that time, there is no ascertained remainderman.<sup>80</sup>

In the case of a limitation to testator's widow for life, or until she marries again, with a devise over to B., in case of such marriage, the devise over is construed to take effect on her death, even without having married, on a presumption of intent to this effect, and consequently the remainder to B. is not contingent on the widow's second marriage, but is vested.<sup>81</sup>

### § 122. Remainders to a class.

Where there is a remainder to a class of persons, as to children, grandchildren, issue, or brothers and sisters, all the members of the class living at the time of testator's death, or, in case of a conveyance *inter vivos*, at the time of the delivery of the instrument, take *prima facie* vested remainders, the benefit of the provision being, however, extended to others of the same class who afterwards come into being before the determination of the particular estate, the shares of those previously born being in that case proportionately diminished.<sup>82</sup> Thus, in the

*Linton v. Laycock*, 33 Ohio St. 128; *Inches v. Hill*, 106 Mass. 575; *Richardson v. Penicks*, 1 App. D. C. 261; *Bredell v. Collier*, 40 Mo. 287; *Reome v. Phillips*, 24 N. Y. 463; *Bromfield v. Crowder*, 4 Bos. & P. 313.

<sup>80</sup> 1 Jarman, Wills, 775; *Festing v. Allen*, 12 Mees. & W. 279, 5 Gray's Cas. 71. And see *Risher v. Adams*, 9 Rich. Eq. (S. C.) 247.

<sup>81</sup> 1 Jarman, Wills, 759; *Luxford v. Cheeke*, 3 Lev. 125, 5 Gray's Cas. 51; *Gordon v. Adolphus*, 3 Brown, Parl. Cas. 306; *Aulick v. Wallace*, 75 Ky. 531; *Farmers' Bank v. Hooft*, 4 Cranch, C. C. 323, Fed. Cas. No. 4,659; *Ferson v. Dodge*, 23 Pick. (Mass.) 287. See *Green v. Hewitt*, 97 Ill. 113, *Finch's Cas.* 866.

This rule of construction does not, however, apply if there is an absolute estate given to the widow, subject to a devise over in case of her marriage. 1 Jarman, Wills, 760; *Sheffield v. Orrery*, 3 Atk. 283; *Frey v. Thompson's Adm'r*, 66 Ala. 28.

<sup>82</sup> 2 Jarman, Wills, 1011, 1012, 1015; Gray, *Perpetuities*, § 110; 2 *Underhill, Wills*, § 558; *Doe d. Willis v. Martin*, 4 Term R. 39, 5 Gray's Cas. 62; *Ayton v. Ayton*, 1 Cox, 327, 5 Gray's Cas. 305; *Doe d. Barnes v.*

case of a devise to A. for life, and, after his death, to his children, or to the children of B., all such children living at testator's death take a vested remainder, and likewise those afterwards born before the termination of A.'s life estate, though, until one of such class is in being, the remainder is, of course, contingent.<sup>83</sup>

### § 123. The failure of contingent remainders.

The prohibition of the abeyance of the seisin, together with the theory that the particular estate and the remainder are parts of one estate, gave rise to an important rule in regard to contingent remainders, to the effect that the remainder must vest either previously to, or at the same instant with, the determination of the particular estate, and that, if it fail so to do, it loses all validity.<sup>84</sup> Accordingly, in the case of a limitation to A. for life, with remainder to the heirs of B., the remainder will fail if A. die before B., since the heirs of B. cannot be ascertained till his death;<sup>85</sup> and, in the case of a limitation to A. for life, and then to B. if B. survive C., the remainder to B. will fail if A. dies before C.<sup>86</sup> So, in

*Provoost*, 4 Johns. (N. Y.) 61; *Doe d. Poor's Lessee v. Considine*, 6 Wall. (U. S.) 458; *Ross v. Drake*, 37 Pa. St. 375; *Minnig v. Batdorff*, 5 Pa. St. 503; *Finch's Cas.* 385; *Downes v. Long*, 79 Md. 382; *Hills v. Simonds*, 125 Mass. 536; *Irvin v. Clark*, 98 N. C. 437; *Waddell v. Waddell*, 99 Mo. 338, 17 Am. St. Rep. 575; *Gourdin v. Deas*, 27 S. C. 479; *Brewer v. Cox* (Md.) 18 Atl. 864; *Field v. Peeples*, 180 Ill. 376; *Lariverre v. Rains*, 112 Mich. 276; *Corse v. Chapman*, 153 N. Y. 466; *Moore v. Dimond*, 5 R. I. 129.

<sup>83</sup> *Anthracite Sav. Bank v. Lees*, 176 Pa. St. 402; *Dorr v. Lovering*, 147 Mass. 530; *Craig v. Rowland*, 10 App. D. C. 402; *Amos v. Amos*, 117 Ind. 19; *Coots v. Yewell*, 95 Ky. 367; *Ross v. Adams*, 28 N. J. Law, 160.

<sup>84</sup> *Fearne*, Cont. Rem. 307 et seq.; *Challis*, Real Prop. 93; 2 Bl. Comm. 168; 3 Cruise, Dig. tit. 16, c. 4; *Archer's Case*, 1 Coke, 66b, 5 Gray's Cas. 46; *Festing v. Allen*, 12 Mees. & W. 279, 5 Gray's Cas. 71; *Price v. Hall*, L. R. 5 Eq. 399, 5 Gray's Cas. 76; *Doe d. Poor's Lessee v. Considine*, 6 Wall. (U. S.) 458; *Madison v. Larmont*, 170 Ill. 65; *Ryan v. Monaghan*, 99 Tenn. 338.

<sup>85</sup> *Co. Litt.* 378a; *Irvine v. Newlin*, 63 Miss. 192.

<sup>86</sup> *Price v. Hall*, L. R. 5 Eq. 399, 5 Gray's Cas. 76.

the case of any limitation in remainder to a class, the members of the class must be determined before or at the time of the termination of the particular estate, and consequently those who thereafter come into being, or come within the description of the class, cannot share.<sup>87</sup>

In the case of a limitation to a child or children, a child *en ventre sa mere* at the time of the termination of the particular estate is considered to be existent and ascertained at the time of A.'s death, and consequently, in such case, the remainder will not fail. This is by force of statute in England and many states in this country.<sup>88</sup> Whether the rule was the same at common law is a question about which the authorities are in conflict;<sup>89</sup> but even in the absence of statute, if the question should arise in this country, the same rule would no doubt be recognized, in analogy to other cases in which a child *en ventre sa mere* is regarded as living.<sup>90</sup>

The rules as to the failure of contingent remainders by the termination of the precedent estate before the happening of the contingency never applied to the case of an equitable estate limited by way of remainder, since the seisin is always vested in the trustee, and is not affected by the termination of the particular estate.<sup>91</sup>

<sup>87</sup> 2 Jarman, Wills, 1027; 2 Underhill, Wills, § 558; Demill v. Reid, 71 Md. 175; Festing v. Allen, 12 Mees. & W. 279, 5 Gray's Cas. 71. And see cases cited ante, note 82.

<sup>88</sup> 10 & 11 Wm. III. c. 16 (A. D. 1699); 1 Stimson's Am. St. Law, §§ 1413, 2844, 6005; 2 Sharswood & B. Lead. Cas. Real Prop. 356.

<sup>89</sup> Co. Litt. 298a, Butler's note; Doe d. Reeve v. Long, 1 Salk. 227, 5 Gray's Cas. 53; Challis, Real Prop. 111; 1 Leake, 329.

<sup>90</sup> Co. Litt. 298a, Butler's note; 4 Kent, Comm. 249; Barker v. Pearce, 30 Pa. St. 173; Crisfield v. Storr, 36 Md. 129; Marsellis v. Thalheimer, 2 Paige (N. Y.) 35; Craig v. Rowland, 10 App. D. C. 402.

<sup>91</sup> Fearn, Cont. Rem. 303; Challis, Real Prop. 95; 2 Jarman, Wills, 1027; Abbiss v. Burney, 17 Ch. Div. 211, 5 Gray's Cas. 575. In England, where the legal title is regarded as being in the mortgagee, an outstanding mortgage has been held to be sufficient to prevent the failure of a contingent remainder on the termination of the particular estate. Astley v. Micklethwait, 15 Ch. Div. 59, 5 Gray's Cas. 78.

—Effect of precedent term.

As before stated, the presence of a term of years before an estate of freehold does not make the latter, in the proper sense of the word, a "remainder," but the freehold is in fact a present estate subject to a term of years.<sup>92</sup> But for our present purpose, calling the freehold estate a remainder after a term of years, a distinction is to be observed according as it is vested or contingent. In the case of a vested estate of freehold after a term of years, the seisin is in the tenant of such estate. If, however, such estate were contingent, either for want of an ascertained remainderman in being, or owing to the existence of some condition precedent, the seisin could not be regarded as being in a tenant thereof, and consequently an abeyance of the seisin would result. From this arises the well-settled common-law rule that a contingent remainder of freehold must always be supported by a particular vested estate of freehold, as distinguished from one not of freehold.<sup>93</sup> In accordance with this rule, when land was limited to A. for fifty years, and after that time to the heirs male of A., the limitation to the heirs male was held to be void.<sup>94</sup>

In the case of a limitation to A. for a term, such as twenty-one years, if he shall so long live, with a remainder over after his death, the remainder is contingent upon the death of A., which may not take place till after the twenty-one years, and it is consequently void, as being supported only by a term of years.<sup>95</sup> If, however, when the limitation is in this form, the term of years is for eighty or ninety years or more, and consequently the possibility that the life of A. will extend beyond the term is very remote, the reference to the death of A. is omitted from consideration, and the remainder is regarded as

<sup>92</sup> See ante, § 134b.

<sup>93</sup> Co. Litt. 217a; Fearn, Cont. Rem. 231; Challis, Real Prop. 93; 2 Cruise, Dig. tit. 16, c. 3, § 1.

<sup>94</sup> Goodright v. Cornish, 1 Salk. 226, Finch's Cas. 918.

<sup>95</sup> Fearn, Cont. Rem. 8; Boraston's Case, 3 Coke, 20a.

if limited to take effect immediately after the term, and consequently as a vested estate, subject to a term of years.<sup>96</sup>

— By destruction of particular estate.

The rule that the remainder must vest before the particular estate ends renders the remainder void, not only when the particular estate, by its limitation, expires before the vesting, but also when it is in some way destroyed before its natural expiration. Such premature termination of the particular estate, with the consequent failure of the remainder, might, at common law, occur in various ways.

At common law, a tortious alienation by the particular tenant by means of a feoffment,<sup>97</sup> fine,<sup>98</sup> or recovery<sup>99</sup> destroyed the particular estate, and so destroyed a contingent remainder dependent thereon. Owing to the quite general statutory provisions that a conveyance shall pass only such an estate as the grantor has,<sup>100</sup> as well as the fact that, in some states, the courts would probably refuse to recognize these common-law methods of conveyance, which are alone susceptible of a tortious effect, the jurisdictions in which a contingent remainder can now be defeated by a tortious conveyance are probably very few, even apart from the statutory provisions hereafter referred to against the destruction of such remainders.

<sup>96</sup> *Fearne*, Cont. Rem. 21; *Napper v. Sanders*, Hut. 118, 5 *Gray's Cas.* 48; *Challis*, Real Prop. 101; 1 *Leake*, 327.

<sup>97</sup> *Challis*, Real Prop. 110; 4 *Kent*, Comm. 253; *Archer's Case*, 1 *Coke*, 66b, 5 *Gray's Cas.* 46; *Doe d. Pope v. Pickett*, 65 *Ala.* 487; *Faber v. Police*, 10 *S. C.* 376; *Redfern v. Middleton's Ex'rs*, 1 *Rice (S. C.)* 459; *Snelling v. Lamar*, 32 *S. C.* 72, 17 *Am. St. Rep.* 835; *Dennett v. Dennett*, 40 *N. H.* 498.

<sup>98</sup> 4 *Kent*, Comm. 253; *Doe d. Willis v. Martin*, 4 *Term R.* 39, 5 *Gray's Cas.* 62; *Doe d. Harris v. Howell*, 10 *Barn. & C.* 191, 5 *Gray's Cas.* 67. See *Bouknight v. Brown*, 16 *S. C.* 155.

<sup>99</sup> *Lodding v. Kime*, 1 *Salk.* 224, 5 *Gray's Cas.* 54; *Lyle v. Richards*, 9 *Serg. & R. (Pa.)* 322; *Abbott v. Jenkins*, 10 *Serg. & R. (Pa.)* 296; *Stump v. Findlay*, 2 *Rawle (Pa.)* 168; *Waddell v. Rattew*, 5 *Rawle (Pa.)* 231, *Finch's Cas.* 316.

<sup>100</sup> See 1 *Stimson's Am. St. Law.* § 1402.

A tortious conveyance by the tenant of the particular estate not merely of itself terminated the estate of the wrongdoer,<sup>101</sup> but it also gave cause for the forfeiture of such estate in favor of the person next entitled, as did other acts involving an assertion of title to the inheritance in himself or a stranger by the tenant of the particular estate. To enforce such forfeiture, however, an entry by the tenant of the next vested estate was necessary.<sup>102</sup> As just stated, a tortious conveyance is, at the present day, of infrequent occurrence, and in a number of states there is a statutory provision that the conveyance of an estate greater than that which the grantor has shall not be cause for forfeiture.<sup>103</sup> In regard to the possibility of forfeiture of the particular estate, and consequent destruction of the remainder, by the particular tenant's assertion of title to the inheritance in other ways than a conveyance, it seems that, since such assertion of title by a tenant for years has, as previously stated,<sup>104</sup> been quite frequently decided to be ground for forfeiture, it might possibly be ground for the forfeiture of an estate of freehold supporting a contingent remainder, and the consequent destruction of the latter.

According to some authorities, if the particular estate is created subject to an express condition subsequent, an enforcement of forfeiture for breach thereof will destroy the estate in remainder.<sup>105</sup> But other authorities consider that the condition is in such case void as a condition, as being repugnant to the grant of the remainder, though it may occasionally be construed as a special limitation.<sup>106</sup>

<sup>101</sup> See Challis, Real Prop. 110.

<sup>102</sup> Co. Litt. 252a; Challis, Real Prop. 108; 4 Kent, Comm. 253, 255; Fearn, Cont. Rem. 323; Williams v. Angell, 7 R. L. 145, Finch's Cas. 930.

<sup>103</sup> 1 Stimson's Am. St. Law, § 1402.

<sup>104</sup> Ante, § 52(f).

<sup>105</sup> Litt. § 723; Fearn, Cont. Rem. 323, Butler's note; Williams v. Angell, 7 R. L. 152, Finch's Cas. 930.

<sup>106</sup> Fearn, Cont. Rem. 270; 1 Sheppard's Touchstone (Preston's Ed.) 120, 121; Edwards, Prop. Land, 128, note.

The tenant of the particular estate may also destroy the contingent remainder by surrendering his estate to the owner of the next vested estate in remainder, at least as great in *quantum* as the surrendered estate, or by acquiring by purchase the next vested estate of inheritance, the particular estate supporting the contingent remainder being thereby merged.<sup>107</sup> A merger will not, however, occur if the inheritance pass by descent to the owner of the particular estate directly from the person who created the various limitations,<sup>108</sup> nor if the particular estate and the inheritance are both limited to one person by the instrument creating the contingent remainder.<sup>109</sup> But if, in this last case, the two estates are thereafter conveyed to a third person, merger will take place, and the contingent remainder be destroyed.<sup>110</sup>

— Statutory provisions.

To obviate the possibility of the destruction of a contingent remainder by the premature termination of the particular estate in one of the ways above described, it is now provided in England that a contingent remainder shall be capable of taking effect in spite of the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold.<sup>111</sup> In a number of states of this country there is a substantially similar provision, while in some it is provided that no contingent re-

<sup>107</sup> *Challis*, Real Prop. 107; 4 Kent, Comm. 254; *Fearne*, Cont. Rem. 317, 323, 340; *Jordan v. McClure*, 85 Pa. St. 495, *Finch's Cas.* 930; *Craig v. Warner*, 5 Mackey, D. C. 460.

<sup>108</sup> *Fearne*, Cont. Rem. 341; *Plunket v. Holmes*, 1 Lev. 11, 5 *Gray's Cas.* 50; *Crisfield v. Storr*, 38 Md. 129.

<sup>109</sup> *Fearne*, Cont. Rem. 345; *Challis*, Real Prop. 109; *Bowles' Case*, 11 Coke, 80a.

<sup>110</sup> *Fearne*, Cont. Rem. 346; *Egerton v. Massey*, 3 C. B. (N. S.) 338, 5 *Gray's Cas.* 74; *Bennett v. Morris*, 5 Rawle (Pa.) 9.

<sup>111</sup> § 8 & 9 Vict. c. 106, § 8 (A. D. 1844). See *Harris v. McElroy*, 45 Pa. St. 216.

mainder shall fail by reason of the termination of the particular estate before the happening of the contingency.<sup>112</sup>

In those states in which it is provided<sup>113</sup> that a freehold estate may be created *in futuro* without any precedent estate to support it, it would seem that the reason for the defeat of the remainder by the premature termination of the particular estate no longer exists, and that consequently such result will no longer follow.

— Trustees to preserve.

In order to avoid the destruction of contingent remainders by the determination of the particular estate before its natural termination, it was the custom in England, until the passage of the remedial statute above referred to, to interpose an estate to trustees, to commence on the determination of a particular estate for life, and to continue during the tenant's life, in whom the seisin might vest, until the vesting of the remainder, these being termed "trustees to preserve contingent remainders."<sup>114</sup> Such an estate in trustees is a vested, and not a contingent, remainder, since it is ready to take effect in possession immediately on the premature termination of the particular es-

<sup>112</sup> These state statutory provisions, as collated in 1 Stimson's Am. St. Law, § 1403, are as follows: No expectant estate can be defeated or barred (1) by any alienation or other act of the owner of the precedent estate (Massachusetts, Maine, New York, Michigan, Wisconsin, Minnesota, Virginia, West Virginia, Kentucky, Texas, California, North Dakota, South Dakota, South Carolina, Alabama, Mississippi); or (2) by the destruction of a precedent estate by dissesin, forfeiture, surrender, merger, or otherwise (Massachusetts, Maine, New York, Michigan, Wisconsin, Minnesota, California, North Dakota, South Dakota, Mississippi). In some of these states, it is also provided (section 1426) that no contingent remainder shall be defeated by the termination of the precedent estate before the happening of the contingency (New York, Indiana, Michigan, Wisconsin, Minnesota, California, North Dakota, South Dakota).

<sup>113</sup> See post, § 150.

<sup>114</sup> Challis, Real Prop. 103; 2 Bl. Comm. 172; 4 Kent, Comm. 256.  
(298)



tate.<sup>115</sup> In those states in this country in which all possibility of destruction of the contingent remainder has not been removed by statute, there should be a provision for a trust of this character in any instrument creating such a remainder.

§ 124. Title pending contingency.

Where a contingent remainder in fee simple is created by a conveyance at common law, as distinct from one taking effect under the Statute of Uses, the reversion in fee, according to some authorities, remains in the grantor until the remainder vests;<sup>116</sup> while by other authorities it is considered that the fee is "in abeyance"—that is, that no person has the fee—until the contingency happens, and that there is a mere possibility of reverter in the grantor.<sup>117</sup> Even by those authorities which take the latter view, it is recognized that, if the contingent remainder ultimately fail, the grantor becomes entitled to immediate possession upon the termination of the particular estate, unless there is an alternative limitation to another, as explained in the next section.<sup>118</sup>

In the case of a contingent remainder created by a conveyance operating under the Statute of Uses or by devise, there has never been any question that the fee, until the remainder vests, is in the grantor,<sup>119</sup> or, in the case of a devise, in his heirs<sup>120</sup> or residuary devisees.<sup>121</sup>

<sup>115</sup> *Smith v. Packhurst*, 3 Atk. 185, 5 Gray's Cas. 55; *Vanderheyden v. Crandall*, 2 Denio (N. Y.) 9; *Challis, Real Prop.* 115.

<sup>116</sup> *Fearne, Cont. Rem.* 360; *Gray, Perpetuities*, § 11, note, citing authorities.

<sup>117</sup> 2 Bl. Comm. 107; *Bohon v. Bohon*, 78 Ky. 410. See 4 Kent, Comm. 257, where this view, as presented by Mr. Preston and others, is stated at length. See also, *Bigley v. Watson*, 98 Tenn. 353.

<sup>118</sup> 2 Preston, Abstracts, 103; *Cornish, Remainders*, 175 et seq.; *Edwards, Prop. Land*, 183.

<sup>119</sup> *Fearne, Cont. Rem.* 351; 4 Kent, Comm. 257; *Gray, Perpetuities*, § 11, note; *Bigley v. Watson*, 98 Tenn. 353; *Coots v. Yewell*, 95 Ky. 367.

<sup>120</sup> *Davis v. Speed*, Carth. 262; *Harrison v. Weatherby*, 180 Ill. 418;

## § 125. Alternative remainders.

Several estates in fee simple, or of a lesser *quantum*, may, at common law, be limited in the alternative by way of contingent remainder after one particular estate, in such a way that one may take effect if another does not, and not otherwise. Such remainders are sometimes known as "alternative remainders," and sometimes as "remainders on a contingency with a double aspect."<sup>122</sup>

## § 126. Cross remainders.

A definition of cross remainders, necessary rather complex, is given in the summary above of the law of remainders. Their nature can perhaps be best explained by examples. A simple instance of cross remainders occurs in the case of a limitation of land to A. and B. for life, with a provision that, on the death of either, his share shall pass to the other. If the limita-

Gilpin v. Williams, 25 Ohio St. 295; Robinson v. Palmer, 90 Me. 246; Nicholson v. Cousar, 50 S. C. 206; Ryan v. Monaghan, 99 Tenn. 338. Consequently it cannot be claimed that those persons who are the heirs of testator at the time of the termination of the particular estate are entitled, rather than those who are his heirs at law at the time of testator's death. Harrison v. Weatherby, 180 Ill. 418.

<sup>121</sup> Craig v. Rowland, 10 App. D. C. 402; High's Estate, 136 Pa. St. 232; De Silver's Estate, 142 Pa. St. 74; In re Reynolds' Will, 20 R. I. 429; Reid v. Walbach, 75 Md. 205; Perceval v. Perceval, L. R. 9 Eq. 386.

<sup>122</sup> Fearn, Cont. Rem. 373; Loddington v. Kime, 1 Salk. 224, 5 Gray's Cas. 54; Plunket v. Holmes, 1 Lev. 11, 5 Gray's Cas. 50; Buzby's Appeal, 61 Pa. St. 111; Demill v. Reid, 71 Md. 175; City of Peoria v. Darst, 101 Ill. 609; Den d. Micheau v. Crawford, 8 N. J. Law, 90; Furnish v. Rogers, 154 Ill. 569; Francks v. Whitaker, 116 N. C. 518; Walker v. Lewis, 90 Va. 578; Buzby's Appeal, 61 Pa. St. 111; Taylor v. Taylor, 63 Pa. St. 481; Watson v. Smith, 110 N. C. 6. For instance, in the case of a limitation to A. for life, and, if he have a son, to that son in fee simple, and, if he have no son, then to B. in fee simple, the remainder to the son of A., as well as that to B., is contingent until the birth of a son to A., when the first remainder vests, and B. is excluded, while, if no son is born B. is entitled to possession on A.'s death. Loddington v. Kime, 1 Salk. 224.

tion be to A., B., and C. for their respective lives, with cross remainders between them, upon the death of A. the right of possession as to A.'s share will pass to B. and C., and, upon the subsequent death of B., the right of possession as to that share, and also of B.'s share, will pass to C.

The various particular estates, though usually existing in separate shares in one piece of land, may exist in separate pieces of land.<sup>123</sup>

While the effect of the limitation of cross remainders, as between persons who are given particular estates for life, is that the survivor or survivors take by way of remainder, if the gift is of particular estates in tail, the right of possession does not pass by way of remainder from one to the other or others upon his death, but awaits the failure of his issue, and then it passes either to the others named in the gift or to their issue.<sup>124</sup>

In a deed, cross remainders can be created only by express limitations;<sup>125</sup> but even there no technical language is necessary to create them, it being sufficient to say that there shall be cross remainders.<sup>126</sup> In a will they may be implied, and their implication, if justified by the language of the devise, will generally be favored, since this is more likely to be in accordance with the testator's intention than that, upon the termination of a particular estate in one share, such share should revert to his heirs or residuary devisee till the termination of the other particular estates.<sup>127</sup>

<sup>123</sup> Challis, Real Prop. 299; 1 Preston, Estates, 94 et seq.

<sup>124</sup> Challis, Real Prop. 300.

<sup>125</sup> Co. Litt. 195, Butler's note; 4 Cruise, Dig. tit. 32, c. 21, §§ 60-62; Doe d. Tanner v. Dorvell, 5 Term R. 518; Bohon v. Bohon, 78 Ky. 408.

<sup>126</sup> Doe d. Watts v. Wainewright, 5 Term R. 427, 431, 5 Gray's Cas. 232.

<sup>127</sup> 2 Jarman, Wills, c. 42; Underhill, Wills, §§ 470, 853; Ashley v. Ashley, 6 Sim. 358, 5 Gray's Cas. 226; Dana v. Murray, 122 N. Y. 604; Reber v. Dowling, 65 Miss. 259, 7 Am. St. Rep. 651.

Mr. Challis (Real Prop. 301) says that stronger evidence is necessary to raise such implication, when the limitation is to three or more persons, than when it is to two only, and cites several modern

So, where land is devised to certain persons for their several lives, and, after their deaths, or after the death of the survivor of them, to other persons, the persons named *prima facie* take cross-remainders, and the property does not go over until the death of the survivor, an intention to bring all the property together being presumed.<sup>128</sup> And where lands are devised to several persons, with a limitation over to another on an indefinite failure of their issue, cross remainders are implied after the termination of the respective estates tail in each by the failure of his issue, provided, of course, estates tail exist in that jurisdiction.<sup>129</sup>

### § 127. Remainders to issue of unborn persons.

The creation of contingent remainders is, by perhaps the

cases in support of the statement. These, strangely enough, uphold a directly contrary view; and to the same effect, that the number of persons involved is immaterial, see 2 Jarman, Wills, 1343, 1348, 1352; Doe d. Gorges v. Webb, 1 Taunt. 234, 5 Gray's Cas. 217.

<sup>128</sup> Ashley v. Ashley, 6 Sim. 358, 5 Gray's Cas. 226; Glover v. Stillson, 56 Conn. 316; Smith v. Usher, 108 Ga. 231; Dow v. Doyle, 103 Mass. 489; Kerr v. Verner, 66 Pa. St. 326.

<sup>129</sup> 2 Jarman, Wills, 1339 et seq.; Doe d. Gorges v. Webb, 1 Taunt. 234, 5 Gray's Cas. 217; Allen v. Trustees of Ashley School Fund, 102 Mass. 262; Hall v. Priest, 6 Gray (Mass.) 18; Pierce v. Hakes, 23 Pa. St. 231.

But since, in perhaps a majority of states, the presumption that an indefinite failure of issue, and consequently of the creation of an estate tail, is rebutted by the use of the word "survivor" or "survivors," failure at the death of the first taker being thereby intended (Anderson v. Jackson, 16 Johns. [N. Y.] 382; Mendenhall v. Mower, 16 S. C. 303; Abbott v. Essex Co., 18 How. [U. S.] 202; Moody v. Walker, 3 Ark. 147; Summers v. Smith, 127 Ill. 650; Groves v. Cox, 40 N. J. Law 40. Contra, Chadock v. Cowley, Cro. Jac. 695, 5 Gray's Cas. 253; Richardson v. Richardson, 80 Me. 585; Bells v. Gillespie, 5 Rand. [Va.] 273; Hoxton v. Archer, 3 Gill & J. [Md.] 199; Caakey v. Brewer, 17 Serg. & R. [Pa.] 441), in those states, on a devise to several persons with limitation over, on the death of any one of them without issue, to the survivor or survivors, the donees take, not estates tail with cross-remainders, but estates in fee simple. 2 Jarman, Wills, 1329, Bigelow's note.

weight of authority, subject to a rule that, in the case of a limitation of land to a person *in esse* for life, and, after his death, to his unborn child for life, and thereafter to the child of such unborn child, the last remainder is void.<sup>130</sup> This rule, if its existence is to be conceded, had its origin, it would seem, in the theory that such a succession of life estates, thus carried on to unborn generations, would constitute in effect a limitation in fee tail of the land, which could not be barred by a common recovery, and that it would thus conduce to a "perpetuity," as it was expressed by the older writers.<sup>131</sup>

In some states in this country, the rigor of such a rule might, it seems, be abated by reason of the somewhat ill-advised legislation there in force, to the effect that, in the case of a gift in tail, the first tenant shall take a life estate with a remainder to his children.<sup>132</sup>

<sup>130</sup> Fearn, Cont. Rem. 502; Williams, Real Prop. 274; Challis, Real Prop. §1; 1 Leake, 334; Whitby v. Mitchell, 44 Ch. Div. 85, 5 Gray's Cas. 604.

The existence of any such rule, other than the rule against perpetuities, operating to restrict the creation of contingent remainders, is, however, denied by very eminent authority. See, for example, Lewis, Perpetuity, Supp. 97 et seq.; Gray, Perpetuities, §§ 191-199, 287-298; articles by J. Savill Valzey, Esq., 6 Law Quart. Rev. 410, and T. Cyprian Williams in 14 Law Quart. Rev. 234.

As a result of such a restriction upon remainders to unborn descendants, provision can be made by way of legal limitation for descendants of persons now living more remote than the unborn children only by giving estates tail to the unborn children, by which certain of their issue may take if the first tenant in tail does not bar the entail. Such a conveyance to one for life, with remainder to his children successively in tail, is very frequently referred to in the English books and reports under the name of a "strict settlement," and is the mode of limitation of family estates usually adopted in that country. See 1 Leake, 335; Fearn, Cont. Rem. 503; Williams, Real Prop. (18th Ed.) 235.

<sup>131</sup> See an article by Charles Sweet, Esq., in 15 Law Quart. Rev. 71, where the writer most learnedly and ably defends the existence of the rule.

<sup>132</sup> In those states where such legislation exists (see ante, § 24).

— *Cy pres* doctrine.

In the case of a gift by will to an unborn person for life, with remainder in tail, either to his child or to his children, successively or in common, it has been held that, while the limitation to the child or children is void, the intention of the testator will be carried out, as closely as possible, by giving the unborn person an estate tail instead of an estate for life, on the doctrine of *cy pres*, the issue of the unborn person thus being enabled to take, though not by way of remainder.<sup>133</sup> Since this doctrine is based on the desire to give the succession to the property to those persons to whom the testator intended it should go, it is applicable, it seems, only in jurisdictions where estates in fee tail still exist unchanged by statute.<sup>134</sup>

§ 128. The acceleration of remainders.

A vested remainder which is preceded by a contingent remainder is "accelerated" upon the failure or destruction of the latter,<sup>135</sup> unless, it seems, there appear an intention to the contrary on the part of the testator or grantor.<sup>136</sup> So, it may be accelerated when the gift of the particular estate fails to take effect for want of capacity to take in the person to whom it is limited,<sup>137</sup> or when it is preceded by a life estate given to the

one could, it seems, after limiting an estate for life to a man in being, limit a remainder in tail to his unborn son, and the statute would then create a life estate in such unborn son, with a remainder in fee simple to the children of such son.

<sup>133</sup> Gray, *Perpetuities*, §§ 643-669; 1 Jarman, *Wills*, 263; Fearn, *Cont. Rem.* 204, Butler's note; *Humberston v. Humberston*, 1 P. Wms. 232, 5 Gray's Cas. 755; *Parfitt v. Hember*, L. R. 4 Eq. 443, 5 Gray's Cas. 770; *Hampton v. Holman*, 5 Ch. Div. 183; *Jackson v. Brown*, 12 Wend. (N. Y.) 437.

<sup>134</sup> See Gray, *Perpetuities*, §§ 663, 668, 669.

<sup>135</sup> *Challis*, *Real Prop.* 94; 1 Jarman, *Wills*, 536; *Goodright v. Cornish*, 1 Salk. 226, *Finch's Cas.* 918.

<sup>136</sup> *Blatchford v. Newberry*, 99 Ill. 11.

<sup>137</sup> *Jull v. Jacobs*, 3 Ch. Div. 712; *Darcus v. Crump*, 6 B. Mon. (Ky.) 363; *Key v. Weathersbee*, 43 S. C. 414.

widow of the testator, and she renounces such testamentary provision, and elects to take the interest given her by law.<sup>138</sup>

A contingent remainder is not susceptible of acceleration, since it cannot vest in possession till the happening of the contingency,<sup>139</sup> and this is necessarily so not only where the common-law rule prevails by which the termination of the precedent estate involves the destruction of the contingent remainder, but also where the remainder is independent of the termination or destruction of the particular estate.<sup>140</sup>

### § 129. The transfer of remainders—(a) Vested remainders.

A vested remainder is susceptible of transfer to the same extent as an estate in possession, either by conveyance *inter vivos*<sup>141</sup> or by will.<sup>142</sup> If an estate of inheritance, it will pass to the heir or heirs of the original remainderman on his death.<sup>143</sup> It is also liable to sale under execution for the owner's debts.<sup>144</sup>

<sup>138</sup> *Timberlake v. Parish's Ex'r*, 5 Dana (Ky.) 345; *Milliken v. Weliver*, 37 Ohio St. 460; *Yeaton v. Roberts*, 28 N. H. 459; *Parker v. Ross*, 69 N. H. 213; *Adams v. Gillespie*, 55 N. C. 244; *Fox v. Rumery*, 68 Me. 121.

<sup>139</sup> *Dale v. Bartley*, 58 Ind. 101; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155.

<sup>140</sup> The New York statute providing that, where a remainder is limited on more than two successive estates for life, the life estates subsequent to the two first shall be void, and the remainder shall take effect as if only the two first life estates had been created, has been held not to apply so as to accelerate a contingent remainder. *Purdy v. Hayt*, 92 N. Y. 446, *Finch's Cas.* 904.

<sup>141</sup> *Cruise*, Dig. tit. 16, c. 1, § 9; *Glidden v. Blodgett*, 38 N. H. 74; *Gardiner v. Gullid*, 106 Mass. 25; *Watson v. Cressey*, 79 Me. 381.

<sup>142</sup> *Glidden v. Blodgett*, 38 N. H. 74; *Davis v. Bawcum*, 10 Heisk. (Tenn.) 406; *Hinkson v. Lees*, 181 Pa. St. 225; *Woodman v. Woodman*, 89 Me. 123.

<sup>143</sup> *Wimple v. Fonda*, 2 Johns. (N. Y.) 288; *Bridgewater v. Gordon*, 2 Sneed (Tenn.) 5; *In re Kenyon*, 17 R. I. 149; *Gourley v. Woodbury*, 42 Vt. 395; *Chew v. Keller*, 100 Mo. 362. It is so provided by statute in a number of states. 2 *Sharswood & B. Lead. Cas. Real Prop.* 302.

<sup>144</sup> *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Ellwood v. Plummer*.

— (b) Contingent remainders.

A contingent remainder is not, by the theory of the common law, an estate, but is merely a possibility coupled with an interest, and is consequently not capable of direct transfer *inter vivos*.<sup>145</sup> A contingent remainder may, however, even at common law, be released to the owner of the estate in possession.<sup>146</sup> Also it may pass by way of estoppel,<sup>147</sup> and an assignment of such an interest for a good or valuable consideration is recognized and enforced in equity.<sup>148</sup> In some jurisdictions, contingent remainders are capable of transfer by reason of a statutory provision extending the right of conveyance of interests in lands;<sup>149</sup> and in some states, notably in Massachusetts, the

78 N. C. 392; *Drake v. Brown*, 68 Pa. St. 223; *Jackson's Adm'r v. Sublett*, 10 B. Mon. (Ky.) 467.

<sup>145</sup> *Williams*, Real Prop. 277; 4 Kent, Comm. 260; *Stewart v. Neely*, 139 Pa. St. 309, *Finch's Cas.* 918; *Robertson v. Wilson*, 38 N. H. 48; *Hall v. Chaffee*, 14 N. H. 215, *Finch's Cas.* 925; *Mudge v. Hammill*, 21 R. I. 283; *Den d. Hopper v. Demarest*, 21 N. J. Law, 525; *Striker v. Mott*, 28 N. Y. 82. See *Williams v. Esten*, 179 Ill. 267.

<sup>146</sup> *Williams*, Real Prop. 277; *Miller v. Emans*, 19 N. Y. 385; *Smith v. Pendell*, 19 Conn. 107; *Jeffers v. Lampson*, 10 Ohio St. 101; *Williams v. Esten*, 179 Ill. 267.

<sup>147</sup> *Fearne*, Cont. Rem. 365; 4 Kent, Comm. 260; *Hayes v. Tabor*, 41 N. H. 521; *Stewart v. Neely*, 139 Pa. St. 309, *Finch's Cas.* 918; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Doe d. Christmas v. Oliver*, 10 Barr. & C. 181; *Young v. Young*, 89 Va. 675. See, as to the transfer of an interest in land by estoppel, post, §§ 456, 457.

It may so pass by estoppel, even though the person estopped by his conveyance was not ascertained to be the remainderman at the time of making it. 1 *Preston*, Estates, 76; *Robertson v. Wilson*, 38 N. H. 48; *Jackson v. Everett* (Tenn.) 58 S. W. 340.

<sup>148</sup> *Fearne*, Cont. Rem. 551; 4 Kent, Comm. 261; *Higden v. Williamson*, 3 P. Wms. 132; *Bailey v. Hopplin*, 12 R. I. 560; *Ridgeway v. Underwood*, 67 Ill. 419; *Watson v. Smith*, 110 N. C. 6; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Foster v. Hackett*, 112 N. C. 546; *Mudge v. Hammill*, 21 R. I. 283. See *Grayson v. Tyler's Adm'r*, 80 Ky. 358.

<sup>149</sup> 2 *Sharswood & B. Lead. Cas. Real Prop.* 370; *Morse v. Proper*, 82 Ga. 18; *Nutter v. Russell*, 3 Metc. (Ky.) 163; *Defreese v. Lake*, 109 Mich. 415; *Young v. Young*, 89 Va. 675.



common-law rule has been departed from, even without reference to any statutory provisions.<sup>150</sup>

In Massachusetts, and apparently in one or two other states, it has even been decided that a remainder contingent owing to uncertainty of the remainderman may be aliened by the persons who would take by way of remainder if the particular estate were immediately to determine.<sup>151</sup>

A contingent remainder of an estate of inheritance may, if the person entitled thereto be ascertained, be devised by him,<sup>152</sup> and it will pass by descent to his heirs;<sup>153</sup> but the remainder cannot, of course, pass by descent or devise if the survivorship of the deceased is the condition precedent which gives the remainder its contingent character;<sup>154</sup> nor is it the subject of devise or descent if the remainderman is uncertain.<sup>155</sup>

<sup>150</sup> See *Gardner v. Hooper*, 3 Gray (Mass.) 398; *Pierce v. Lee*, 9 Gray (Mass.) 42; *Dunn v. Sargent*, 101 Mass. 336; *Butterfield v. Reed*, 160 Mass. 361; *Cummings v. Stearns*, 161 Mass. 506.

<sup>151</sup> *Belcher v. Burnett*, 126 Mass. 230; *Putnam v. Story*, 132 Mass. 205; *Daniels v. Eldredge*, 125 Mass. 356; *Wainwright v. Sawyer*, 150 Mass. 168; *Grayson v. Tyler's Adm'r*, 80 Ky. 358; *Gorman v. Simmons*, 118 Mo. 122; *Brown v. Fulkerson*, 125 Mo. 400. Contra, *Jackson v. Everett* (Tenn.) 58 S. W. 340.

<sup>152</sup> *Fearne*, Cont. Rem. 366; *Doe d. Perry v. Jones*, 1 H. Bl. 30; *Jones v. Perry's Lessee*, 3 Term R. 88; *Morse v. Proper*, 32 Ga. 13, *Finch's Cas.* 882; *Loring v. Arnold*, 15 R. I. 428; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, *Finch's Cas.* 926; *Heard v. Read*, 169 Mass. 216.

<sup>153</sup> *Fearne*, Cont. Rem. 364; *Loring v. Arnold*, 15 R. I. 428; *Clark v. Cox*, 115 N. C. 93; *Buck v. Lantz*, 49 Md. 439; *Kenyon v. See*, 94 N. Y. 563; *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.) 469; *Winslow v. Goodwin*, 7 Metc. (Mass.) 363; *Chess' Appeal*, 87 Pa. St. 362.

<sup>154</sup> *Fearne*, Cont. Rem. 364; *Kelso v. Lorillard*, 85 N. Y. 177; *Hennesy v. Patterson*, 85 N. Y. 95, *Finch's Cas.* 868; *Strode v. McCormick*, 158 Ill. 142. See *Whitesides v. Cooper*, 115 N. C. 570, *Finch's Cas.* 877.

For instance, a remainder limited to B. provided C. survive A. will pass to the heirs of B., but this will not happen if the remainder is to B. provided B. survive A., and A. is still living at B.'s death, since the death of B. before A. destroys the remainder.

<sup>155</sup> 1 *Preston, Estates*, 76; *Alverson v. Randall*, 13 R. I. 71; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570; *Loring v. Arnold*, 15 R. I.

A contingent remainder has occasionally been held to be subject to sale under execution for the debts of the remainderman,<sup>156</sup> while a contrary view has also been taken,<sup>157</sup> it being to a great extent a question of the construction of the state statute as to executions.

#### IV. THE RULE IN SHELLEY'S CASE.

If, after a limitation to a person of an estate of freehold, there be limited, by the same instrument, an estate in the form of a remainder to his heirs, or the heirs of his body, he will, at common law, take an estate in remainder in fee or in tail, according to the class of heirs specified, and the freehold estate previously limited to him will merge therein, unless there be another estate interposed which will prevent merger.

This rule does not apply if the words "heirs" or "heirs of the body" are used to designate children or other definite individuals; but if the limitation in remainder is to "heirs" or "heirs of the body," by those or other terms, it applies as an absolute rule of law, and not one of construction, and hence a clear indication of intention that it shall not apply cannot prevent its application.

The rule has been abolished by statute in a number of the states.

#### § 130. The nature of the rule.

The rule in Shelley's Case takes its name from a case of

428; *Smith v. Rice*, 130 Mass. 441; *Clark v. Cox*, 115 N. C. 93; *Eager v. Whitney*, 163 Mass. 463; *Paget v. Melcher*, 156 N. Y. 399; *De Lassus v. Gatewood*, 71 Mo. 371; *Smith v. Block*, 29 Ohio St. 488; *Teets v. Weise*, 47 N. J. Law, 154; *In re Hoadley*, 101 Fed. 233; *Bates v. Gillett*, 132 Ill. 287.

<sup>156</sup> *Drake v. Brown*, 68 Pa. St. 223; *White v. McPheeters*, 75 Mo. 286. That it may be reached by a creditor in equity, see *Jacob v. Howard* (Ky.) 22 S. W. 323.

<sup>157</sup> *Watson v. Adams*, 103 Ga. 733; *Smith v. Gilbert*, 71 Conn. 169; *Young v. Young*, 89 Va. 675.

that name which turned upon the application of the rule,<sup>158</sup> though the rule itself seems to have been recognized at a much earlier date.<sup>159</sup>

In the case of a limitation to A. for life, with remainder to his heirs or to the heirs of his body, which is the typical form calling for an application of the rule in *Shelley's Case*, the effect of the rule, it would seem, is not to operate directly upon the life estate in A., but to give to the remainder the effect of a gift to A., the whole limitation taking effect as if it were to A. for life, with remainder to A. and his heirs, or to A. and the heirs of his body. In the remainder in fee or in tail thus vested in A., the estate limited to him for life will necessarily merge, and he will consequently take a fee simple or fee tail in possession, while the heirs or heirs of the body will take nothing.<sup>160</sup>

<sup>158</sup> 1 Coke, 93. The decision in the case, as clearly shown by Mr. Challis, was undoubtedly a direct adjudication in favor of the rule, in spite of quite frequent statements to the contrary. See Challis, *Real Prop.* c. 13.

<sup>159</sup> The Provost of *Beverley's Case*, Y. B. 40 Edw. 3, 9 (A. D. 1366), seems to have clearly recognized the existence of such a rule. See Williams, *Real Prop.* 258.

The origin of the rule is a matter on which there is a conflict of opinion. Perhaps the most credible theory is that it was originally based upon the desire to secure to the lord the rights incident to the descent of the tenement, the burden of which could have been to a great extent avoided if, by a limitation to heirs as purchasers, they could have been enabled to succeed to the rights of their ancestor, thus in effect giving them the benefits of descent, without any of the burdens thereof. See Challis, *Real Prop.* 135; Hayes, *Principles*, 52. Another suggested foundation of the rule is that it was based on a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor (*Justice Blackstone*, in *Perrin v. Blake*, *Hargrave's Law Tracts*, 500), and, regarded in this light, the rule is in full accordance with the present policy of the law to remove all clogs on alienation.

<sup>160</sup> The explanation of the operation of the rule here given is based upon that in 1 Hayes, *Conveyancing* (5th Ed.) 542-546, and the previous work by the same writer, "*Principles for Expounding Dispositions of*

If, to take another case, the remainder to the heirs or heirs of the body is in form contingent on some event, as in the case of a limitation to A. for life, with remainder, if A. shall survive B., to A.'s heirs, or the heirs of his body, A. then has an estate for life, and an estate in remainder in fee or in tail contingent on his survival of B. In such case, the remainder being contingent, the particular estate will not merge therein, but, upon the vesting of the remainder by the death of B. before A., merger will take place, and A. will have, as in the previous case, an estate in fee simple or fee tail in possession.<sup>161</sup>

If there be an intermediate estate interposed between the life estate in the ancestor and the remainder to the heirs, as in the case of a limitation to A. for life, remainder to B. for life or in tail, remainder to the heirs of A., or to the heirs of his body, A. will then have a remainder in fee or in tail, as in the previous cases. The vested remainder in B., however, being interposed between A.'s life estate and his remainder in fee or in tail, will prevent the merger of the life estate in the remainder. In such case, if the remainder in B. should terminate before the end of A.'s life estate, this latter will then be merged in the fee simple or fee tail of A.<sup>162</sup> If,

Real Estate," etc., where, as stated by Gibson, C. J., in *Hilleman v. Bouslaugh*, 13 Pa. St. 351, the author "sounded the profoundest depths of the subject." As shown by him, to assimilate the limitation "to A. for life, with remainder to his heirs," to a limitation to "A. and his heirs," as is usually done, gives no assistance whatever in the understanding and application of the rule, except when the limitation is in this simple form, with no remainders interposed, and a particular estate in A. strictly for his life. Mr. Challis takes the same view of the operation of the rule as affecting only the limitation in remainder, making it an estate of inheritance in the ancestor, in which the particular estate is merged in cases proper for merger. See Challis, *Real Prop.* 124. See, also, *Van Grutten v. Foxwell* [1897] App. Cas. 658, 669.

<sup>161</sup> *Fearne*, Cont. Rem. 34; 1 *Preston*, Estates, 319, 333.

<sup>162</sup> *Fearne*, Cont. Rem. 29; Challis, *Real Prop.* 113; *Colson v. Colson*, 3 Atk. 246.

however, the remainder interposed in favor of B. is a contingent and not a vested remainder, while A.'s life estate and his remainder in fee or in tail are united in him, the former is not merged in the latter, and they become separated upon the vesting of B.'s estate.<sup>163</sup>

§ 131. Estates and interests subject to the rule.

In the instances above given, the particular estate given to A., the ancestor, was an estate for life; but the rule applies where any other freehold estate is given to him, as an estate tail,<sup>164</sup> an estate *pur autre vie*,<sup>165</sup> or a life estate subject to a special limitation;<sup>166</sup> but the rule has no application if the estate limited to the ancestor be less than freehold, as an estate for years.<sup>167</sup>

The particular estate in the ancestor and the remainder to the heirs must arise under the same instrument, and so the rule will not apply, for instance, when A., being tenant for life, with remainder, after his death, to the heirs of B., conveys his life estate to B.<sup>168</sup>

If a term of years be limited to A. for life, with remainder to his heirs or the heirs of his body, a rule analogous to that in Shelley's Case will, it seems, generally apply, so as to vest the whole term in A., but this will, it seems, happen only if no intention to the contrary appears.<sup>169</sup> Likewise, a lease for

<sup>163</sup> Fearn, Cont. Rem. 36; 1 Preston, Estates, 346; Bowles' Case, 11 Coke, 79b. See Dennett v. Dennett, 48 N. H. 499.

<sup>164</sup> Litt. § 719; Co. Litt. 376b; Goodright v. Wright, 1 P. Wms. 397.

<sup>165</sup> Fearn, Cont. Rem. 31; 1 Preston, Estates, 313.

<sup>166</sup> Challis, Real Prop. 132; 2 Jarman, Wills, 1181; Curtis v. Price, 12 Ves. 89.

<sup>167</sup> Co. Litt. 319b; Fearn, Cont. Rem. 51; Challis, Real Prop. 121.

<sup>168</sup> Fearn, Cont. Rem. 71; 1 Preston, Estates, 309; Moor v. Parker, 4 Mod. 316, 5 Gray's Cas. 93; Adams v. Guerard, 29 Ga. 651.

<sup>169</sup> 2 Jarman, Wills, 1179; Fearn, Cont. Rem. 490; Taylor v. Lindsay, 14 R. L. 518.

In Hughes v. Niklas, 70 Md. 484, 14 Am. St. Rep. 377, Hampton v.

life to one, with a remainder to his executors or legal representatives for a certain number of years, will generally give him the term of years absolutely.<sup>170</sup>

The rule in *Shelley's Case* does not apply if the remainder is to the heirs or heirs of the body of both the donee of the particular estate and another person, as in the case of a gift to A. for life, and the remainder to the heirs of the body of A. by his wife, B.<sup>171</sup>

The rule applies in the case of equitable estates, as well as in that of legal estates;<sup>172</sup> but it does not apply if the particular estate and that in remainder are not both legal estates or both equitable estates.<sup>173</sup>

As has been before stated, the rule does not apply to executory trusts, which, we have previously explained, are such trusts as are to be carried out by a conveyance or settlement, to be framed according to certain directions, and the intention of the creator of such a trust will be considered, irrespective of the

Rather, 30 Miss. 193, and *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400, while the application of this analogous rule to chattel interests is recognized, it does not seem to be considered that the intent of the party will affect such application,—that is, it is considered an absolute rule of law, as in the case of freehold interests, and not one of construction.

<sup>170</sup> Co. Litt. 54b; *Webb v. Sadler*, 3 Ch. App. 419; *Theobald, Wills*, (5th Ed.) 423.

<sup>171</sup> *Fearne*, Cont. Rem. 65; *Frogmorton v. Wharrey*, 2 W. Bl. 723; *Shaw v. Robinson*, 42 S. C. 342; *Mudge v. Hammill*, 21 R. I. 283; *Dawson v. Quinnerly*, 118 N. C. 183.

<sup>172</sup> 1 *Perry, Trusts*, § 358; *Wright v. Pearson*, 1 Eden, 119; *Brydges v. Brydges*, 3 Ves. 120; *Baile v. Coleman*, 2 Vern. 670, 5 Gray's Cas. 94; *Loring v. Elliot*, 16 Gray (Mass.) 568, *Finch's Cas.* 857; *Croxall v. Shererd*, 5 Wall. (U. S.) 268.

<sup>173</sup> *Fearne*, Cont. Rem. 52, 57; 2 *Jarman, Wills*, 1180; *Lord Say & Seal v. Jones*, 3 Brown, Parl. Cas. 113; *Silvester v. Wilson*, 2 Term R. 444; *Green v. Green*, 23 Wall. (U. S.) 486; *Hanna v. Hawes*, 45 Iowa, 437; *Mercer v. Hopkins*, 88 Md. 292; *Mannerback's Estate*, 123 Pa. St. 343 (312)

fact that words which would otherwise involve an application of the rule are used in the declaration of trust.<sup>174</sup>

§ 132. The rule not one of construction.

In determining whether the rule is in any particular case to be applied so as to give an estate in fee or in tail to the ancestor, the first question to be determined is whether the remainder is to the heirs of A., which is purely a question of construction, and herein lies the chief difficulty in regard to the application of the rule. Other words, such as "children" or "issue," may have the meaning, in a devise, of the word "heirs," or "heirs of the body," and in such case the rule will apply; and the same is true in the case of deeds where the use of the word "heirs," in order to create an estate of inheritance, has been dispensed with.<sup>175</sup> On the other hand, when the word "heirs" or "heirs of the body," in the limitation of the remainder, have, in view of the context, the meaning of "children," or are otherwise intended to designate certain individuals merely, the rule does not apply.<sup>176</sup>

The fact that to the word "heirs" or "heirs of the body" in the limitation of the remainder there is added a further lim-

<sup>174</sup> *Papillon v. Voice*, 2 P. Wms. 471, 5 Gray's Cas. 95; *Trevor v. Trevor*, 5 Brown, Parl. Cas. 122; 1 *Perry, Trusts*, § 359; *Green v. Green*, 23 Wall. (U. S.) 486. See ante, § 96.

<sup>175</sup> 2 *Jarman, Wills*, 1184 et seq.; *Jordan v. Adams*, 9 C. B. (N. S.) 483, 5 Gray's Cas. 107; *Doe d. Dodson v. Grew*, 2 Wils. 322, 5 Gray's Cas. 96; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823.

The word "issue" has the meaning and effect of the phrase "heirs of the body" in this connection, unless a contrary intention appear. *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425; *Grimes v. Shirk*, 169 Pa. St. 74; *Dickson v. Satterfield*, 53 Md. 317.

<sup>176</sup> 2 *Jarman, Wills*, 1184, 1205 et seq.; *Archer's Case*, 1 Coke, 66b, 5 Gray's Cas. 46; *Van Grutten v. Foxwell* [1897] App. Cas. 658; *Cowell v. Hicks* (N. J. Ch.) 30 Atl. 1091; *Kuntzleman's Trust Estate*, 136 Pa. St. 142, 20 Am. St. Rep. 909; *Martling v. Martling*, 55 N. J. Eq. 771; *Campbell v. Noble*, 110 Ala. 332; *Granger v. Granger*, 147 Ind. 95.

itation to "their" heirs does not affect the application of the rule as showing that the previous word or words were used to designate particular individuals only.<sup>177</sup> Nor will the application of the rule be affected by the addition to "heirs" or "heirs of the body" of words indicating that they are to take concurrently or distributively, as that they shall take "share and share alike,"<sup>178</sup> or that the property shall "be equally divided between them,"<sup>179</sup> or that they shall take in the proportions which the ancestor may appoint,<sup>180</sup> these words not showing that the words of inheritance are to be construed as meaning children or some particular individuals.

Though the meaning of the words used to describe donees of the estate in remainder is a matter to be settled by construction, the rule itself is in no way a rule of construction, but takes effect regardless of the donor's intention, and frequently in direct contravention thereof.<sup>181</sup> As stated by a distinguished

<sup>177</sup> 2 Jarman, Wills, 1205; Fearn, Cont. Rem. 181; Challis, Real Prop. 134; *Andrews v. Lowthrop*, 17 R. I. 60. Contra, *De Vaughn v. Hutchinson*, 165 U. S. 566, applying the Maryland law as presented in *Shreve v. Shreve*, 43 Md. 382.

But if the limitation in remainder is to the "heir" or "heir of the body," in the singular number, with words of limitation added, as "to the heir male and to the heirs male of the body of such heir male," the word "heir" is one of purchase, and the rule does not apply. 1 Leake, 359; *Archer's Case*, 1 Coke, 66b, 5 Gray's Cas. 46.

<sup>178</sup> *Jesson v. Wright*, 2 Bligh, 1, 5 Gray's Cas. 101; *Sims v. Georgetown College*, 1 App. D. C. 72.

<sup>179</sup> *Clarke v. Smith*, 49 Md. 106; *Cockin's Appeal*, 111 Pa. St. 26; *Moore v. Brooks*, 12 Grat. (Va.) 135; *Cooper v. Cooper*, 6 R. I. 261; *Crockett v. Robinson*, 46 N. H. 454; *Holt v. Pickett*, 111 Ala. 362; *Simms v. Bulst*, 52 S. C. 554. But occasionally these words have been regarded as indicating that words "heirs" or "heirs of the body" were not to be taken in their technical sense. *Jenkins v. Jenkins*, 96 N. C. 254; *Herring v. Rogers*, 30 Ga. 615.

<sup>180</sup> *Jesson v. Wright*, 2 Bligh, 1, 5 Gray's Cas. 101; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Jordan v. Adams*, 9 C. B. (N. S.) 483, 5 Gray's Cas. 107.

<sup>181</sup> *Van Grutten v. Foxwell* [1897] App. Cas. 658; *Hilleman v. Boslaugh*, 13 Pa. St. 344, 53 Am. Dec. 475; *Grimes v. Shirk*, 169 Pa. St. (314)



English judge, it having been settled, on construction of the instrument, that the persons to whom the remainder is given are the heirs of the ancestor, whether they are or are not so termed, then the rule in *Shelley's Case* is imperative, and no incident superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration, however express or emphatic, of the grantor or testator, can, either by inference or by the force of express direction, affect in any way the operation of the rule as creating an estate in fee or in tail in the ancestor.<sup>182</sup>

Thus, the rule will apply though the donor superadd to the estate for life some incident of an estate of inheritance, such as unimpeachability for waste, which would be superfluous if an estate of inheritance was intended,<sup>183</sup> or he declare in express terms that his intention in creating the estate for life is that the donee thereof shall not be able to dispose of his estate

74; *Carpenter v. Van Olinder*, 127 Ill. 42, 11 Am. St. Rep. 92; *Brant v. Gelston*, 2 Johns. Cas. (N. Y.) 384; *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Crockett v. Robinson*, 46 N. H. 461; *Hughes v. Nicklas*, 70 Md. 484, 14 Am. St. Rep. 377; *Trumbull v. Trumbull*, 149 Mass. 200; *Daniel v. Whartenby*, 17 Wall. (U. S.) 639; *Nichols v. Gladden*, 117 N. C. 497; *Brown v. Bryant*, 17 Tex. Civ. App. 454; *Lippincott v. Davis*, 59 N. J. Law, 241; *Silva v. Hopkinson*, 158 Ill. 386; *Martling v. Martling*, 55 N. J. Eq. 771.

Occasionally the rule has been regarded as one of construction. *Smith v. Hastings*, 29 Vt. 240; *Earnhart v. Earnhart*, 127 Ind. 397, 22 Am. St. Rep. 652; *Wescott v. Binford*, 104 Iowa, 645.

To the same effect are *Loring v. Elliot*, 16 Gray (Mass.) 568, and *Howell v. Knight*, 100 N. C. 254, which are, however, overruled in this respect by later decisions.

<sup>182</sup> *Cockburn, C. J.*, in *Jordan v. Adams*, 9 Q. B. (N. S.) 483, 5 Gray's Cas. 107.

<sup>183</sup> *Papillon v. Voice*, 2 P. Wms. 471, 5 Gray's Cas. 95; *Langley v. Baldwin*, 1 Eq. Cas. Abr. 185, pl. 23, 5 Gray's Cas. 94.

for longer than his life;<sup>184</sup> or that it is his "will and meaning" that the first donee shall have only an estate for life, and that she shall not have power to defeat his intent and meaning in this respect.<sup>185</sup>

§ 133. Abolition of the rule.

By statute in a considerable number of states, the rule in Shelley's Case has been abolished, and, where this is the case, the ancestor will take a life estate with a contingent remainder to his heirs.<sup>186</sup> In other states it remains in full force,<sup>187</sup>

<sup>184</sup> *Perrin v. Blake*, 4 Burrow, 2579, 1 W. Bl. 672, 5 Gray's Cas. 98, and note; 6 Cruise, Dig. tit. 38, c. 14, §§ 70, 71.

<sup>185</sup> *Doe d. Thong v. Bedford*, 4 Maule & S. 362, 5 Gray's Cas. 99. See *Jordan v. Adams*, 9 C. B. (N. S.) 483, 5 Gray's Cas. 107.

<sup>186</sup> 1 Stimson's Am. St. Law, § 1406. See *Trumbull v. Trumbull*, 143 Mass. 200; *Wilson v. Alston*, 122 Ala. 630; *Barnett v. Barnett*, 104 Cal. 298.

As to the desirability of the abrogation of the rule, there are conflicting opinions, but it seems proper to note that the objection to the rule usually made, that it defeats the intention of the testator or grantor, is by no means conclusive in favor of its abolition, since the same may be said of the rule against perpetuities, and the statutes modifying and abolishing estates tail. In fact, this objection to the rule, thus stated, seems to involve the erroneous view of the rule as one of construction. The question really is, as in the case of other rules of law, whether public policy renders the abrogation of the rule desirable, and in deciding this question the fact that it defeats the intention is to be considered. On the other hand is to be considered the fact that the rule does, as stated by Sir Wm. Blackstone, tend to throw the land into commerce one generation sooner, and this is in accord with the modern policy of the courts and the legislature. There seems, on the whole, no particular injustice in requiring one who desires to limit land to another for life, and, after his death, to that indefinite class known as the "heirs" or "heirs of the body" of such other, to do it by the creation of an estate in fee simple or in fee tail in the ancestor, which the ancestor can dispose of, and not by way of an estate for life, and a remainder, which cannot be disposed of till the death of the ancestor. If the rule applied in the case of a remainder to children or other ascertained persons, the question as to the desirability of its abolition would, of course, be very different.

though of course a remainder to the heirs of the body of the first taker will, where estates tail are changed into estates in fee simple,<sup>188</sup> or otherwise modified,<sup>189</sup> create, not an estate tail, but an estate or estates of the modified character.

#### V. EXECUTORY INTERESTS.

An executory interest in land is an interest created by such a limitation of an estate to arise in the future, at a time or on a contingency named, as would be invalid at common law, because not capable of taking effect by way of remainder, but which is valid if created by a conveyance to uses or by will. The limitation by which it is created is termed an "executory limitation."

An executory limitation usually, if not always, takes effect in derogation of an estate in fee simple in the creator of the limitation or his heirs, or in derogation of an estate simultaneously limited to another person.

An executory limitation of an estate to arise in the future cannot be defeated by the tenant of the previous estate otherwise than by the prevention of the contingency on which the future estate is to arise.

Limitations of estates will, if possible, be construed as creating present vested estates, rather than executory interests.

Limitations of future estates will always take effect, if possible, by way of remainder, rather than as executory limitations.

<sup>187</sup> As instances of the application of the rule, the following cases may be referred to: *Hileman v. Bouslaugh*, 13 Pa. St. 351, 53 Am. Dec. 474; *Starnes v. Hill*, 112 N. C. 1; *Hurst v. Wilson*, 89 Tenn. 270; *Taney v. Fahnley*, 126 Ind. 83, *Finch's Cas.* 519; *Reutter v. McCall*, 192 Pa. St. 77; *Simms v. Buist*, 52 S. C. 554; *Nichols v. Gladden*, 117 N. C. 497; *Hardage v. Stroope*, 58 Ark. 303; *Pressgrove v. Comfort*, 58 Miss. 644.

<sup>188</sup> *Shoup v. De Long*, 190 Pa. St. 331; *Chamblee v. Broughton*, 120 N. C. 170.

<sup>189</sup> *Clarkson v. Clarkson*, 125 Mo. 381.

In South Carolina, a remainder to the heirs of the body of the first taker creates a common-law conditional fee. *Simms v. Buist*, 52 S. C. 554.

There may be alternative and cross executory limitations analogous to alternative and cross remainders.

On the failure of an executory limitation, the previous estate continues as if the executory interest were nonexistent. On the failure of a previous limitation, the executory interest is generally accelerated.

An executory interest is susceptible of transfer to the same extent as a contingent remainder.

### § 134. Future uses.

While, at common law, as we have seen, an estate could not be limited to take effect in possession upon an event to happen before the expiration of an estate immediately preceding it, or after the expiration of a preceding estate, by means of the Statute of Uses and the Statute of Wills it became possible to limit such future estates, and the interests created by such limitations have acquired the name of "executory interests," and the limitations by which they are created are known as "executory limitations."<sup>100</sup>

The effect of the Statute of Uses in this regard has been already referred to, but its operation may be more fully explained as follows: In cases where an estate in the future is sought to be created by means of a common-law conveyance operating by transmutation of possession, it may be accomplished by a declaration by the grantor of a use to A. and his heirs after a certain number of years, or upon the happening of a certain event, and the use which will thus spring up in A. will draw to it the legal title by virtue of the statute. If a conveyance operating under the Statute of Uses—a bargain and sale, for instance—be employed, a use is raised in the grantee by the consideration in accordance with the declaration by the grantor, as in case of a conveyance for a valuable consideration to A.

<sup>100</sup> See Smith, *Executory Interests*, passim; Williams, *Real Prop.* § 2, c. 2.  
(318)

and his heirs from and after a certain time, or the happening of a certain event, and the use thus springing up in the grantee draws to itself the legal title. Uses thus limited to spring up in the future without any preceding limitation are termed "springing uses."<sup>191</sup> Until the time named for the springing up of the use in the grantee, the use in the land, being unappropriated, results to the grantor. This resulting use, which draws to itself the legal title, is the whole use, so that the grantor remains seised in fee simple, as before, until the springing up of the use in the grantee. In other words, he has a fee-simple estate liable to be displaced by a future estate, and not a particular estate followed by a remainder.<sup>192</sup>

By means of the Statute of Uses, moreover, an estate in fee simple could be conveyed to one person subject to a provision that, upon the happening of a certain contingency, his estate should be divested, and the land should pass or shift to another person. Thus, one may convey land to the use of A. and his heirs, and, if A. fail to pay a certain sum to B. at a certain time, then to the use of B. and his heirs. In such case, the use in A. will draw to him the legal title by force of the statute, until the shifting of the use to B., in which case the legal title will also pass to B. If the conveyance is one operating under the Statute of Uses, as by a bargain and sale, being in terms a grant to A. and his heirs, and, in case A. fail to pay a certain sum to B. at a certain time, then to B., a use is raised by the payment of consideration which will shift in accordance with the declaration in the conveyance, and draw the legal title to B. on the

<sup>191</sup> Challis, Real Prop. 141; Sugden's Gilbert, Uses, 153.

<sup>192</sup> 1 Leake, 113, 352; Sugden's Gilbert, Uses, 161; 1 Hayes, Conveyancing (5th Ed.) 464; Davies v. Speed, 2 Salk. 675; Sir Edward Clere's Case, 6 Coke, 18a. See Town of Shapleigh v. Pillsbury, 1 Me. 271.

The effect of a springing use is thus in reality the same as that of a shifting use. It divesting a fee in another person. 1 Leake, 352.

happening of the contingency.<sup>193</sup> Uses which thus take effect in substitution or defeasance of other uses previously limited are termed "shifting uses."

Since, as stated in another part of this work,<sup>194</sup> a conveyance, whatever may be its form, will, if necessary to its operation, be supported as a bargain and sale or covenant to stand seised, if there exist the proper consideration for such species of conveyance, and, since a future estate may be created by either of these classes of conveyance,<sup>195</sup> a conveyance, if supported by a consideration, will, in most jurisdictions, be effective to create a future estate whenever it purports so to do, however invalid the limitation would have been at common law, or would be now if the conveyance could not take effect under the Statute of Uses.<sup>196</sup>

<sup>193</sup> Sugden's *Gilbert, Uses*, 152; *Williams, Real Prop.* 290 et seq.; 4 *Kent, Comm.* 296-298.

The statement in the text that an estate may be created by a conveyance under the statute of uses, so as to take effect in derogation of another estate in fee simple previously limited, must, perhaps, be qualified as regards the state of Illinois, where there are a line of dicta to the effect that a fee can be limited on a fee only by executory devise. *Strain v. Sweeny*, 163 Ill. 603; *Palmer v. Cook*, 159 Ill. 300. *Smith v. Kimbell*, 153 Ill. 368; *McCampbell v. Mason*, 151 Ill. 500. But it seems somewhat questionable there how far it can be done by executory devise. See post, note 230.

<sup>194</sup> See post, § 378.

<sup>195</sup> Sugden's *Gilbert, Uses*, 163; 1 *Leake*, 350; *Doe d. Wilkinson v. Tranmer*, 2 *Wills*. 75, 1 *Gray's Cas.* 494; *Wyman v. Brown*, 50 *Me.* 139. *Finch's Cas.* 909; *Rogers v. Eagle Fire Co.*, 9 *Wend. (N. Y.)* 611, 5 *Gray's Cas.* 121; *Brewton v. Watson*, 67 *Ala.* 121; *Shackelton v. Sebree*, 86 *Ill.* 616; *Bell v. Scammon*, 15 *N. H.* 381, 41 *Am. Dec.* 706; *Savage v. Lee*, 90 *N. C.* 320; *Ferguson v. Mason*, 60 *Wis.* 377.

<sup>196</sup> See *Gray, Perpetuities*, §§ 52-68.

In two early cases it was decided that a use limited by way of contingent remainder after a term of years in the grantor could not take effect as a springing use, though necessarily void as a remainder. *Adams v. Savage*, 2 *Ld. Raym.* 855, 5 *Gray's Cas.* 119; *Rawley v. Holland*, 22 *Vin. Abr.* 189. Such a doctrine would involve an exception to the general rule allowing the creation of future estates by way of (320)

— Conveyance taking effect on grantor's death.

At common law, if, on the conveyance of a fee, the grantor reserved to himself a life estate, the conveyance would have been void as attempting to create an estate *in futuro*.<sup>197</sup> Such a conveyance, subject to a life estate in the grantor, may now well be supported as creating a future estate to arise upon the grantor's death by force of the Statute of Uses.<sup>198</sup> In some cases in this

use, regardless of the presence of any particular estate, and these cases have been much criticised. See Sugden's note to Gilbert, Uses, 167; 1 Sanders, Uses, 147. Mr. Gray (Perpetuities, §§ 58-60) considers the doctrine of these decisions at length, and shows that they can hardly be regarded as law at the present day. See, also, an article to the same effect by Mr. Challis in 1 Law Quart. Rev. 412.

The Massachusetts decisions (*Welsh v. Foster*, 12 Mass. 93; *Brewer v. Hardy*, 22 Pick. 376, and other cases), to the effect that an estate in futuro cannot be created by a bargain and sale, enunciate a doctrine peculiar to that state. See Gray, Perpetuities, § 57; *Wyman v. Brown*, 50 Me. 139, *Finch's Cas.* 909; and other cases cited *supra*, note 192. This erroneous doctrine has been, as stated by Mr. Gray, rendered harmless by another doctrine peculiar to that state, that a covenant to stand seised can be raised on a pecuniary consideration. See *Trafton v. Hawes*, 102 Mass. 533.

There are also some dicta to the effect that a use to a person not in esse cannot be raised by a bargain and sale, on the ground that no consideration can move to such person. These dicta are considered at length in Gray, Perpetuities, §§ 61-65, and there shown to have little judicial authority in their support, and to have no foundation in reason, since a valuable consideration may always be paid by one person in behalf of another.

<sup>197</sup> *Doe d. Wilkinson v. Tranmer*, 2 Wils. 75, 1 Gray's Cas. 494; *Wyman v. Brown*, 50 Me. 139, *Finch's Cas.* 909; *Youle v. Jones*, 13 Mees. & W. 534; *Perkins*, Prof. Book, 704; *Co. Litt.* 48b; *Williams*, Real Prop. 189. But the conveyance has been regarded as valid when the premises of the conveyance granted a fee, and the reservation of the life estate was in the habendum, and could be supported as a use. *Goodtitle v. Gibbs*, 5 Barn. & C. 716.

<sup>198</sup> *Wyman v. Brown*, 50 Me. 139, *Finch's Cas.* 909; *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *McDaniel v. Johns*, 45 Miss. 632; *Rogers v. Eagle Fire Co.*, 9 Wend. (N. Y.) 611; *Cribb v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; *Pledger v. David's Adm'rs*, 4 Deaus. (S. C.) 264;

country, however, the fact that such a conveyance creates a future estate, in contravention of common-law rules, seems to have been ignored, the reservation of the life estate being regarded as valid as a "reservation," in its technical sense;<sup>199</sup> an effect being thus given to a reservation as excepting from the grant a particular estate in the thing granted, which it does not appear to have had at common law. In some cases, the estate vested in the grantee in such case is spoken of as a "remainder" after the life estate in the grantor,<sup>200</sup>—a nomenclature not in accord with the common-law theory of remainders, which required the seisin to pass out of the grantor, by the ceremony of livery, to the tenant of the particular estate, at the time of the creation of the remainder.

### § 135. Future devises.

By the Statute of Wills,<sup>201</sup> the owner of land was given the power to dispose thereof by "last will and testament." Such dispositions by will were, from their very nature, not subject to

*Savage v. Lee*, 90 N. C. 320; *Brewer v. Hardy*, 22 Pick. (Mass.) 376, 33 Am. Dec. 747. And see *Shackelton v. Sebree*, 86 Ill. 616.

<sup>199</sup> *Beebe v. McKenzie*, 19 Or. 296; *White v. Hopkins*, 80 Ga. 154; *Planters' Bank of Tennessee v. Davis*, 31 Ala. 626; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610; *Harshbarger v. Carroll*, 163 Ill. 636; *Rollins v. Davis*, 96 Ga. 107; *Webster v. Webster*, 33 N. H. 18; *Steel v. Steel*, 4 Allen (Mass.) 417; *Hurst v. Hurst*, 7 W. Va. 289; *McDougal v. Musgrave*, 46 W. Va. 509. As to reservations, see post, § 383. In some of these states the common-law prohibition of the creation of a future estate is, by express statutory provision, no longer in force, and the conveyance may in such case be regarded as simply creating an estate to take effect in possession in the grantee upon the grantor's death, until which time the possession is necessarily in the grantor. So considered, the term "reservation" seems to be applied rather to the wording of the instrument than to its legal effect.

<sup>200</sup> *Planters' Bank of Tennessee v. Davis*, 31 Ala. 626; *Bissell v. Grant*, 35 Conn. 288; *Watson v. Cressey*, 79 Me. 381; *Achorn v. Jackson*, 86 Me. 215; *Bombarger v. Morrow*, 61 Tex. 417; *Shackelton v. Sebree*, 86 Ill. 616.

<sup>201</sup> 22 Hen. VIII. c. 1 (A. D. 1540).



the requirement of livery of seisin, and any possibility of abeyance of the seisin could be avoided by regarding the seisin, during any unappropriated interval, as being in the heir at law, to whom the land would have passed in the absence of devise. In view of these considerations, and in analogy to the doctrines which prevailed in regard to the limitation of uses, it was decided that devises of freehold estates might be made to take effect in the future,—that is, at a time subsequent to the testator's death, either with or without a preceding limitation to another.<sup>202</sup> Such a devise of an estate *in futuro*, which could not take effect as a common-law remainder, became known as an "executory devise," a term which has been defined as a "devise of a future interest which is not preceded by an estate of freehold created by the same will, \* \* \* or which, being so preceded, is limited to take effect before or after, and not at the expiration of, such prior estate of freehold."<sup>203</sup> As examples of future interests created by executory devise, not preceded by an estate of freehold, may be mentioned a devise to A. to take effect six months after the testator's death, or to A. when he shall attain the age of twenty-one,<sup>204</sup> or if he shall, within a certain time, become a citizen of the United States.<sup>205</sup>

In these cases, where the future interest is not preceded by a limitation of another estate, the fee vests in the heir or heirs at law of the testator until the devise takes effect, with a right to the accruing rents and profits,<sup>206</sup> unless there is a residuary de-

<sup>202</sup> 2 Bl. Comm. 173; Challis, Real Prop. 137; Digby, Hist. Real Prop. 380; Williams, Real Prop. 314.

<sup>203</sup> 1 Jarman, Wills, 822. This definition would have to be modified if it be conceded that an executory devise can be limited to take effect immediately upon the termination of a "determinable fee." See post, note 210.

<sup>204</sup> Clarke v. Smith, 1 Lutw. 798; 6 Cruise, Dig. tit. 38, c. 18, § 3; 1 Jarman, Wills, 823.

<sup>205</sup> Beard v. Rowan, 9 Pet. (U. S.) 301.

<sup>206</sup> 1 Leake, 361; Fearn. Cont. Rem. 536; Smith, Executory Interest, § 739; Hopkins v. Hopkins, cas. temp. Talb. 44, 5 Gray's Cas. 168; Merton v. Funk, 6 Pa. St. 483; Miller v. Chittenden, 4 Iowa, 252.

vise, in which case the fee will pass thereunder subject to subsequent displacement.<sup>207</sup>

In case a devise is to a person not in being or not ascertained, it is necessarily, if it can take effect at all, a future or executory devise until the devisee is in being or ascertained, as when it is to the heirs of A., who is living at the testator's death, or to the children of A., who has no children at the testator's death.<sup>208</sup>

Executory devises of the character just referred to, which take effect in the future without any preceding limitation to another by the same instrument, are similar in their operation to springing uses. Similar to shifting uses are those executory devises which are preceded by a limitation of an estate in fee simple to another. Thus, in the case of a devise to A. and his heirs, but, if he die before twenty-one, then to B., the fee shifts from A. to B. in that contingency.<sup>209</sup>

Shifting uses and executory devises which thus take effect in derogation of estates previously limited are frequently termed "conditional limitations."<sup>210</sup>

<sup>207</sup> Fearn, Cont. Rem. 544; Smith, Executory Interests, § 741; Stephens v. Stephens, cas. temp. Talb. 228, 5 Gray's Cas. 522; Ackers v. Phipps, 3 Clark & F. 667; In re Mowlem, L. R. 18 Eq. 9.

<sup>208</sup> 1 Jarman, Wills, 822; Gore v. Gore, 2 P. Wms. 28, 5 Gray's Cas. 166; Hopkins v. Hopkins, cas. temp. Talb. 44, 5 Gray's Cas. 168.

<sup>209</sup> See Challis, Real Prop. 141.

<sup>210</sup> See ante, § 78.

By writers who recognize the existence of determinable, base, or qualified fees (see ante, § 81), it is stated that an executory interest may be created to arise after the termination of such a fee by its special limitation. See Smith, Executory Interests, §§ 126, 165; Challis, Real Prop. (2d Ed.) 161. Admitting the existence of determinable fees, however, it is only in the exceptional cases in which the first taker is given in terms a determinable fee that he takes such an estate, rather than one in fee simple, and the view, frequently suggested by the most respectable courts, that a conveyance or devise to A. and his heirs is necessarily a determinable fee if there is an executory limitation over to another,—that is, that an executory limitation takes effect after the termination of a determinable fee, rather than in defeasance of an

## § 136. Uses by way of remainder

We have considered above limitations of springing and shifting uses, by which estates may be created *inter vivos* which could not be created at common law. There is another class of limitations of a future use, namely, limitations of estates which might have been created at common law by way of remainder, because preceded by a particular estate. Limitations of this character, which are generally called "future" or "contingent" uses, but which we will designate by the more descriptive term "uses by way of remainder," take effect, according to a well-settled rule of law, as common-law remainders, and not as future uses. In other words, a remainder retains its character as such even when created by the limitation of

estate in fee simple,—is entirely contrary to the views of the authoritative writers on the subject. See 2 Bl. Comm. 173; Sugden's *Gilbert, Uses*, 153; 1 Saunders, *Uses & Trusts* (5th Ed.) 149; Williams, *Real Prop.* 292; Fearn, *Cont. Rem.* 381, 399, and Butler's notes; Smith, *Executory Interests*, §§ 148-158; 1 Jarman, *Wills*, 822; Sir Thomas Plumer, Vice Chancellor, in *Lyon v. Mitchell*, 1 Madd. 480; Gray, *Perpetuities*, § 32. This is clearly recognized by those cases deciding that, on failure of the executory limitation, the first taker has an absolute estate in fee simple. See post, § 148. If he had merely a fee determinable upon the occurrence of the contingency which was to give rise to the executory interest, his estate would necessarily determine then, irrespective of whether the limitation over took effect. On this theory, also, is the rule that dower and curtesy are not barred by the taking effect of the limitation over alone explicable. See, post, §§ 183, 208.

The contingency which forms a condition precedent to the taking effect of the executory devise is not to be regarded as a condition subsequent terminating the estate of the first taker, since a condition subsequent can be taken advantage of only by the grantor or his heirs. It is merely a condition precedent to the executory limitation, except when, as suggested above, it can also be regarded as determining the estate of the first taker by "special limitation,"—that is, as limiting a determinable fee.

There may be a limitation over by way of executory devise, though not by way of remainder, after a common-law conditional fee. Gray *Perpetuities*, § 14, note 7; *Selman v. Robertson*, 46 S. C. 262.

a use.<sup>211</sup> The consequence of this rule is that, though a future estate of a contingent character, created by a conveyance operating under the Statute of Uses, would have been valid without any prior estate to support it, if there is such a prior estate, and the future estate can thereby take effect as a contingent remainder, it will fail if the prior estate terminate before the contingency happens,—that is, before the future estate vests,—and such failure cannot be avoided by construing as a future use what has once taken effect as a remainder.<sup>212</sup>

§ 137. Devises by way of remainder.

Analogous to a use by way of remainder is a future devise which might take effect as a remainder by reason of the existence of a particular estate to support it. Such a devise is, like a use by way of remainder, controlled by the rules which apply to common-law remainders.<sup>213</sup> Consequently, a contingent remainder created by devise will fail if the particular estate terminate before the vesting of the remainder, and such failure cannot be avoided by then construing the limitation as an executory devise.<sup>214</sup>

<sup>211</sup> Challis, Real Prop. 97; Williams, Real Prop. 293; Fearn, Cont. Rem. 284; Goodtitle v. Billington, Doug. 753.

<sup>212</sup> Sugden's Gilbert, Uses, 165; Challis, Real Prop. 97.

<sup>213</sup> Challis, Real Prop. 97; Fearn, Cont. Rem. 386, 526; Smith, Executory Interests, § 196; Purefoy v. Rogers, 2 Saund. 380; Blanchard v. Blanchard, 1 Allen (Mass.) 223, 5 Gray's Cas. 85; Waddell v. Ratte, 5 Rawle (Pa.) 230, Finch's Cas. 932; Arnold v. Brown, 7 R. I. 188; Burleigh v. Clough, 52 N. H. 267; Wolfe v. Van Nostrand, 2 N. Y. 436; Manderson v. Lukens, 23 Pa. St. 31; Bouknight v. Brown, 16 S. C. 155; Watson v. Smith, 110 N. C. 6; Nightingale v. Burrell, 15 Pick. (Mass.) 111; Demill v. Reid, 71 Md. 175.

<sup>214</sup> Challis, Real Prop. 97; Fearn, Cont. Rem. 395. Contra, Thompson v. Hoop, 6 Ohio St. 480.

Thus, in the case of a devise to testator's wife for life, with a remainder to his son for a term of years, and, after the death of both the wife and son, then to the heirs of the body of the son, it was held that the limitation to the heirs of the body was a contingent remainder.

So, in the case of a devise to A. for life, and, after her death, to such members of a class—her children, for example—as attain a certain age or marry, or comply with some other qualification, the limitation must take effect as a contingent remainder, and can do so in favor of those children only who have attained twenty-one or married at the time of A.'s death, and may fail entirely for want of such children.<sup>215</sup> But if it is clearly expressed in the will that not only those who comply with the qualification before A.'s death, but also those who comply therewith after her death, shall take, the limitation cannot take effect as a remainder, since the time of vesting is necessarily deferred till a time later than the termination of the particular estate, and it takes effect as an executory devise.<sup>216</sup>

In the case of a devise to take effect after a term of years, the existence of the term of years does not affect the validity of the devise by rendering it a remainder unsupported by an estate of freehold, and it takes effect as an executory devise.<sup>217</sup>

— Changing effect of limitation.

Since a will takes effect at the death of the testator, and not at the time of its execution, the question whether a future devise can take effect as a remainder is to be determined by the state of facts at the time of such death.<sup>218</sup> So, upon a devise to A. for life, with a devise over, after his death, to the

which failed by the death of the wife before the son, and it could not be supported as an executory devise. *Doe d. Mussell v. Morgan*, 3 Term R. 763.

<sup>215</sup> *Challis*, Real Prop. 97; *Festing v. Allen*, 12 Mees. & W. 379, 5 Gray's Cas. 71; *Rhodes v. Whitehead*, 2 Drew & S. 532.

<sup>216</sup> *In re Lechmere*, 18 Ch. Div. 524, 5 Gray's Cas. 82.

<sup>217</sup> 1 *Jarman*, Wills, 823; *Gore v. Gore*, 2 P. Wms. 28, 5 Gray's Cas. 166; *Gray*, Perpetuities, § 60. As to the validity of a similar limitation of a springing use, see ante, § 134, note 196.

<sup>218</sup> *Fearne*, Cont. Rem. 525, 526, and *Butler's* note; 1 *Jarman*, Wills 832; 2 *Preston*, Abstracts, 155.

sons of B., who has no sons, while the devise over to such sons is, upon the face of the will, a contingent remainder, it can, if A. dies before testator, and B. is without sons at testator's death, take effect only as an executory devise, and is so to be regarded.<sup>219</sup> On the other hand, a limitation which, at the time of the making of the will, could only have operated by way of executory devise, may, by change of circumstances in the testator's lifetime, operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder.<sup>220</sup>

A change of circumstances, even after the testator's death, may change an executory devise into a remainder, with all the incidents of remainders. So, in the case of a devise to A. for life, with remainder in fee to B., and a devise over, in case of B.'s death before A., to any children whom A. might leave, it was held that, upon the death of B. before A., what had previously been an executory devise to A.'s children, owing to the gift of a fee to B., became, upon the removal of B.'s estate by his death, a contingent remainder.<sup>221</sup> And where an executory devise is followed by another executory devise, which is to take effect upon the termination of the previous one, the latter devise becomes a remainder when the previous devise takes effect in possession.<sup>222</sup> But a change of circumstances after the testator's death, while it will thus change an executory devise to a remainder if it thereby enables the limitation to

<sup>219</sup> *Hopkins v. Hopkins*, cas. temp. Talb. 44, 5 Gray's Cas. 168.

<sup>220</sup> *Doe d. Harris v. Howell*, 10 Barn. & C. 191, 5 Gray's Cas. 67; 2 Preston, Abstracts, 154; 1 Jarman, Wills, 834.

<sup>221</sup> *Doe d. Harris v. Howell*, 10 Barn. & C. 195, 5 Gray's Cas. 67. See *Stephens v. Stephens*, cas. temp. Talb. 228, 5 Gray's Cas. 522.

<sup>222</sup> *Fearne*, Cont. Rem. 503, 506, and Butler's notes; *Brownsword v. Edwards*, 2 Ves. Sr. 243. So, in the case of a devise to A. in fee, but, if he dies unmarried, then to B. for life, and, on B.'s death, to C. in fee, B. and C. have both executory devises, and, on A.'s death unmarried, B.'s estate becomes an estate in possession, and C.'s estate a vested remainder. Gray, Perpetuities, § 114, note 2.

take effect as a remainder, can never, as we have seen, enable a limitation which once took effect as a remainder thereafter to take effect as an executory devise.<sup>223</sup>

§ 138. Limitations on failure of issue.

In jurisdictions where estates tail are still recognized, on a devise to A. and his heirs, with a devise over to B. upon the indefinite failure of A.'s issue, A. takes, as has been before stated, an estate tail, and the devise to B. takes effect as a remainder.<sup>224</sup> In states where estates tail no longer exist, the limitation over to B. on an indefinite failure of issue in A. cannot take effect as a remainder, and consequently is to be regarded as an executory devise, which, as we shall presently see, is void under the rule against perpetuities.<sup>225</sup> In the case of a devise to A., with a devise over to B. on the failure of issue of A., if the failure of issue at the time of A.'s death, and not an indefinite failure, is intended, then there is a valid executory devise, taking effect in derogation of A.'s estate on his death without issue.<sup>226</sup>

§ 139. Destruction by first taker.

Unlike a contingent remainder, an executory limitation, to take effect, whether by devise or by means of a use, in derogation of an estate previously limited, cannot, except in one case, be affected by any act of a tenant of the preceding estate, so

<sup>223</sup> 2 Preston, Abstracts, 172; 1 Jarman, Wills, 835. Ante, note 214.

<sup>224</sup> See ante, § 118.

<sup>225</sup> See post, § 156.

<sup>226</sup> 1 Jarman, Wills, 824; Underhill, Wills, § 846; Pells v. Brown, Cro. Jac. 590, 5 Gray's Cas. 163; Britton v. Thornton, 112 U. S. 526; Myar v. Snow, 49 Ark. 125; Summers v. Smith, 127 Ill. 645; Newsom v. Holesapple, 101 Ala. 682; Miller's Estate, 145 Pa. St. 561; Moore v. Gary, 149 Ind. 51; Weybright v. Powell, 86 Md. 573; Randall v. Josselyn, 59 Vt. 557; Dorr v. Johnson, 170 Mass. 540; Lawlor v. Holohan, 70 Conn. 87; Mullreed v. Clark, 110 Mich. 229.

as to prevent the limitation taking effect on the happening of the contingency named.<sup>227</sup> In the case, however, of a limitation in derogation of an estate tail, the power of the tenant in tail to turn his estate into a fee simple by suffering a common recovery, or, under modern statutes, by a deed in fee, enables him to destroy all subsequent limitations.<sup>228</sup>

§ 140. Power of disposition in first taker.

In some early cases in this country,<sup>229</sup> a doctrine was enunciated that, on the principle that the first taker cannot defeat the executory limitation, a gift to him, either express or implied, of the power to alien the property in fee, since it enables him to defeat such limitation, renders the latter void as being repugnant to the gift, and the first taker has an absolute estate. This view, supported by the approval of Chancellor Kent, has been generally adopted in this country, with but little

<sup>227</sup> Challis, Real Prop. 143; Pells v. Brown, Cro. Jac. 590, 5 Gray's Cas. 163; In re Barber's Settled Estates, 18 Ch. Div. 624; Hilleary v. Hilleary's Lessee, 26 Md. 274; Smith v. Hunter, 23 Ind. 530; Parker v. Parker, 5 Metc. (Mass.) 134; Randall v. Josselyn, 59 Vt. 557.

<sup>228</sup> Fearn, Cont. Rem. 424; 2 Preston, Abstracts, 121; Taylor v. Taylor, 63 Pa. St. 481; Gray, Restraints, Allen Prop. § 77. As to the effect of this rule upon the application of the rule against perpetuities, see post, § 156.

<sup>229</sup> These cases are *Ide v. Ide*, 5 Mass. 500, and *Jackson v. Bull*, 10 Johns. (N. Y.) 19. The first of these cases cited only *Attorney General v. Hall*, Fitzg. 314, W. Kel. 13, which decided merely that a common recovery will bar a contingent remainder limited on an estate tail, and that an executory limitation of chattels personal is not good where the first taker has an absolute property therein, as distinct from a gift of the mere use of it. See article by Edward Brooks, Jr., Esq., 32 Am. Law Reg. (N. S.) 1035; Gray, Restraints, Allen Prop. § 68. In *Jackson v. Bull*, supra, the above-named Massachusetts and English cases only were cited. The doctrine of these cases was strongly approved by Chancellor Kent in *Jackson v. Robins*, 16 Johns. (N. Y.) 537, and was stated as settled law in his *Commentaries* (volume 4, p. 270), citing the above cases only.



expression of dissent,<sup>230</sup> though it seems, on principle, difficult to justify.<sup>231</sup>

That the rule is not based on any considerations of public policy appears from the fact that the same results as those pro-

<sup>230</sup> *Cornwell v. Wulff*, 148 Mo. 542; *Howard v. Carusi*, 109 U. S. 725; *Clay v. Chenault*, 21 Ky. Law Rep. 1485, 55 S. W. 729; *Combs v. Combs*, 67 Md. 11; *Van Horne v. Campbell*, 100 N. Y. 287; *Kelley v. Meins*, 135 Mass. 231; *Law v. Douglass*, 107 Iowa, 606; *Fisher v. Wister*, 154 Pa. St. 65; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21; *Foster v. Smith*, 156 Mass. 379; *Wolfer v. Hemmer*, 144 Ill. 554.

In Illinois this doctrine has received an extension which produces a peculiar result. It is there held that a devise over in derogation of a fee-simple estate is invalid because repugnant to the estate in fee simple in the first taker, which, by its very nature, gives him the power to dispose of the whole fee. *Lambe v. Drayton*, 132 Ill. 110. See an article in 14 Harv. Law Rev. 595, for a judicious discussion of this and other decisions in that state upon the subject of such devises over after a fee. This view is peculiar to this state, and is undoubtedly directly contrary to *Pells v. Brown*, Cro. Jac. 590, *supra*, and numberless cases decided since in which such a devise has been expressly or impliedly upheld. In the later case, however, of *Koeffler v. Koeffler*, 185 Ill. 261, which is somewhat difficult to distinguish from the previous case on the facts, it was held that the first taker did not have a fee-simple estate, but a "determinable fee," and that consequently the devise over was valid. In this latter case, it may be observed, there was an express power in the first taker to dispose of the fee, which would, under Chancellor Kent's rule, invalidate the devise over, but this is not referred to in the opinion.

<sup>231</sup> The rule that an executory limitation cannot be defeated by the tenant of the previous estate means merely that he cannot prevent the taking effect of the limitation over upon the happening of the contingency, and it is so stated in the previous section of the text. But it is evident that the first taker can, very generally, prevent the limitation over from taking effect by preventing the contingency, as when the limitation over is to take effect on his marriage without the consent of the executor, or on his going to Rome. So, in the ordinary case of a limitation over on the death of the first taker without issue, he may prevent the limitation over taking effect by his marriage with the prospect of issue. It is evident, from these considerations, that Chancellor Kent's hypothesis, on which he based the view referred to in the text, that the first taker can never defeat the limitation over, was an erroneous one. Since he can defeat

hibited by the rule can be generally obtained by giving a particular estate to the first taker, with a power to dispose of the fee, and a remainder to the second taker, which remainder is subject to be defeated by the exercise of the power.<sup>232</sup> In other words, when there is a gift to A. for life, or on special limitation until some contingency named, with a power in A. to dispose of the fee by deed or by will, a remainder subsequent thereto may be given to B., though this is liable to be defeated by an exercise of the power, and though this is in effect the same as a limitation over to B., which is to take effect in derogation of a gift in fee simple to A., but which A. may defeat by an alienation of the fee.<sup>233</sup>

This rule has generally been applied in cases in which there is a limitation over in case the first taker fail to dispose of the land by deed or by will, this in effect giving him a power to dispose of it, and the limitation over in such case has been frequently held to be void.<sup>234</sup> The same rule has been ap-

plied in such cases as those referred to above, and his ability to do so does not invalidate the limitation over, it is difficult to see why the fact that he is given the power to defeat it by disposing of the land should have such an effect. See *Andrews v. Royce*, 12 Rich. Law (S. C.) 536, and particularly *Gray, Restraints, Alien. Prop.* § 57 et seq., and note by Edward Brooks, Jr., Esq., to *Fisher v. Wister*, 22 Am. Law Reg. (N. S.) 1035, on which two works the remarks here made are based. The New York courts have, it appears, availed themselves of a statutory provision to overthrow the rule thus established by the earlier decisions. *Leggett v. Firth*, 53 Hun, 152, 132 N. Y. 7.

<sup>232</sup> See ante, note 73.

<sup>233</sup> *Gray, Restraints, Alien. Prop.* § 74d; *Kelley v. Meins*, 135 Mass. 231; *Kent v. Morrison*, 153 Mass. 187; *Hall v. Otis*, 71 Me. 326; *Burleigh v. Clough*, 52 N. H. 267; *Mulvane v. Rude*, 146 Ind. 476; *Wommack v. Whitmore*, 58 Mo. 448.

<sup>234</sup> *Howard v. Carusi*, 109 U. S. 725; *McNutt v. McComb*, 61 Kan. 26; *Mulvane v. Rude*, 146 Ind. 476; *Wolfer v. Hemmer*, 144 Ill. 554; *Combs v. Combs*, 67 Md. 11; *Foster v. Smith*, 156 Mass. 379.

In England the limitation over in such cases is regarded as void, not as being inconsistent with the power of disposition in the first taker, but apparently as depriving the estate in the first taker of its  
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plied as invalidating a limitation over after a gift in fee simple, which is limited to take effect in case the first taker fail to dispose of the land in his lifetime;<sup>235</sup> and it has been applied where the gift over was on condition that the first taker did not dispose of his property by will.<sup>236</sup>

§ 141. Construction in favor of vesting.

In conformity with the principle before referred to, that an instrument will be construed, if possible, as not creating an estate subject to a condition, particularly a condition precedent,<sup>237</sup> a provision in a will is *prima facie* regarded as conferring a vested, and not a contingent, interest; in other words, not as creating an executory interest, but rather a present one, with possession thereunder deferred.<sup>238</sup>

Accordingly, if a prior interest is limited to others, words of futurity are generally to be regarded as fixing the time of the taking effect in possession, and not of the vesting of the interest.<sup>239</sup> So, a devise to A. until B. shall attain twenty-one,

quality of heritability, or of depriving a tenant in fee simple of his right to enjoy the estate without alienating it. *Shaw v. Ford*, 7 Ch. Div. 669. See *Gray, Restraints, Allen. Prop.* § 64; 32 *Am. Law Reg.* (N. S.) 1035, 1038. And see *Kent v. Morrison*, 153 *Mass.* 137.

<sup>235</sup> *Gray, Restraints, Allen. Prop.* § 56a; *Outland v. Bowen*, 115 *Ind.* 150; *Karker's Appeal*, 60 *Pa. St.* 141; *Bills v. Bills*, 80 *Iowa*, 269; *Joslin v. Rhoades*, 150 *Mass.* 301; *Van Horne v. Campbell*, 100 *N. Y.* 237; *Newland v. Newland*, 46 *N. C.* 463; *Hall v. Palmer*, 87 *Va.* 354.

This result might be reached, as is the case in England, on the ground that the tenant in fee simple is thus deprived of the power to alienate the land by will. *Gray, Restraints, Allen. Prop.* § 56; *Perry v. Merritt*, L. R. 18 *Eq.* 152; *Bowes v. Goslett*, 27 *Law J. Ch.* (N. S.) 249; *Karker's Appeal*, 60 *Pa. St.* 141.

<sup>236</sup> *Fisher v. Wister*, 154 *Pa. St.* 65.

<sup>237</sup> See ante, §§ 68, 69.

<sup>238</sup> *Young v. Kinkead's Adm'rs*, 101 *Ky.* 252; *McArthur v. Scott*, 113 *U. S.* 340; *Hawkins v. Bohling*, 168 *Ill.* 214; *Fowler v. Duhme*, 145 *Ind.* 248; *Patton v. Ludington*, 103 *Wis.* 629; *Van Brunt v. Van Brunt*, 111 *N. Y.* 178; *Dulany v. Middleton*, 72 *Md.* 67.

<sup>239</sup> *Fearne, Cont. Rem.* 242; *Grigsby v. Breckinridge*, 12 *B. Mon.* (Ky.) 629; *Bredell v. Collier* (*Collier's Will*), 40 *Mo.* 237.

and "when" he attains that age, or "at" or "after" attaining it, to B. in fee, will generally be construed as giving B. a vested interest, subject to a term of years in A., rather than as an executory devise to B. upon his attaining that age.<sup>240</sup> But if there is no intermediate disposition of the property in such case during the minority of B., this presumption in favor of vesting does not apply.<sup>241</sup> On the same principle, a devise "after" payment of debts or legacies gives a vested estate to the devisee, subject merely to a charge created for the amount of the debts or legacies, and does not postpone the vesting.<sup>242</sup>

In accordance with the rule that a condition will be construed, if possible, as subsequent rather than precedent, as well as under the general presumption in favor of vesting, words of contingency will be referred, not to the vesting of the estate, but rather to its divesting;<sup>243</sup> and a devise to A. "if" or "when" he shall attain a certain age, with a devise over in case he fail to attain that age, will *prima facie* give A. a present estate, subject to be divested by his death under that age, when the devise over will take effect, rather than as giving A. a future estate to arise on his attaining that age.<sup>244</sup>

<sup>240</sup> 1 Jarman, Wills, 762; Hawkins, Wills, 237; Boraston's Case, 3 Coke, 19; Doe d. Hodgson v. Ewart, 7 Adol. & E. 636; Grigaby v. Breckinridge, 12 B. Mon. (Ky.) 629; Sammis v. Sammis, 14 R. I. 129; Roome v. Phillips, 24 N. Y. 465; Meyer v. Elsler, 29 Md. 28; Bredell v. Collier (Collier's Will), 40 Mo. 287.

<sup>241</sup> 1 Jarman, Wills, 762; Illinois Land & Loan Co. v. Bonner, 75 Ill. 316; Kingman v. Harmon, 131 Ill. 171.

<sup>242</sup> 1 Jarman, Wills, 777; Bowling's Heirs v. Dobyn's Adm'rs, 5 Dana (Ky.) 434; Neely v. Boyce, 128 Ind. 1; Scofield v. Olcott, 120 Ill. 362; Little's Appeal, 117 Pa. St. 14.

<sup>243</sup> Hawkins, Wills, 237.

<sup>244</sup> 1 Jarman, Wills, 767; Hawkins, Wills, 240; Edwards v. Hammond, 3 Lev. 132; Edwards v. Hammond, 2 Show. 398, 5 Gray's Cas. 52; Bromfield v. Crowder, 1 Bos. & P. (N. R.) 313; Roome v. Phillips, 24 N. Y. 465; Illinois Land & Loan Co. v. Bonner, 75 Ill. 316; Packard v. Packard, 16 Pick. (Mass.) 191; Hancock v. Titus, 39 Miss. 224; Rivers v. Fripp, 4 Rich. Eq. (S. C.) 278; Linton v. Laycock, 33 Ohio (334)

## § 142. Gifts to a class.

In the case of a devise to the children of A., without any postponement of possession, the children who are living at the time of the testator's death are *prima facie* the beneficiaries of the devise, to the exclusion of children afterwards born.<sup>245</sup> If, however, a devise to "children" is not to take effect in possession immediately on the testator's death, but is in terms to take effect in the future, whether or not a previous estate is limited to another, the same rule applies as in the case of remainders,<sup>246</sup> and each of the children living at testator's death will *prima facie* take a vested estate, subject to divesting *pro tanto* in order to permit others thereafter born to share in the benefit of the devise;<sup>247</sup> and the same rule applies to gifts to grandchildren, brothers, nephews, and other classes of relations.<sup>248</sup>

## § 143. Limitations to "survivors."

Where there is a limitation to a number of persons, whether as individuals or a class, with a provision that, on the death of any one without issue, or on some other contingency, his share shall go to the "survivor" or "survivors," the meaning of the latter word quite frequently comes in question, it being sought to give the benefit of the limitation over, not only to the actual survivors, but also to the heirs or next of kin of those who have not survived; in other words, it is sought to construe the word "survivor" as meaning "other." The term

St. 128; *Watkins v. Quarles*, 23 Ark. 179; *Hughes v. Hughes*, 12 B. Mon. (Ky.) 115. Compare *Sager v. Galloway*, 113 Pa. St. 500.

<sup>245</sup> 2 Jarman, Wills, 1010; 1 Underhill, Wills, § 14; *Scott v. Harwood*, 5 Madd. 332; *Merriam v. Simonds*, 121 Mass. 198; *Wood v. McGuire*, 15 Ga. 202; *Downing v. Marshall*, 23 N. Y. 373.

<sup>246</sup> See ante, § 122.

<sup>247</sup> 2 Jarman, Wills, 1011; 2 Underhill, Wills, § 554; *Oppenheim v. Henry*, 10 Hare, 441; *Hall v. Hall*, 123 Mass. 120; *Hill v. Rockingham Bank*, 45 N. H. 270.

<sup>248</sup> 2 Jarman, Wills, 1010; *Baldwin v. Rogers*, 3 De Gex. M. & G. 649.

will not, however, as is now well settled, be construed as meaning "other" unless this meaning is to be inferred from other parts of the will, and consequently the heirs or next of kin of deceased donees cannot share.<sup>249</sup> But the context of the will may show that the word "survivor" should be read as "other," and this will generally be the case when there is a gift to several devisees, with a limitation to the survivors, to take effect on a certain event, such as the death of any of them under age or without issue, with a gift over, upon the death of the last survivor, to a third person.<sup>250</sup>

The question has frequently arisen, in the case of a testamentary gift to the "survivor" or survivors of certain individuals, or of a certain class, as to the time to which survivorship is to be referred. If the gift is immediate,—that is, if the gift is to take effect in possession immediately upon the testator's death,—the word "survivors" will be construed as referring to those who may be surviving at the time of such death, since there is no other time to which it can refer.<sup>251</sup> When, however, the gift is not to take effect immediately in possession upon the testator's death, there being a prior life or other particular interest carved out, the authorities are not in accord on the question. In England it is now the rule, contrary to the view which formerly obtained, that, in such case, the survivorship is *prima facie* to be referred to the time of the termination of the preceding interest, and those only who sur-

<sup>249</sup> 2 Jarman, Wills, 1500; 1 Underhill, Wills, § 351; *Ferguson v. Dunbar*, 3 Brown Ch. 470, note, 5 Gray's Cas. 231; *Bayless v. Prescott*, 79 Ky. 252; *Crowder v. Stone*, 3 Russ. 217, 5 Gray's Cas. 238; *Lee v. Stone*, 1 Exch. 674, 5 Gray's Cas. 242; *Davis v. Davis*, 118 N. Y. 411; *Anderson v. Brown*, 84 Md. 261; *Duryea v. Duryea*, 85 Ill. 41.

<sup>250</sup> 2 Jarman, Wills, 1508; Theobald, Wills (5th Ed.) 600; *Doe d. Watts v. Wainwright*, 5 Term R. 427, 5 Gray's Cas. 232; *Wilmot v. Wilmot*, 8 Ves. 10, 5 Gray's Cas. 237.

<sup>251</sup> 2 Jarman, Wills, 1532; *Smith v. Horlock*, 7 Taunt. 129; *Johnson v. Morton*, 10 Pa. St. 245; *Armistead's Ex'rs v. Hartt*, 97 Va. 316; *Crossman v. Field*, 119 Mass. 170; *Whitney v. Whitney*, 45 N. H. 311; *Reams v. Spann*, 26 S. C. 561.

vive to that time can share as survivors, unless a contrary intention clearly appear.<sup>252</sup> The present English rule has been adopted in some states in this country,<sup>253</sup> while in others the former English rule still prevails, that, even when there is a preceding interest in another, the words of survivorship are to be referred to the time of the testator's death.<sup>254</sup>

### § 144. Alternative limitations.

Executory limitations may be made in the alternative, so that, if the contingency upon which one is to take effect does not happen, the other will take effect;<sup>255</sup> and there may be a limitation over to a person which will in one event operate as a remainder, and in the other as an executory devise.<sup>256</sup>

<sup>252</sup> 2 Jarman, Wills, 1533 et seq.; *Cripps v. Wolcott*, 4 Madd. 11; In re Gregson's Estate, 2 De Gex, J. & S. 428. The gift to survivors will, in such case, if the property is land, generally be a remainder rather than an executory interest, but it is convenient to refer to the matter here rather than in connection with remainders.

<sup>253</sup> *Slack v. Bird*, 23 N. J. Eq. 238; *Hill v. Rockingham Bank*, 45 N. H. 270; *Sinton v. Boyd*, 19 Ohio St. 30; *Olney v. Hull*, 21 Pick. (Mass.) 311; In re Winter's Estate, 114 Cal. 186.

<sup>254</sup> *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Embury v. Sheldon*, 68 N. Y. 235; *Ross v. Drake*, 37 Pa. St. 373; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Drayton v. Drayton*, 1 Desaus. (S. C.) 324; *Cheatham v. Gower*, 94 Va. 383; *Grimmer v. Friederich*, 164 Ill. 245, distinguishing *Blatchford v. Newberry*, 99 Ill. 11.

<sup>255</sup> 1 Leake, 364; *Fearne*, Cont. Rem. 508, 514; *Smith*, Executory Interest, §§ 128, 136; *Stephens v. Stephens*, cas. temp. Talb. 228, 5 Gray's Cas. 522. For instance, in the case of a devise to A. in fee, with a limitation over, in the event of A.'s death before arriving at twenty-one, to C., and, in the event of C.'s previous death, then to D., there are alternative executory limitations to C. and D.

<sup>256</sup> *Doe d. Herbert v. Selby*, 2 Barn. & C. 926, 5 Gray's Cas. 171; *Evers v. Challis*, 7 H. L. Cas. 531, 5 Gray's Cas. 637. Thus, where there was a devise to A. for life, with remainder to his children, and, in case he died without leaving issue, or if, in case he left issue, his child should die before attaining twenty-one, then over to B., it was held that B. had a contingent remainder, which, if A. left a child would become an executory devise. *Doe d. Herbert v. Selby*, 2 Barn. & C. 926, 5 Gray's Cas. 171.

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## § 145. Cross limitations.

We have previously discussed the subject of cross remainders. Similar in their general aspect to cross remainders are cross executory limitations, by which, after the limitation of estates in fee simple to two or more persons, it is provided that in certain events, the share of each shall pass to the other or others.<sup>257</sup> There is one important distinction to be noticed as between such limitations and cross remainders, and that lies in the fact that, even in a will, they are not implied, since their creation involves the divesting of an estate previously vested, and is never necessary to avoid intestacy, as in the case of cross remainders. Thus, when there are limitations to a number of persons in fee, with a limitation over to another person in case they all die under a given age, or under other prescribed circumstances, there is no implication of cross limitations, but the share of each goes, in the absence of an express provision to the contrary, to his heirs, until the death of the last survivor.<sup>258</sup>

## § 146. Chattel interests.

One may create a term for years, to begin in the future, since the question of seisin is not involved,<sup>259</sup> and, likewise, one who has such a term may create a future interest therein by a devise or grant of the term to another person, to take effect on a future event or at a future time.<sup>260</sup>

If the gift of a future interest in a term is preceded by the gift of a life interest to another, the law in England, apparently, is that, since a life interest is in theory greater than

<sup>257</sup> 2 Jarman, Wills, 43. See *Anderson v. Brown*, 84 Md. 261.

<sup>258</sup> 2 Jarman, Wills, 1358; *Skey v. Barnes*, 3 Mer. 335, 5 Gray's Cas. 220; *Fenby v. Johnson*, 21 Md. 111.

<sup>259</sup> Gray, Perpetuities, § 74; 2 Preston, Abstracts, 7; *Barwick's Case*, 5 Coke, 93b; *Wright v. Cartwright*, 1 Burrow, 282. See ante, § 40.

<sup>260</sup> Gray, Perpetuities, § 74; *Rayman v. Gold*, Moore, 635; *Welcken v. Elkington*, 2 Plowd. 519, 524; *Culbreth v. Smith*, 69 Md. 450.



a term for years, the first gift, if made *inter vivos*, consumes the entire term, and consequently the future gift is void.<sup>261</sup> This theory, however, the court did not apply in the case of a devise, as distinguished from a gift *inter vivos*, of a life interest in the term, followed by a devise of the residue after the death of the first taker to another, and both of such devises were held to be valid;<sup>262</sup> and it was regarded as immaterial, in this respect, that the person to take such residue was uncertain or not in being.<sup>263</sup> In this country, it seems that the English view that a grant of a future interest after a gift for life is invalid would not be adopted, but that the rule which is here almost universally applied to chattels personal, that a gift either *inter vivos* or by will of such a future interest after a gift for life to another is valid, would also be applied to chattels real.<sup>264</sup>

#### § 147. Failure of preceding limitation.

When there is an executory limitation, to take effect in derogation of a preceding estate upon the happening of a contingency, if the preceding estate never takes effect owing to the death of the first devisee in testator's lifetime, his nonexistence, or for other reasons, the executory interest is, as a general rule, accelerated.<sup>265</sup> So, where one devised land to the child of

<sup>261</sup> Challis, Real Prop. (2d Ed.) 159; Gray, Perpetuities, § 76; 14 Harv. Law Rev. 402; Welcden v. Elkington, 2 Plowd. 519, 520; Woodcock v. Woodcock, Cro. Eliz. 795. Compare Wright v. Cartwright, 1 Burrow, 282. Such a future interest after one for life is therefore always created there by the interposition of a trustee. Williams, Settlements, 223.

<sup>262</sup> Manning's Case, 8 Coke, 94b, 5 Gray's Cas. 130; Lampet's Case, 10 Coke, 46b.

<sup>263</sup> Cotton v. Heath, 1 Rolle, Abr. 612, pl. 3, 5 Gray's Cas. 135.

<sup>264</sup> Culbreth v. Smith, 69 Md. 450. See Gray, Perpetuities, § 74 et seq., and the lucid and exhaustive article by the same writer on Future Interests in Personal Property, in 14 Harv. Law Rev. 397, on which the statements here made are based.

<sup>265</sup> 3 Jarman, Wills, 1642 et seq.; Fearn, Cont. Rem. 237, 509; Ave-

which his wife was then *enceinte*, and, in case such child died under twenty-one, then over, the devise over took effect immediately, the wife, as a matter of fact, not being *enceinte*.<sup>266</sup> And the limitation over will take effect immediately if the prior limitation is void.<sup>267</sup> But the fact that the prior limitation fails will not make the limitation over effective if the result would be to give the property to the second devisee or grantee under circumstances which would have excluded the limitation over if the prior limitation had taken effect.<sup>268</sup>

### § 148. Failure of executory limitation.

If an executory limitation fail to take effect for any cause, as where the objects thereof never come into existence, or where the contingency on which it is limited becomes impossible, the preceding estate will, according to the decisions in this country, continue in the first taker, according to its original limitation, unless a contrary intention on the part of the testator appear.<sup>269</sup>

*lyn v. Ward*, 1 Ves. Sr. 420, 5 Gray's Cas. 202; *Mathis v. Hammond*, 6 Rich. Eq. (S. C.) 121; *In re Miller's Will*, 161 N. Y. 71; *Robison v. Female Orphan Asylum of Portland*, 123 U. S. 702; *Perkins v. Fisher*, 59 Fed. 801, 8 C. C. A. 270.

<sup>266</sup> *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245, pl. 10, 5 Gray's Cas. 199; *Frogmorton v. Holyday*, 3 Burrows, 1618.

<sup>267</sup> *Hall v. Warren*, 9 H. L. Cas. 420; *Burbank v. Whitney*, 24 Pick. (Mass.) 146; *Perkins v. Fisher*, 59 Fed. 801, 8 C. C. A. 270.

<sup>268</sup> *Tarbut v. Tarbut*, 4 Law J. Ch. 129, 5 Gray's Cas. 207; *Doe v. Brabant*, 4 Term R. 706, 5 Gray's Cas. 204; *Mathis v. Hammond*, 6 Rich. Eq. (S. C.) 127; *Lomas v. Wright*, 2 Mylne & K. 769, 5 Gray's Cas. 205; *McGreevy v. McGrath*, 152 Mass. 24. Thus, where there is a devise to A. with a devise over to B. in case of A.'s death under twenty-one, B. does not take merely because A. dies before the testator, if such death does not occur till A. has reached twenty-one, since to hold otherwise would give B. the property, although A. reached twenty-one, in violation of the terms of the will. *Doe v. Brabant*, 4 Term R. 706, 5 Gray's Cas. 204; *Williams v. Chitty*, 3 Ves. 549.

<sup>269</sup> *Drummond's Ex'rs v. Drummond*, 26 N. J. Eq. 234; *Groves v. Cox*, 40 N. J. Law, 40; *Shadden v. Hembree*, 17 Or. 14; *Medley v. Medley*, 81 Va. 265; *Merriam v. Simonds*, 121 Mass. 198; *North Adams First Universalist Soc. v. Boland*, 155 Mass. 171; *Gray, Perpetuities*, § 250. (340)

In England, however, it has been decided that the happening of the contingency named will terminate the prior estate, though the limitation over cannot take effect, unless the objection there to is on the ground of remoteness.<sup>270</sup>

An estate subject to an executory devise to arise on a future event is, it seems, on the happening of that event, defeated only to the extent of the executory interest. Thus, on a devise to A. in fee, with a limitation over to B. for life on a certain contingency, A. is entitled to the property, rather than the heirs of the testator, after the expiration of the life estate in B.<sup>271</sup>

#### § 149. Transfer of executory interests.

By the common law, an executory interest created by deed or will is, like a contingent remainder, regarded merely as a possibility, and cannot be conveyed *inter vivos*,<sup>272</sup> but it may

But see *Leonard v. Burr*, 18 N. Y. 96. That this is the rule in case the limitation over is void for remoteness, see post, § 157.

<sup>270</sup> *Doe d. Blomfield v. Eyre*, 5 C. B. 713, 5 Gray's Cas. 188; *Robinson v. Wood*, 27 Law J. Ch. 726, 5 Gray's Cas. 192; *Hurst v. Hurst*, 21 Ch. Div. 278. This rule is questioned in the reporter's notes to *Doe d. Blomfield v. Eyre*, supra, and doubted on principle in the two cases last above cited, they being decided on the authority of *Doe d. Blomfield v. Eyre*. It is defended in Sugden, Powers (8th Ed.) 513. See the judicious discussion of these decisions in an article by Howard Wurts Page, Esq., in 20 Am. & Eng. Enc. Law (1st Ed.) 947, note.

The English doctrine seems to be opposed to the view, quite commonly held in England, that a determinable fee cannot exist at the present day (see ante, § 81), since thereby the contingency is, if the limitation over is void, given the effect of a special limitation. See 1 Leake, 363, note (c); Gray, Perpetuities, § 250.

<sup>271</sup> *Gatenby v. Morgan*, 1 Q. B. Div. 685, 5 Gray's Cas. 178; *Jackson v. Noble*, 2 Keen. 590; *Thomae v. Thomae* (N. J. Ch.) 18 Atl. 355. Contra, *Doe d. Harrington v. Dill*, 1 Houst. (Del.) 398. See 2 Washburn, Real Prop. 346.

<sup>272</sup> *Smith, Executory Interests*, § 754; *Challis, Real Prop.* 58, 142; *Lampet's Case*, 10 Coke, 46b; *Hall v. Chaffee*, 14 N. H. 215, *Finch's Cas.* 925; *Jackson v. Waldron*, 13 Wend. (N. Y.) 178. In Massachusetts, in view of the decisions as to contingent remainders (ante, § 129)

be released to the owner of the land,<sup>273</sup> and may pass by estoppel.<sup>274</sup> The transfer of such an interest *inter vivos*, if for a good or valuable consideration, will be recognized in equity.<sup>275</sup> In England it is now provided that executory interests may be disposed of by deed,<sup>276</sup> and in a number of states in this country there are substantially similar provisions.<sup>277</sup>

An executory interest in an estate of inheritance, or in a term of years, will pass to the heirs or executors of a person who is entitled thereto, on his decease,<sup>278</sup> and it may be devised by him.<sup>279</sup> If, however, the person entitled thereto is not ascertained, the interest can neither descend nor be devised, apart from statute.<sup>280</sup>

executory interests are no doubt freely alienable. See *Wainwright v. Sawyer*, 150 Mass. 168.

<sup>273</sup> 2 Preston, Abstracts, 283; *Lampet's Case*, 10 Coke, 46b; *Miller v. Emans*, 19 N. Y. 384; *Jeffers v. Lampson*, 10 Ohio St. 107.

<sup>274</sup> *Smith, Executory Interests*, § 754.

<sup>275</sup> *Smith, Executory Interests*, § 749; *Fearne, Cont. Rem.* 549; *Wright v. Wright*, 1 Ves. Sr. 409; *Crofts v. Middleton*, 8 De Gex, M. & G. 192; *Higden v. Williamson*, 3 P. Wms. 132; *Bayler v. Com.*, 40 Pa. St. 37; *Watson v. Smith*, 110 N. C. 6; *Wright v. Brown*, 116 N. C. 26.

<sup>276</sup> 8 & 9 Vict. c. 106, § 6.

<sup>277</sup> *Chaplin, Suspens. Alien.* § 10. See statutes cited 20 Am. & Eng. Enc. Law (1st Ed.) 970. And see *Nutter v. Russell*, 3 Metc. (Ky.) 163; *Griffin v. Shepard*, 124 N. Y. 70.

<sup>278</sup> *Challis, Real Prop.* 58; *Goodright v. Searle*, 2 Wils. 29; *Chess Appeal*, 87 Pa. St. 362; *Kenyon v. See*, 94 N. Y. 563; *Finch's Cas.* 907; *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.) 456; *Hennessy v. Patterson*, 85 N. Y. 91; *Finch's Cas.* 868; *Collins v. Smith*, 105 Ga. 525; *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103; *Clark v. Cox*, 115 N. C. 93; *Medley v. Medley*, 81 Va. 265; *Edwards v. Bibb*, 43 Ala. 666; *Brooks v. Kip*, 54 N. J. Eq. 462.

<sup>279</sup> *Challis, Real Prop.* 142; *Roe d. Perry v. Jones*, 1 H. Bl. 30; *Jones v. Roe d. Perry's Lessee*, 3 Term R. 83; *Collins v. Smith*, 105 Ga. 525; *Winslow v. Goodwin*, 7 Metc. (Mass.) 363.

<sup>280</sup> *Roe d. Noden v. Griffiths*, 1 W. Bl. 605; *Smith, Executory Interests*, § 744; 4 Kent, Comm. 261; *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103; *Collins v. Smith*, 105 Ga. 525.

## VI. STATE STATUTORY ESTATES.

The law of future estates has been materially modified in many of the states by statutes tending to abolish the restrictions growing out of the doctrines of seisin and abeyance thereof.

## § 150. Statutes dispensing with a particular estate.

In many states it is provided that a freehold estate may be created to commence *in futuro* by deed or by will, with or without a precedent estate.<sup>281</sup> Provisions of the above character not only dispense with the necessity of a particular estate to support an estate in its creation, but also, it would seem, prevent the possibility of the failure of a limitation under the rule that a contingent remainder must vest before the termination of the particular estate. But in some of these same states there are express statutory provisions, which have been previously referred to, against the failure of a remainder by the premature termination of the particular estate.<sup>282</sup>

## § 151. Statutes extending executory interests.

In a number of states there are statutes undertaking, in effect, to assimilate remainders to executory interests, it being sometimes provided that any contingent remainder will be valid if it would be valid as a conditional limitation;<sup>283</sup> sometimes that any estate which would be good by way of executory devise is equally good if created by deed.<sup>284</sup> In a few states it is pro-

<sup>281</sup> 1 Stimson's Am. St. Law, § 1421. These states are New York, Indiana, Michigan, Wisconsin, Iowa, Minnesota, Nebraska, Virginia, West Virginia, Kentucky, Missouri, Texas, California, North Dakota, South Dakota, Mississippi.

<sup>282</sup> See ante, § 123.

<sup>283</sup> 1 Stimson's Am. St. Law, § 1426. New York, Indiana, Michigan, Wisconsin, Minnesota, California, North Dakota, South Dakota.

<sup>284</sup> 1 Stimson's Am. St. Law, § 1421. Virginia, West Virginia, Kentucky, Alabama.

vided that a fee may be limited on a fee,<sup>285</sup> and in several that a contingent remainder of freehold may be created to commence on the termination of a term of years,<sup>286</sup> this being in fact a corollary of the provisions in the same states allowing a future estate to be created without a freehold to support it.

As before stated, in a few states, though the Statute of Uses is not in force, and there is no statute expressly allowing the creation of future estates, it has been decided that future estates may be created without reference to the common-law rules on the subject.<sup>287</sup>

#### VII. THE RULE AGAINST PERPETUITIES.

The rule against perpetuities prohibits the creation of a future contingent interest unless, by the terms of its creation, the interest must vest within a life or lives in being, and twenty-one years thereafter. The rule applies to executory interests and powers, to contingent remainders, and, in some jurisdictions, to other contingent interests, and it is immaterial whether the interest be legal or equitable.

The rule does not apply if the interest must vest before or at the termination of an estate tail in another person in the same land.

#### § 152. The nature of the rule.

The rule against perpetuities, as developed by the English decisions, and recognized by the authoritative text writers, is concerned only with the time of vesting of an estate, and not with the duration of an estate already vested.<sup>288</sup> Accordingly,

<sup>285</sup> 1 Stimson's Am. St. Law, § 1424. New York, California, North Dakota, South Dakota, Georgia.

<sup>286</sup> 1 Stimson's Am. St. Law, § 1424. New York, Indiana, Michigan, Wisconsin, Tennessee, California, North Dakota, South Dakota.

<sup>287</sup> See ante, § 119(c).

<sup>288</sup> That this is the true scope of the rule is conclusively shown in Gray, Perpetuities, §§ 123-200, 232-246. So in Lewis, Perpetuity, p. 173, it is said: "The remoteness against which the rule is directed

the fact that a life estate may continue beyond the period fixed by the rule does not affect its validity if it is to vest immediately, or must vest within that time.<sup>288</sup>

The purpose of the rule is to facilitate the alienation of property, by prohibiting the clogging of the title with future interests dependent on contingencies which may not occur at all, or until a remote period. When there exists a future contingent interest, both the preceding vested interest and also the future contingent interest are rendered uncertain in value, and the complete alienation of the land is thus dependent on the agreement of the owners of the two interests, and to that extent the power of alienation is obstructed. This condition of uncertainty of the title it is the object of the rule to terminate within a limited time, in order that all the parties interested may determine the exact position in which they stand, and may, if desirous so to do, dispose of their interests free from any uncertainty as to their existence or character, and consequently without the depreciation in value resulting from the presence of a contingency.<sup>290</sup>

is remoteness in the commencement, or first taking, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to be determined on the happening of any event, however remote."

The following cases may be referred to in which this is clearly recognized: *Madison v. Larmon*, 170 Ill. 65; *Howe v. Hodge*, 152 Ill. 252; *Owsley v. Harrison*, 190 Ill. 235; *Phillips v. Harrow*, 93 Iowa, 92; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America* (C. C. A.) 82 Fed. 124; *Coggins' Appeal*, 124 Pa. St. 10; *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 26; *Johnston's Estate*, 185 Pa. St. 179; *Lawrence's Estate*, 136 Pa. St. 354; *Pulitzer v. Livingston*, 89 Me. 359, overruling *Slade v. Patten*, 68 Me. 380. And see *Stout v. Stout*, 44 N. J. Eq. 479; *Howe v. Morse*, 174 Mass. 491.

<sup>288</sup> *Gray, Perpetuities*, § 232; *Madison v. Larmon*, 170 Ill. 65; *Loring v. Worthington*, 106 Mass. 86; *Loring v. Blake*, 98 Mass. 253; *Donohue v. McNichol*, 61 Pa. St. 73; *Heald v. Heald*, 56 Md. 300; *In re Boyd's Estate* (Pa.) 49 Atl. 297. For an examination of decisions of an opposite tendency, see *Gray, Perpetuities*, §§ 238-246.

<sup>290</sup> *Lewis, Perpetuity*, Supp. 16-19; *Gray, Perpetuities*, § 269.

It results from this view that the applicability of the rule is not affected by the fact that the person or persons who would take in case of the occurrence of the contingency on which the future limitation depends are in being, and could alienate their interests, since the same condition of uncertainty as to the vesting, and, consequently, as to the value of their interests, exists as if the limitations were to persons not in being, or not ascertained, and that this is the law is recognized by the authoritative text writers, as well as by the later English decisions.<sup>291</sup> As rightly understood, therefore, the rule is not inapplicable because the contingent limitation to take effect in the future is in favor of a person in being, who could release his interest; nor, when the contingency is as to the persons who are to take in the future, does the fact that such persons belong to a class, all the members of which are ascertainable within the statutory period, render the rule inapplicable, though by a conveyance, in which all the members of the class join, the future interest could be aliened. There are, however, a number of *dicta* and some decisions to the effect that an interest is not invalid under the rule if there are persons in being who, by joining in a conveyance, could make a perfect title, and these, though now overruled, have exerted an unfortunate influence in obscuring the real nature of the rule.<sup>292</sup>

The occasional, if not frequent, misunderstanding of the rule in this regard, as being directly aimed at limitations which render the land inalienable, "though all mankind join in the conveyance," as it has been expressed, arises, no doubt,

<sup>291</sup> Marsden, *Perpetuities*, c. 3; Gray, *Perpetuities*, c. 7; 1 Sanders, *Uses* (5th Ed.) 203; *In re Hargreaves*, 43 Ch. Div. 401, 5 Gray's Cas. 602; *London & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 5 Gray's Cas. 579; *Winsor v. Mills*, 157 Mass. 362.

<sup>292</sup> See *Scatterwood v. Edge*, 1 Salk. 229, 5 Gray's Cas. 518; *Avern v. Lloyd*, L. R. 5 Eq. 383, 5 Gray's Cas. 571; *Gilbertson v. Richards*, 4 Hurl. & N. 277, 5 Hurl. & N. 453; *Birmingham Canal Co. v. Cartwright*, 11 Ch. Div. 421.



from the fact that, before the development of the rule here treated of, the word "perpetuity" was used in an entirely different sense from that of "remoteness of vesting." The conception of a perpetuity as it presented itself to the minds of the early judges found its typical example in the case of a fee tail, as it existed before the introduction of methods by which it could be barred.<sup>292</sup> The word in this original primary sense meant an interest which was both indestructible and inalienable. Accordingly, it was said that a condition, in an instrument creating an estate tail, that a recovery barring the entail should not be suffered, was bad, as conducing to a perpetuity;<sup>294</sup> and, on the same ground, the courts at first refused to recognize limitations of terms for years after a failure of issue of the first taker, since they could not be barred by recovery or otherwise.<sup>295</sup> And so it was considered that a contingent remainder, if it were indestructible, since it could not be aliened, would constitute "a perpetuity."<sup>296</sup>

The word "perpetuity" is still sometimes used in this primary sense, which is evidently the more natural signification of the word. This being so, the rule against perpetuities, of which we here treat, might, as stated by a leading authority on the subject,<sup>297</sup> be more properly termed the "rule against remoteness," and, if this had been done, there would now exist a much more general apprehension of its true character.

<sup>292</sup> Gray, Perpetuities, §§ 140, 141, 152, 156-159. See ante, § 27.

<sup>294</sup> Corbet's Case, 1 Coke, 83b; Mildmay's Case, 6 Coke, 40a.

<sup>295</sup> Gray, Perpetuities, §§ 156, 161; Child v. Baylie, Cro. Jac. 459, 5 Gray's Cas. 495. These early decisions were overruled by the Duke of Norfolk's Case, 3 Ch. Cas. 1, 5 Gray's Cas. 498, so far as they decided that a devise over of a term on failure of issue in the first taker was void when the failure of issue must occur within a life or lives in being. See post, § 154.

<sup>296</sup> Chudleigh's Case, 1 Coke, 120a.

<sup>297</sup> Gray, Perpetuities, § 2.

## § 153. Illustrations of the rule.

The effect of the rule may be illustrated as follows: The contingency upon which the future interest is to vest may be the ascertainment of the person who is to take in accordance with some characteristic or qualification named, as in the case of a devise to such son of A. (A. having no son at the time of testator's death) as should be in holy orders, which devise is void, since the son of A., even though he took orders, might not do so till over twenty-one years of age.<sup>298</sup> So, a devise to the first son of A. who attains twenty-five (A. having no son of that age at testator's death) is void, since no son of A. may attain that age during A.'s life, or within twenty-one years after A.'s death.<sup>299</sup> But a devise to the first son of A. who attains twenty-one is valid, since he must attain this age within twenty-one years after the death of A.,—that is, within that number of years after a life in being.<sup>300</sup>

The rule is perhaps most frequently applied in the case of limitations to a class, in which case the members of the class must be ascertained within the time allowed by the rule. Thus, in the case of a devise to those of testator's grandchildren (testator leaving children living), or to those of the children of A., who may attain twenty-one, the devise is valid, since they must be ascertained within twenty-one years after the death of their parent; but if the devise is to those who may attain twenty-two, the devise is void, since only those born after testator's death may reach twenty-two, in which case the vesting would be more than twenty-one years after a life in being.<sup>301</sup>

<sup>298</sup> *Proctor v. Bishop of Bath & Wells*, 2 H. Bl. 358, 5 Gray's Cas. 620.

<sup>299</sup> *Abbliss v. Burney*, 17 Ch. Div. 211, 5 Gray's Cas. 575.

<sup>300</sup> *Woodruff v. Pleasants*, 81 Va. 37.

<sup>301</sup> *Gray, Perpetuities*, c. 10; 1 *Jarman, Wills*, 226 et seq.; *Leake v. Robinson*, 2 Mer. 363, 5 Gray's Cas. 622; *In re Moseley's Trusts*, L. R. 11 Eq. 499; *Pearks v. Moseley*, 5 App. Cas. 714, 5 Gray's Cas. 667; *Lawrence v. Smith*, 163 Ill. 149; *Eldred v. Meek*, 183 Ill. 26; *Coggins* (848)

In the case, however, of a legal limitation to a class, which can be regarded as a remainder after a life estate, since the members of the class must be ascertained before the termination of the particular estate, the limitation cannot be too remote, though it would be remote if it were an executory devise. Thus, in the case of a devise to A., and, after his death, to his children who attain twenty-two, since only those can take who attain that age during A.'s life,—that is, within a life in being,—the limitation is valid. This exemption from the rule does not, however, apply to so-called equitable remainders, since they need not vest during or at the termination of the previous life estate.<sup>302</sup>

In the case of a devise to testator's child for life, and then to his or her wife or husband for life, and then to the children of such child, the latter limitation is void, since testator's child may possibly marry one not in being at the time of testator's death, in which case the interest of the children might not vest till after a life not in being,—that of the surviving wife or husband.<sup>303</sup>

§ 154. The period allowed for vesting.

As before stated, in order not to be invalid under the rule, the future interest must vest within a life or lives in being, and twenty-one years thereafter. That the estate need not vest during a life or lives in being was settled in the Duke of Norfolk's Case,<sup>304</sup> which in fact established the rule against perpetuities. This period was subsequently extended by decisions that, if the person to take such interest was an infant, either born or

Appeal, 124 Pa. St. 10; Gerber's Estate, 196 Pa. St. 366; Otterback v. Bohrer, 87 Va. 548; Woodruff v. Pleasants, 81 Va. 37.

<sup>302</sup> 1 Jarman, Wills, 227; Gray, Perpetuities, § 325; Abbiss v. Burney, 17 Ch. Div. 211, 5 Gray's Cas. 575. See Lovering v. Lovering, 128 Mass. 97.

<sup>303</sup> Loring v. Blake, 38 Mass. 253; Hodson v. Ball, 14 Sim. 558.

<sup>304</sup> 2 Ch. Cas. 1, 5 Gray's Cas. 498; Gray, Perpetuities, §§ 169, 170.

begotten during a life in being, the time might be extended till the termination of such infant's minority, thus extending the possible time of vesting to twenty-one years and the period of gestation after a life or lives in being.<sup>305</sup> To what extent, in cases other than those of infancy, a period longer than a life or lives in being would be allowed, was for many years undecided, it being usually stated that the time of vesting might be "within a reasonable time" after lives in being;<sup>306</sup> and it was not till towards the middle of the nineteenth century that it was settled that the period of twenty-one years could be added to the life or lives in being in cases where the person to take is not an infant.<sup>307</sup>

The persons in being by whose lives the period is in part measured may be indefinite in number, provided it is possible to ascertain as a fact the termination of the life of the last survivor, so as to determine when the period of twenty-one years is to commence. Nor need these persons have any connection whatever with the property,—that is, they need not be persons taking prior estates therein,—nor need they even be relatives of persons given interests in the property.<sup>308</sup>

A life is "in being," within the rule, even though it be that of a person not yet born, but who is *en ventre sa mere* at the date of the creation of the interest, as in the case of a limitation to the child of testator's posthumous son; such son being regarded as in being at the time of the creation of the inter-

<sup>305</sup> *Stephens v. Stephens*, *cas. temp. Talb.* 228, 5 *Gray's Cas.* 522; *Gray, Perpetuities*, § 175.

<sup>306</sup> See *Lloyd v. Carew*, *Show. Parl. Cas.* 137, 5 *Gray's Cas.* 515; *Gray, Perpetuities*, §§ 180-182.

<sup>307</sup> *Cadell v. Palmer*, 1 *Clark & F.* 872, 5 *Gray's Cas.* 555.

<sup>308</sup> *Theellusson v. Woodford*, 11 *Ves.* 112, 5 *Gray's Cas.* 530; *Cadell v. Palmer*, 1 *Clark & F.* 872, 5 *Gray, Cas.* 555. And see *Scatterwood v. Edge*, 1 *Salk.* 229, 5 *Gray's Cas.* 518; *Low v. Burron*, 3 *P. Wms.* 262, 5 *Gray's Cas.* 520; *Marsden, Perpetuities*, 22; *Gray, Perpetuities*, §§ 190, 216-219.

est,—that is, testator's death,—and consequently the limitation to his child necessarily taking effect within a life or lives in being.<sup>309</sup> Furthermore, a future interest which is to vest upon the attainment of the age of twenty-one by a person not yet born is within the period allowed by the rule if such person is *en ventre sa mere* at the termination of the life or lives in being. For instance, a limitation to a grandson of testator who attains twenty-one is valid, though he is not born until after his father's death, the vesting consequently being deferred for a life in being, and twenty-one years thereafter, and also the period of gestation.<sup>310</sup>

Two periods of gestation may accordingly be allowable in particular cases,—that is, one period in the case of the person “in being” at the date of the testator's death or execution of the conveyance, and the other in the case of the person who is to take the future estate. So, a gift to testator's grandchildren who attain the age of twenty-one will be good, although the only grandchild who does attain such age is the posthumous son of testator's posthumous son.<sup>311</sup>

If the time named for the vesting of the future interest is not measured by lives, but is merely a definite number of years, it is necessary that this be less than twenty-one years, in order that the limitation be valid.<sup>312</sup>

In the case of wills, the validity of the limitation is to be determined as of the time of the testator's death,—that is, at the time at which the will goes into effect, and not at the time of its execution.<sup>313</sup> Accordingly, in the case of a devise to A.

<sup>309</sup> Long v. Blackhall, 7 Term R. 100, 5 Gray's Cas. 528; Thellusson v. Woodford, 11 Ves. 112, 5 Gray's Cas. 530; Maraden, Perpetuities, 35; Lewis, Perpetuity, 148.

<sup>310</sup> Cadell v. Palmer, 1 Clark & F. 372, 5 Gray's Cas. 555.

<sup>311</sup> Thellusson v. Woodford, 11 Ves. 112, 5 Gray's Cas. 530; Gray, Perpetuities, § 221; Lewis, Perpetuity, 147.

<sup>312</sup> Maraden, Perpetuities, 34; 1 Leake, 441; Palmer v. Holford, 4 Russ. 403; Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238.

<sup>313</sup> Lewis, Perpetuity, Supp. 30-65; Gray, Perpetuities, § 231; Mo-

for life, and, after his death, to such of his children as attain the age of twenty-five, while the limitation to the children would be void if the testator died before A., since there might be a child born thereafter, on the other hand, if the testator died after A., there would be no possibility of the birth of other children, and none of the living children could possibly attain the age of twenty-five at a period later than that allowed by the rule.<sup>314</sup>

The requirement that the contingency on which the estate is to vest shall occur within the time named by the rule is absolute, and the mere improbability of its occurrence after that time is immaterial.<sup>315</sup> Nor is a limitation not in compliance with the rule rendered valid by the fact that subsequent events cause the contingency to occur within the legal period.<sup>316</sup>

A gift to such children of a living person as may be living at a time too remote under the rule is void, though the age of such person is such that it is morally certain that there will be no such children who are not living at the time of the testator's death.<sup>317</sup>

### § 155. Interests subject to the rule.

The rule against perpetuities, since its object is merely to restrict the time of vesting, cannot apply to vested interests,—that is, to interests in favor of ascertained persons in being not

Arthur v. Scott, 113 U. S. 340; *Cattlin v. Brown*, 11 Hare, 372, 5 Gray's Cas. 651; *Brown v. Brown*, 36 Tenn. 277; *Hall v. Hall*, 123 Mass. 120.

<sup>314</sup> *Southern v. Wollaston*, 16 Beav. 276, 5 Gray's Cas. 569.

<sup>315</sup> *Gray, Perpetuities*, § 214; *Lewis, Perpetuity*, 170; *Lawrence v. Smith*, 163 Ill. 149.

<sup>316</sup> *Lewis, Perpetuity*, 170; *Challis, Real Prop.* 155; *Jee v. Audley*, 1 Cox, 324, 5 Gray's Cas. 525; *In re Wood* [1894] 3 Ch. 381; *Smith's Appeal*, 88 Pa. St. 492, 5 Gray's Cas. 737; *Coggins' Appeal*, 124 Pa. St. 10.

<sup>317</sup> *Jee v. Audley*, 1 Cox, 324, 5 Gray's Cas. 525; *Gray, Perpetuities*, §§ 215, 215a; *Marsden, Perpetuities*, 68, 69; *In re Dawson*, 29 Ch. Div. 155.

subject to a condition precedent;<sup>318</sup> and the fact that the right to possession or enjoyment of a vested interest is deferred till a remote time does not bring it within the operation of the rule.<sup>319</sup> Accordingly, a vested remainder is valid, although the remainderman does not come into possession until after the period of the rule.<sup>320</sup>

In this country it has been decided, and generally recognized, that the rule does not apply to the contingent right of entry for breach of a condition, even though annexed to a fee.<sup>321</sup> In England a different, and perhaps, on principle, a sounder, view has prevailed.<sup>322</sup> Likewise, in this country, the rule has not been applied to a possibility of reverter after a determinable fee.<sup>323</sup> It has been held to apply to a covenant to convey land at any time in the future on the payment of a certain sum, since this creates an interest in land of a contingent character.<sup>324</sup>

A right to re-enter for breach of a covenant in a lease for years has never been regarded as within the rule, since it is

<sup>318</sup> Gray, *Perpetuities*, §§ 205-210; Lewis, *Perpetuity*, 164, 511. See authorities ante, note 233.

<sup>319</sup> Gray, *Perpetuities*, § 209; Lewis, *Perpetuity*, c. 22; Marsden, *Perpetuities*, c. 11; *Loring v. Blake*, 98 Mass. 353; *Otis v. McLellan*, 13 Allen (Mass.) 339; *Seaver v. Fitzgerald*, 141 Mass. 401; *Siddall's Estate*, 180 Pa. St. 127.

<sup>320</sup> Gray, *Perpetuities*, § 209; *Gates v. Seibert*, 157 Mo. 254; *Madison v. Larmon*, 170 Ill. 65. So it has been decided that a vested remainder after a lease for 999 years is not invalid. *Todhunter v. Des Moines, I. & M. R. Co.*, 58 Iowa, 205.

<sup>321</sup> *Hopkins v. Grimshaw*, 165 U. S. 342; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *In re Stickney's Will*, 85 Md. 79, 103; *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Soc.*, 106 Mass. 479. See Gray, *Perpetuities*, §§ 304-311.

<sup>322</sup> *In re Trustees of Hollis' Hospital & Hague's Contract* [1899] 2 Ch. 540. And see *Dunn v. Flood*, 25 Ch. Div. 629, 5 Gray's Cas. 593.

<sup>323</sup> *Hopkins v. Grimshaw*, 165 U. S. 342; *First Universalist Soc. v. Boland*, 155 Mass. 171, *Finch's Cas.* 525.

<sup>324</sup> *London & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 5 Gray's Cas. 579; *Winsor v. Mills*, 157 Mass. 362.

merely an incident of the reversion, which is a vested interest,<sup>325</sup> and, on the same principle, the lessee's right to perpetual renewal of his lease under a covenant by the lessor therefor, being incident to his vested interest, is not invalid under the rule.<sup>326</sup>

— Equitable interests.

That future equitable interests which are not vested are subject to the rule to the same extent as legal interests has never been questioned.<sup>327</sup>

In accordance with the view that the rule applies merely to the time of vesting, and not to the duration of an interest, it is not violated by a limitation of an estate in trust, because, by the terms of its creation, the trust may extend beyond a life or lives in being and twenty-one years thereafter, provided it commence within that time.<sup>328</sup>

<sup>325</sup> Gray, *Perpetuities*, § 303; Lewis, *Perpetuity*, 619.

<sup>326</sup> Gray, *Perpetuities*, § 230; Marsden, *Perpetuities*, 15; *Hare v. Burges*, 4 Kay & J. 45. Contra, *Blackmore v. Boardman*, 23 Mo. 420; *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447.

<sup>327</sup> Gray, *Perpetuities*, § 323; Lewis, *Perpetuity*, 169, 574; 1 Perry, *Trusts*, § 377.

<sup>328</sup> Gray, *Perpetuities*, § 234; *Johnston's Estate*, 185 Pa. St. 179; *Pulitzer v. Livingston*, 89 Me. 359, overruling *Slade v. Patten*, 68 Me. 380; *Phillips v. Harrow*, 93 Iowa, 92. See, also, ante, note 288.

In *Barnum v. Barnum*, 26 Md. 119, it seems to have been held that a trust for a person and his heirs is void under the rule, which would be equivalent to a decision that an equitable fee simple is necessarily invalid. This case is in terms approved in the later cases of *Deford v. Deford*, 36 Md. 168, *Goldsborough v. Martin*, 41 Md. 488, and *Missionary Soc. v. Humphreys*, 91 Md. 181, though these cases did not involve a like state of facts. The only other case in which there has ever been a suggestion that an equitable estate given to a person and his heirs contravenes the rule against perpetuities is *Slade v. Patten*, 68 Me. 380, which has been expressly overruled in this regard by *Pulitzer v. Livingston*, 89 Me. 359. That such an equitable estate is valid has been recognized in numberless decisions. Indeed, if an equitable fee simple were invalid, the same would be



In the case of a gift to a person in trust for another, if there are specific and *effectual* directions that the trust shall continue for a specified time, and that the trust *res* or principal shall not be turned over to the beneficiary or beneficiaries until a certain time named, the *cestui que trust* cannot be considered as having a vested interest therein until the arrival of the time named; and consequently, it would seem, if the time named is more remote than the period allowed by the rule, the gift would be void. It has been so decided in a number of decisions in this country.<sup>329</sup> In England, however, such a direction postponing the conveyance of the *corpus* of the fund does not invalidate the gift, since the beneficiary or beneficiaries, if their interests are absolute, are entitled to demand a conveyance by the trustee, in spite of a direction to the contrary in the instrument creating the trust, such direction being regarded as nugatory.<sup>330</sup> In some cases in this country, as before stated,<sup>331</sup> the courts have refused to follow the English rule that such direction for postponement is void, holding, on the contrary, that a conveyance by the trustee cannot be demanded if this would be contrary to the intention of the creator of the trust; and such a departure from the English rule seems to be, apparently, the only justification for the decisions above referred to holding a trust void if intended to endure beyond the period of the rule.<sup>332</sup>

In the case of a conveyance in trust, the trust resulting to true of a legal fee simple, since the rule against perpetuities is the same in equity as at law.

<sup>329</sup> Winsor v. Mills, 157 Mass. 362; Davis v. Williams, 85 Tenn. 646; Siedler v. Syme, 56 N. J. Eq. 275; Bigelow v. Cady, 171 Ill. 229; Hart v. Seymour, 147 Ill. 598; Thomas v. Gregg, 76 Md. 169. See, also, Potter v. Couch, 141 U. S. 296, 314.

<sup>330</sup> Gray, Perpetuities, § 121; Marsden, Perpetuities, c. 11; Lewis, Perpetuity, c. 23; Fox v. Fox, L. R. 19 Eq. 286; Tatham v. Vernon, 29 Beav. 604.

<sup>331</sup> See ante, § 101.

<sup>332</sup> See Gray, Perpetuities, § 120, note.

the grantor or his heirs upon the failure of the trust named, though dependent on a contingency which may not happen within the period prescribed by the rule against perpetuities, is not invalid under the rule.<sup>333</sup>

—Contingent remainders.

There has been much discussion as to whether the rule against perpetuities is applicable to contingent remainders. At the present time, the view that it is so applicable is the more prevalent one, and it has been so decided judicially.<sup>334</sup>

The question of the existence of another rule than that against perpetuities, restricting remoteness of vesting of contingent remainders, has been previously considered.<sup>335</sup>

§ 156. Limitations after estates tail.

Limitations which are to vest in the future immediately after or in derogation of an estate tail are not subject to the rule, since, owing to the power of the tenant in tail to convey a fee simple, either by a common recovery or by a conveyance, the future limitations are, as to him, practically nonexistent until their time of vesting, and consequently do not clog the title, though they are invalid if they may not vest till after the termination of the estate tail, since, if not barred by the tenant in tail before his estate ends, they become indestructible.<sup>336</sup>

<sup>333</sup> *Hopkins v. Grimshaw*, 165 U. S. 342; *In re Randell*, 38 Ch. Div. 212.

<sup>334</sup> *In re Frost*, 43 Ch. Div. 246, 5 Gray's Cas. 598. See, also, *Wood v. Griffin*, 46 N. H. 230; *Lockridge v. Mace*, 109 Mo. 162; *Gray, Perpetuities*, §§ 282-298; *Lewis, Perpetuity*, c. 16; *Id. Supp.* 97 et seq. *Contra, Challis, Real Prop.* (2d Ed.) 183; *Williams, Real Prop.* (12th Ed.) 274.

<sup>335</sup> See ante, § 127.

<sup>336</sup> *Lewis, Perpetuity*, 664; *Gray, Perpetuities*, §§ 442-453; *Marsden, Perpetuities*, c. 7; 1 *Jarman, Wills*, 217; *Cole v. Sewell*, 4 Dru. & War. 1, 2 H. L. Cas. 186; *Goodwin v. Clark*, 1 Lev. 35, 5 Gray's Cas. 698; *Nicholls v. Sheffield*, 2 Browne, Ch. 215, 5 Gray's Cas. 699; *Bris* (356)

Consequently, in the case of a devise to A., or to A. and his heirs, and, upon the (indefinite) failure of the issue of A., then over to another or others, since A. takes an estate tail, the limitation over after such estate tail is not within the rule, and is valid. The case is, however, different if there is a limitation over on the failure of issue, not of the first taker, but of some third person, as if, for instance, the limitation over in the above case were on the failure of the issue of "B." The limitation over is then, as in the first case, presumptively on an indefinite failure of issue, and this is liable to occur at a time in the future indefinitely remote. In this case there is not, as in the other, an estate tail in the first taker to save the limitation over from the operation of the rule, and it is consequently void.<sup>337</sup>

*tow v. Boothby*, 2 Sim. & S. 465, 5 Gray's Cas. 702; *Barber v. Pittsburgh, Ft. W. & C. Ry. Co.*, 166 U. S. 83.

Such a limitation is, however, void in jurisdictions where the tenant in tail has no power to convey the fee, the reason for the rule being nonexistent. *St. John v. Dann*, 66 Conn. 401.

<sup>337</sup> Gray, *Perpetuities*, §§ 212, 213; Marsden, *Perpetuities*, 183; Lewis, *Perpetuity*, c. 15; 1 Jarman, *Wills*, 217; *Barber v. Pittsburgh, Ft. W. & C. Ry. Co.*, 166 U. S. 83; *Taylor v. Taylor*, 63 Pa. St. 481. And see cases cited ante, note 336.

In 4 Kent's Comm. 276, the author says: "The series of cases in the English law have been uniform, from the time of the Year Books down to the present day, in the recognition of the rule of law that a devise in fee, with a remainder over if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote, and founded on an indefinite failure of issue." The first clause of this statement is correct if restricted to cases in which a "definite" failure is not intended (see ante, § 35); but the second clause is singularly incorrect, since the presence of the estate tail prevents invalidity for remoteness. Of the numerous authorities cited by the learned chancellor, all but two support merely the statement that an estate tail is created by such a devise. Of these two, one (*Doe d. Fonnereau v. Fonnereau*, 2 Doug. 504) decided that a limitation after an estate tail so created is valid, and the other (*Barlow v. Salter*, 17 Ves. 479) decided that a limitation over of personalty after an indef-

If the failure of issue referred to is not an indefinite failure of issue, but a failure upon the death of a living person, the limitation over is upon a contingency within the period prescribed by the rule, and consequently is valid.<sup>338</sup>

In jurisdictions where a fee tail is changed to a fee simple, the limitation over after an indefinite failure of issue cannot be defeated by a conveyance by the first taker, and consequently it is void as violating the rule.<sup>339</sup>

When one who has a term of years devises it to A. with a limitation over on the indefinite failure of issue of A., there cannot be an estate tail in A., since an estate tail in a term for years is not recognized, and consequently the limitation over on failure of issue is invalid, as being too remote.<sup>340</sup>

§ 157. Effect of remoteness of contingency.

Limitations which are void for remoteness have no effect upon estates previously limited to others.<sup>341</sup> So, previous interests which were intended to be abridged by such limitations will continue unaffected by the void limitations. For instance, in the case of a devise in fee simple, with a limitation over to B. at the termination of twenty-five years, the latter limitation being void, A. has an indefeasible fee-simple estate.<sup>342</sup>

nite failure of issue is void. There was no rule against remoteness in the time of the Year Books.

<sup>338</sup> Lewis, *Perpetuity*, 186; Marsden, *Perpetuities*, c. 15; Pells v. Brown, Cro. Jac. 590, 5 Gray's Cas. 163; Duke of Norfolk's Case, 3 Ch. Cas. 1, 5 Gray's Cas. 498; Glover v. Condell, 163 Ill. 566; Pratt v. Alger, 136 Mass. 550.

<sup>339</sup> Hackney v. Tracy, 137 Pa. St. 53; Lurman v. Hubner, 75 Md. 268; Comegys v. Jones, 65 Md. 317.

<sup>340</sup> Lewis, *Perpetuity*, 318, et seq.; Marsden, *Perpetuities*, 183; Gray, *Perpetuities*, § 212; Fearn, *Cont. Rem.* 485; Barlow v. Salter, 17 Ves. 479.

<sup>341</sup> Gray, *Perpetuities*, §§ 247-250.

<sup>342</sup> Gray, *Perpetuities*, §§ 247, 250; Brattle Square Church v. Grant, 3 Gray (Mass.) 142; Howe v. Hodge, 152 Ill. 253; Post v. Rohrbach, (358)

In England there are a number of decisions to the effect that any limitation expectant on a previous limitation which is void for remoteness is also void on a presumption of intent to that effect;<sup>343</sup> but, as shown by the distinguished writer to whom we have so often referred, there seems no reason for the adoption of any such general rule as to intent, and a limitation of an interest which must vest within the legal period might well be sustained, though preceded by a limitation of an interest void for remoteness.<sup>344</sup>

If the previous estate is merely for life, the property will, in case of the remoteness of the future limitation, pass to such persons as would have taken if there had been no future limitation, these being usually the heirs or residuary devisees of the testator.<sup>345</sup>

— Separation of limitations.

When a limitation provides for the vesting of an estate or interest at a time which may occur beyond the legal period, it will not be separated into two gifts by the court,—one in case the contingency occurs within the period, and the other in case it occurs thereafter, and upheld as to the former.<sup>346</sup> Accordingly, the fact that the happening of the contingency

142 Ill. 600; *Nevitt v. Woodburn*, 190 Ill. 283; *Watkins v. Quarles*, 23 Ark. 179.

<sup>343</sup> *Maraden, Perpetuities*, c. 15; *Monypenny v. Dering*, 2 De Gex, M. & G. 145.

<sup>344</sup> *Gray, Perpetuities*, §§ 251-257.

<sup>345</sup> *Gray, Perpetuities*, § 248; *Lewis, Perpetuity*, 420; *Bears v. Narramore*, 61 Conn. 13. In *Lockridge v. Mace*, 109 Mo. 162, it was held that, where a remainder was void under the rule, the preceding life estates were also void, on the theory that the entire gift should stand or fall together. In *Johnston's Estate*, 185 Pa. St. 179, a term in trustees preceding a remote limitation was held to fail because created solely for the purpose of making the invalid gift over.

<sup>346</sup> *Lewis, Perpetuity*, 465, 466; *Gray, Perpetuities*, § 231; *Post v. Rohrbach*, 142 Ill. 600; *Eldred v. Meek*, 183 Ill. 26.

named would necessarily involve another contingency which is not remote does not render the limitation over valid in the latter contingency, unless this latter contingency is named in the original limitation,—that is, unless the original settlor expressly so provide.<sup>347</sup> Thus, if there is a gift to A. for life, with a gift over in case he has no son who shall attain twenty-five years, the gift over is void, though the contingency named includes the contingency that A. may have no children, which must occur during A.'s life. If, on the other hand, there is a gift over in case A. has no son who shall attain twenty-five years, or "in case he has no son," while the gift over in the first alternative will be void, that in the second will be upheld.<sup>348</sup> In the case of such alternative or separable limitations, it is well settled that one may be valid, though the other violates the rule;<sup>349</sup> and it has been adjudged in England that, even when the settlor or testator has not in terms separated the contingencies by alternative limitations, if a gift over will, in certain circumstances, take effect as a contingent remainder, and in other circumstances as an executory devise, it may be valid as creating a remainder, though, if it took effect as an executory devise, it would violate the rule.<sup>350</sup>

In the case of a gift to a class, the vesting of which is postponed till after the period allowed by the rule, the gift is void as to all members of the class. Thus, in the case of a gift to those of testator's grandchildren who reach the age of twenty-

<sup>347</sup> Gray, *Perpetuities*, §§ 332-337; *Proctor v. Bishop of Bath & Wells*, 2 H. Bl. 358, 5 Gray's Cas. 620.

<sup>348</sup> See *Miles v. Harford*, 12 Ch. Div. 691, 5 Gray's Cas. 622.

<sup>349</sup> *Lewis, Perpetuity*, c. 21; *Leake v. Robinson*, 2 Mer. 363, 5 Gray's Cas. 622; *Longhead v. Phelps*, 2 W. Bl. 704, 5 Gray's Cas. 619; *Halsey v. Goddard*, 36 Fed. 25; *Perkins v. Fisher*, 8 C. C. A. 270, 59 Fed. 801; *Jackson v. Phillips*, 14 Allen (Mass.) 572; *Seaver v. Fitzgerald*, 141 Mass. 401; *Walker v. Lewis*, 90 Va. 578.

<sup>350</sup> *Challis v. Doe*, 18 Q. B. 231; *Evers v. Challis*, 7 H. L. Cas. 581, 5 Gray's Cas. 637.

five, the share of each cannot be determined till the youngest reaches that age, and consequently the gift is void even as to those who reach twenty-five within the legal period.<sup>551</sup> If, however, the gifts to the members of a class are independent, so that the amount of the gift to each member may be determined within the legal period, the gift to any one member is not invalidated by the fact that that to others may not vest within the legal period.<sup>552</sup>

### § 158. Charities.

When it is said, as is frequently done, that the rule against perpetuities does not apply to charitable trusts, the word "perpetuity" is used in its primary sense, and the statement merely means that the trust is not invalid, though it is indestructible,

<sup>551</sup> Gray, *Perpetuities*, §§ 369-389; 1 Jarman, *Wills*, 229; *Leake v. Robinson*, 2 Mer. 363, 5 Gray's Cas. 622; *Porter v. Fox*, 6 Sim. 485, 5 Gray's Cas. 634; *In re Moseley's Trusts*, L. R. 11 Eq. 499, 11 Ch. Div. 555; *Pearks v. Moseley*, 5 App. Cas. 714, 5 Gray's Cas. 667; *Sears v. Putnam*, 102 Mass. 5; *Coggins' Appeal*, 124 Pa. St. 10; *Eldred v. Meek*, 183 Ill. 26; *Lawrence v. Smith*, 163 Ill. 149.

In *Edgerly v. Barker*, 66 N. H. 434, in the case of a devise to grandchildren on arrival at the age of forty, which is evidently too remote, the court held that the devise would be upheld so as to vest upon the arrival of the grandchildren at the age of twenty-one,—that is, within the legal period. This decision stands alone. It is searchingly criticised by Mr. Gray in 9 Harv. Law Rev. 242, where the uncertainty and confusion likely to arise from such attempts to mould the limitations in order to make them valid are clearly shown.

<sup>552</sup> Gray, *Perpetuities*, §§ 389-395; 1 Jarman, *Wills*, 229; *Cattlin v. Brown*, 11 Hare, 372, 5 Gray's Cas. 651; *Storrs v. Benbow*, 8 De Gex, M. & G. 390, 5 Gray's Cas. 649; *Albert v. Albert*, 68 Md. 352. As supporting this view, Prof. Gray considers at length *Lowry v. Muldrow*, 8 Rich. Eq. (S. C.) 241, and *Hills v. Simonds*, 125 Mass. 536, and criticises *Sears v. Russell*, 8 Gray (Mass.) 86, *Lovering v. Lovering*, 129 Mass. 97, and *Smith's Appeal*, 88 Pa. St. 492, which cases, without considering the question from this point of view, held that gifts which might thus be regarded as independent were all invalid together. *Lovering v. Lovering* has since been overruled by *Dorr v. Lovering*, 147 Mass. 530.

is void.<sup>300</sup> If, however, the gift can be regarded as vesting immediately,—and, as before stated, gifts are always regarded as vested, if possible,—the direction for accumulation is not binding on the donee, since it constitutes an invalid restraint on alienation, and is merely nugatory.<sup>301</sup>

In the case of a gift to a charity, with a direction to accumulate for an illegal period, the gift will be upheld, if it can be regarded as a present gift, and, in place of the illegal accumulation, the court will direct a management of the fund which is legal and possible, *cy pres* the original direction.<sup>302</sup>

A direction to accumulate for the purpose of the payment of debts is not invalid under the rule. The creditors have a present vested interest, and can stop the accumulation at any time.<sup>303</sup>

In England, the period during which accumulations may continue before the vesting of the gift has been reduced, by what is known as the "Thelluson Act,"<sup>304</sup> to one of four periods named by the act,—that is, during the life of the giver, during

<sup>300</sup> Marsden, Perpetuities, 314; Gray, Perpetuities, §§ 674, 675, 677; Southampton v. Hertford, 2 Ves. & B. 54, 5 Gray's Cas. 781; Curtis v. Lukin, 5 Beav. 147, 5 Gray's Cas. 785; Thorndike v. Loring, 15 Gray (Mass.) 391; City of Philadelphia v. Girard's Heirs, 45 Pa. St. 9, 23, 29; Webster v. Wiggin, 19 R. I. 73.

<sup>301</sup> Gray, Perpetuities, §§ 671-673; Gray, Restraints, Alien. Prop. §§ 107-111a; Marsden, Perpetuities, 317, 319; Oddie v. Brown, 4 De Gex & J. 179; Phipps v. Kelynge, 2 Ves. & B. 57, note.

<sup>302</sup> Gray, Perpetuities, § 673; Ingraham v. Ingraham, 169 Ill. 432; Odell v. Odell, 10 Allen (Mass.) 1; St. Paul's Church v. Attorney General, 164 Mass. 188; City of Philadelphia v. Girard's Heirs, 45 Pa. St. 9.

<sup>303</sup> Gray, Perpetuities, § 676; Bateman v. Hotchkiss, 10 Beav. 426; Morgan v. Morgan, 20 R. I. 600.

<sup>304</sup> 39 & 40 Geo. III. c. 98 (A. D. 1800). The act takes its name from Peter Thellusson, whose will, providing for the accumulation of the income of an immense property during the lives of his children and grandchildren living at the time of his death, and of their children, was sustained as not violating the rule against perpetuities. Thellusson v. Woodford, 4 Ves. 227, 11 Ves. 112, 5 Gray's Cas. 530.



twenty-one years after the giver's death, during the minorities of any persons living at the giver's death, or during the minorities of persons who would be entitled to the income of the fund. Accumulation can be directed for only one of these periods. The effect of exceeding the statutory period is not, however, as in the case of exceeding the period fixed by the rule against perpetuities, to defeat the direction for accumulation entirely, but it is void only as to the excess over the statutory period.<sup>365</sup> In Pennsylvania, there is a statutory provision similar in the main to the Thelluson act.<sup>366</sup> In New York and states adopting its legislation in this regard, an accumulation of the rents and profits of real property is restricted by the general requirement that the absolute power of alienation shall not be suspended for more than two lives in being, and also by special provisions that it shall last only during the minority of the persons to be benefited thereby. Directions for accumulation to extend beyond such minority are void only as to the excess over the legal period.<sup>367</sup>

### § 160. Statutory modifications of the rule.

In a number of states, the common-law rule against perpetuities has been more or less modified by statute. A brief reference only can be made to these statutory provisions. In New York, and in Michigan, Minnesota, and Wisconsin, which have adopted its legislation in this regard,<sup>368</sup> it is provided that the

<sup>365</sup> Marsden, *Perpetuities*, c. 17; Gray, *Perpetuities*, Appendix B; 1 Jarman, *Wills*, 271 et seq.

<sup>366</sup> Act April 18, 1853, § 9; 2 *Pepper & Lewis' Digest*, 4055. The act and the decisions thereunder are considered in Gray, *Perpetuities*, §§ 715-725.

<sup>367</sup> See New York Real Property Law, § 51; Chaplin, *Susp. Alien.* § 252 et seq.; 1 Stimson, *Am. St. Law*, § 1443.

<sup>368</sup> See 1 Stimson, *Am. St. Law*, § 1440 (A); 1 *Rev. St. N. Y.* pt. 2, c. 1, tit. 2, §§ 14, 15. These provisions of the New York statutes and others connected therewith are fully treated in Chaplin's *Suspension of the Power of Alienation*. As appears from that work, they

power of alienation of real estate shall not be suspended by any condition or limitation for a longer period than during the continuance of two lives in being at the creation of the estate, and that such suspension occurs when there are no persons in being by whom an absolute fee in possession can be conveyed. This, it would appear, is an entirely different rule from that which we have been considering, since it is directed, not against remoteness of vesting, by which the title is kept in a condition of uncertainty, but merely against a suspension of the power of alienation, and that this is so appears from the general current of New York decisions, though there are some cases in which it seems to have been considered that remoteness of vesting is also prohibited by these and other provisions connected therewith. A recent writer<sup>369</sup> summarizes the results of the decisions in New York in effect as follows: The sole test of the validity of a limitation is the suspension of the power of alienation. Trusts which do not involve such suspension, or which may be terminated at any time, either by the trustee or by the *cestui que trust*, or by both acting together, are not invalid. Future contingent interests are valid, though they do not vest within two lives in being, if there are persons in being who can convey an absolute fee in possession.

In California, Idaho, North Dakota, and South Dakota the provision is against restraint of alienation as in New York, except that it is not limited to a particular number of lives in being.<sup>370</sup> In Indiana there is a peculiar provision, based in part on the New York statute;<sup>371</sup> and in Georgia, Iowa, and

have given rise to a great deal of litigation. See, also, Gray, *Perpetuities*, § 750.

<sup>369</sup> See article by George F. Canfield, Esq., in 1 *Columbia Law Rev.* 224, on "The New York Revised Statutes and the Rule Against Perpetuities."

<sup>370</sup> Civ. Code Cal. §§ 715, 716; Rev. St. Idaho 1887, § 2839; Rev. Codes N. D. 1895, §§ 3308-3310; St. S. D. 1899, §§ 3629-3631.

<sup>371</sup> Rev. St. 1894, § 3382. See *Fowler v. Duhme*, 143 Ind. 248.

Kentucky there are provisions which were probably intended to declare the common-law rule, but which are unhappily expressed.<sup>372</sup> In Ohio, an estate in land cannot be limited except to a person or persons in being, or to their immediate issue or descendants.<sup>373</sup> A similar provision in Connecticut has been repealed, and there the common-law rule alone now exists.<sup>374</sup> In Alabama, it is provided that conveyances, except to one's wife, or wife and children, cannot extend beyond three lives in being.<sup>375</sup> And in Mississippi, a conveyance or devise may be made to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple.<sup>376</sup>

<sup>372</sup> See Gray, *Perpetuities*, § 735; *Stevens v. Stevens*, 21 Ky. Law Rep. 1315.

<sup>373</sup> Rev. St. 1890, § 4200. See *Turley v. Turley*, 11 Ohio St. 173.

<sup>374</sup> *Tingler v. Chamberlin*, 71 Conn. 466; *Healy v. Healy*, 70 Conn. 469.

<sup>375</sup> Code 1896, § 1030.

<sup>376</sup> Code 1892, § 2436; *Cannon v. Barry*, 59 Miss. 239; *Beeks v. Rye*, 77 Miss. 252.

## **CHAPTER VII.**

### **CONCURRENT OWNERSHIP.**

- § 161. The general nature of concurrent ownership.**
- 162. Joint tenancy.**
- 163. Tenancy in common.**
- 164. Coparcenary.**
- 165. Tenancy by entireties.**
- 166. Community property.**
- 167. Partnership property.**
- 168. Ouster of cotenant.**
- 169. Accounting by cotenant.**
- 170. Contracts and conveyances by cotenant.**
- 171. Contribution as between cotenants.**
- 172. Acquisition of adverse title by cotenant.**
- 173. Actions by cotenants.**
- 174. Voluntary partition.**
- 175. Compulsory partition.**

**Estates and interests in land, whether present or future, may belong to two or more individuals, in such a way that the latter have concurrent or simultaneous interests in the whole of certain land, and not separate interests in distinct parts. Such concurrent ownership may take the form of (1) joint tenancy; (2) tenancy in common; (3) coparcenary; (4) tenancy by entireties; (5) community property; (6) partnership property.**

**Joint tenancy exists when a single estate in land is owned by two or more persons claiming under one instrument; its most important characteristic being that, unless the statute otherwise provides, the interest of each joint tenant, upon his death, inures to the benefit of the surviving joint tenant or tenants, to the exclusion of his own heirs, devisees, or personal representatives.**

**Tenancy in common exists when two or more persons hold separate estates in undivided shares in land, claiming either under**  
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different titles, or under a single instrument not showing an intention to create a joint tenancy.

At common law, a tenancy in coparcenary or parcenary arises when, on the death of one having an estate of inheritance, it descends to two or more heirs. It is frequently changed into tenancy in common in this country.

Tenancy by entireties is the tenancy by which husband and wife hold land conveyed or devised to them by a single instrument, which does not expressly require them to hold it by another character of tenancy. The survivor of the marriage takes the whole property so held.

Community property is such property as belongs, under the community system prevailing in certain states, equally to man and wife, as having been acquired by their joint efforts.

Partnership property is property the beneficial interest in which is applicable to the payment of the debts of a firm, usually as a result of its purchase with the firm's funds for firm purposes, the legal title being vested in one or more firm members, or in a person not a member.

There may be an ouster of one tenant in common, joint tenant, or coparcener by another, but there is no presumption of ouster from the fact that one is in sole possession.

One cotenant cannot, by his conveyance of his interest in a part of the common property, affect the rights of the other cotenants as regards that part.

One cotenant cannot usually demand contribution from the others on account of improvements made by him, though he may, by the weight of authority in this country, have contribution for necessary repairs made by him after asking the others to join therein.

An adverse title acquired by one cotenant will, by the decisions in this country, usually inure to the benefit of the others, upon contribution by them to the cost of its acquisition.

Property held in joint tenancy, tenancy in common, or coparcenary may be divided among the cotenants, either by agreement (voluntary partition), or by legal proceedings (compulsory partition).

**§ 161. The general nature of concurrent ownership.**

While, as a general rule, lands or estates therein are held by one person in severalty, that is, in his own right only, without any other person being joined or connected with him in point of interest, during the continuance of his estate therein, this is not necessarily the case, and two or more persons may have concurrent interests in the land; the common characteristic of all such interests being that the owners have no separate rights as regards any distinct portion of the land, but each is interested, according to the extent of his share, in every part of the whole land.<sup>1</sup> Such concurrent ownership bears different names, and presents different characteristics, according to the various methods and circumstances of its creation. Each of the various forms of such ownership will be here considered separately, and subsequently some characteristics common to two or more of them will be considered.

**§ 162. Joint tenancy.**

In the case of a joint tenancy, all the tenants have together, in the theory of the law, but one estate in the land, and to this are to be traced the various characteristics of the tenancy. Furthermore, all the tenants, whether only two, or more than two, constitute for some purposes but one tenant, or, as it is more specifically stated, each tenant is regarded as the tenant of the whole, for purposes of tenure and survivorship; while for purposes of alienation and forfeiture each has his own share only.<sup>2</sup>

<sup>1</sup> See 2 Bl. Comm. 179; 2 Cruise, Dig. tit. 18, c. 1, § 1; Digby, *Hist. Real Prop.* (4th Ed.) p. 274; Challis, *Real Prop.* 293.

<sup>2</sup> Co. Litt. 186a; 1 Preston, *Est.* 136; 4 Kent, *Comm.* 360, note (a); 1 Washburn, *Real Prop.* 406; Challis, *Real Prop.* 296. This is apparently the meaning of the statement in the books that each tenant holds "per my et per tout," whether "my" means "half," or whether it means "nothing,"—a matter on which there has been a conflict of opinion. See authorities cited *supra*. See, also, 2 Blackstone, 183; Williams, *Real Prop.* 136, and American note.

Likewise, as between each other, joint tenants have each the right to a share of the rents and profits of the land.<sup>3</sup>

In a joint tenancy there are said by Blackstone to be four unities, to wit, unity of interest, of title, of time, and of possession, or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.<sup>4</sup> Of these, the unity of possession, only, exists in all forms of concurrent ownership. The unity of interest refers to the necessity that all the tenants have interests of the same duration, and accordingly one cannot be tenant for life and another for years; one cannot be tenant in fee, and the other in tail. This requirement is a necessary result of the theory that together they have but one estate.<sup>5</sup> The requirement of unity of time involves a necessity that the interests of all the joint tenants should vest at the same time. Thus, if, after a lease for life, a remainder be limited to the heirs of A. and B., and during the continuance of the particular estate A. and B. die at different times, the heir of A. and the heir of B.

<sup>3</sup> Williams, Real Prop. 132; 4 Kent, Comm. 359. See *infra*, § 121.

<sup>4</sup> 2 Bl. Comm. 180. As stated by Mr. Challis, this theory of the four unities has perhaps attracted attention rather by reason of its appearance of symmetry and exactness than by reason of its practical utility, and it means merely that each joint tenant stands in all respects in exactly the same position as each of the others, and anything which creates a distinction either severs the tenancy or prevents it from arising. Challis, Real Prop. 295.

<sup>5</sup> Co. Litt. 188a; 2 Cruise, Dig. tit. 18, c. 1, §§ 12-15; 2 Bl. Comm. 181; 4 Kent, Comm. 357.

An estate may, however, be limited to two persons in joint tenancy for less than a fee, as for their lives, with remainder to one of them in fee, in which case, if he who has the fee dies first, the survivor, by right of survivorship, takes the whole estate for life, or they may have a joint tenancy for their lives, with several inheritances. 2 Bl. Comm. 181, and Chitty's note; Litt. §§ 283, 285; Co. Litt. 188a; 4 Kent, Comm. 357. As to a joint tenancy in two persons for their lives, with remainders to their heirs, see 6 Harv. Law Rev. 321.

cannot be joint tenants, since their interests do not arise at the same time.<sup>6</sup> This requirement does not, however, apply in the case of limitations by way of use, or where the interests arise by devise,<sup>7</sup> and the same is no doubt true in the case of a statutory conveyance by way of grant.

— The doctrine of survivorship.

As stated in the definition, the leading characteristic of a joint tenancy is the fact that, on the death of one joint tenant, the other joint tenant or tenants who may survive him, if it is an estate of inheritance, have the whole estate. Thus, if there be three joint tenants, on the death of one the two survivors have the whole, and, on the death of one of these survivors, the last survivor has the whole, and, on the death of this last survivor, the whole passes to his heirs, or to his personal representatives, if it be a leasehold estate.<sup>8</sup> This doctrine is based on the fact, before referred to, that all the tenants together, as regards the feudal lord, were regarded as constituting but one tenant, and that this fictitious personality was considered as existent so long as any one of the tenants was alive.<sup>9</sup>

The right of the survivor to succeed to the interest of a deceased joint tenant takes precedence of any devise made by the latter, nor can it generally be affected by any charge placed by the latter on his interest, or by a grant by him of a right of use or profit.<sup>10</sup> It may, however, be destroyed at the option

<sup>6</sup> Co. Litt. 188a; 2 Bl. Comm. 181.

<sup>7</sup> 2 Cruise, Dig. tit. 18, c. 1, § 25; Williams, Real Prop. 135; 4 Kent, Comm. 358, note (d); Challis, Real Prop. 295. Consequently, if there is a limitation of a use in remainder to the children of the life tenant, they may be joint tenants, though they come into being at different times. 2 Jarman, Wills, 1118.

<sup>8</sup> Litt. § 280; 2 Bl. Comm. 183; 4 Kent, Comm. 360.

<sup>9</sup> Williams, Real Prop. 134.

<sup>10</sup> Co. Litt. 185a; 4 Kent, Comm. 360; 2 Cruise, Dig. tit. 18, c. 1, §§ 53-56; Freeman, Cotenancy, § 14.



of either joint tenant by a "severance" of the tenancy, as hereafter explained.<sup>11</sup>

Since the right of survivorship is a necessary incident, there cannot be a joint tenancy between a corporation and another, since a corporation is perpetual.<sup>12</sup>

— Termination.

A joint tenancy may be terminated by the destruction of one of its unities, since they are all necessary to its existence.<sup>13</sup> This is frequently termed a "severance" of the joint tenancy.

The unity of title is destroyed by a conveyance by a joint tenant of his interest. If one of two joint tenants thus disposes of his interest, the other joint tenant and the grantee become tenants in common, while, if one of three or more joint tenants conveys his interest to a third person, the latter then becomes a tenant in common, instead of a joint tenant, with the others, though such others remain joint tenants as between themselves.<sup>14</sup> A contract by one joint tenant to convey his share has the same effect as a conveyance in destroying the tenancy.<sup>15</sup>

A lease for years by one joint tenant is a valid severance of the tenancy so long as it continues, and consequently takes precedence of the right of survivorship in another joint tenant;<sup>16</sup> and a mortgage likewise has been held to create a severance.<sup>17</sup>

<sup>11</sup> See post, note 17.

<sup>12</sup> Freeman, Cotenancy, § 15; *De Witt v. City of San Francisco*, 2 Cal. 289; *Telfair v. Howe*, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

<sup>13</sup> 2 Bl. Comm. 185.

<sup>14</sup> Litt. §§ 292, 294; 2 Bl. Comm. 186; 4 Kent, Comm. 363; *Robison v. Codman*, 1 Sumn. 121, Fed. Cas. No. 11,970; *Davidson v. Heydom*, 2 Yeates (Pa.) 459.

<sup>15</sup> In *re Wilford's Estate*, 11 Ch. Div. 267; *Burnaby v. Equitable Reversionary Interest Soc.*, 28 Ch. Div. 416.

<sup>16</sup> Co. Litt. 185a; *Clerk v. Clerk*, 2 Vern. 323.

<sup>17</sup> *York v. Stone*, 1 Salk. 158; *Simpson's Lessee v. Ammons*, 1 Bin. (Pa.) 175, 2 Am. Dec. 425; 1 Washburn, Real Prop. 412. In *Wilkins v. Young*, 144 Ind. 2, 55 Am. St. Rep. 162, it was decided that a mort-

If one of three or more joint tenants release his interest to one of the others, the latter becomes a tenant in common with the third cotenant as to that interest, since there is no longer unity of title, though still a joint tenant as to that which he first held.<sup>18</sup>

A joint tenancy may also be terminated by the destruction of the unity of interest, as when one of two or more joint tenants for life purchases the inheritance or obtains it by descent, his life interest being thus merged in the fee;<sup>19</sup> and it may be terminated by the destruction of the unity of possession,—that is, by a partition of the property among the cotenants, to hold each a part in severalty.<sup>20</sup>

— Joint tenancy regarded with disfavor.

The common law favored joint tenancy, as against other classes of concurrent ownership, because the policy of that law was adverse to the division of tenures, and the consequent multiplication of feudal services and the weakening of the feudal relation, and in the case of joint tenancy this did not occur to any considerable extent, since the joint tenants were one person so far as the feudal lord was concerned.<sup>21</sup> With the practical abolition of tenures, however, the reason for such policy ceased, and thereafter courts of equity, regarding the right of survivorship as productive of injustice, in making no provision for posterity, showed a disposition to lay hold of any indication of intent in order to construe an instrument as creating a tenancy

gaged by one joint tenant of his share takes precedence of the right of survivorship in the other cotenant. Since, however, in that state, a mortgage is regarded as a lien only, it is perhaps difficult to understand how it can effect a severance and thus destroy the right of survivorship.

<sup>18</sup> Litt. § 304; 2 Bl. Comm. 186; 1 Washburn, Real Prop. 411.

<sup>19</sup> Co. Litt. 182b; Wiscot's Case, 2 Coke, 60; 2 Bl. Comm. 186; 2 Cruise, Dig. tit. 18, c. 2, §§ 2-7.

<sup>20</sup> See post, §§ 174, 175.

<sup>21</sup> 1 Bl. Comm. 193; 4 Kent, Comm. 361; Fisher v. Wigg, 1 Salk. 391; Martin v. Smith, 5 Bin. (Pa.) 16, 6 Am. Dec. 395; Caines v. Grant's Lessee, 5 Bin. (Pa.) 120.

in common, and not a joint tenancy.<sup>22</sup> The same position has been taken by the courts in this country.<sup>23</sup> In spite, however, of the prejudice on the part of the courts against joint tenancies, in the absence of any statutory provision on the subject existing at the date of the instrument in question, a conveyance or devise to two or more will create a joint tenancy if there are no words indicating an intention that they shall take separate interests.<sup>24</sup>

In pursuance of the same policy as that of the courts in hostility to joint tenancy, it has been provided by statute in many states that a conveyance or devise to two or more persons shall create a tenancy in common, and not a joint tenancy, unless a contrary intent is plainly apparent, or, in some states, is expressly declared.<sup>25</sup> In some states, the legislature has entirely abolished joint tenancy, making what would have been a joint tenancy at common law a tenancy in common.<sup>26</sup> In still

<sup>22</sup> 2 Bl. Comm. 180, Chitty's note; 4 Kent, Comm. 361; 2 Cruise, Dig. tit. 28, c. 1, §§ 33-37; 2 Jarman, Wills, 1123; Lake v. Craddock, 8 P. Wms. 168; Jolliffe v. East, 3 Brown Ch. 25; Rigden v. Vallier, 2 Ves. Sr. 258.

<sup>23</sup> Noble v. Teeple, 58 Kan. 398; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Caines v. Grant's Lessee, 5 Bin. (Pa.) 120; Barclay v. Hendrick's Heirs, 3 Dana (Ky.) 378.

<sup>24</sup> Greer v. Blanchard, 40 Cal. 194; Seitz v. Seitz, 11 App. D. C. 358; Campbell v. Herron, 1 Conf. R. (N. C.) 291, Finch's Cas. 947; Barclay v. Hendrick's Heirs, 3 Dana (Ky.) 378; Young v. De Bruhl, 11 Rich. Law (S. C.) 638; Lockhart v. Vandyke, 97 Va. 356; Martin v. Smith, 5 Bin. (Pa.) 16; Noble v. Teeple, 58 Kan. 398. And see Powell v. Powell, 5 Bush (Ky.) 619.

<sup>25</sup> 4 Kent, Comm. 361; 3 Sharswood & B. Lead. Cas. Real Prop. 21; 1 Stimson's Am. St. Law, 1371(B); Freeman, Cotenancy, § 35. A conveyance to two persons "jointly" has been held to show an intention to create a joint tenancy within the statute. Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253. And, likewise, a devise to several persons and the survivor or survivors of them. Apgar v. Christophers, 33 Fed. 201.

<sup>26</sup> 1 Stimson's Am. St. Law, § 1371(A); 3 Sharswood & B. Lead. Cas. Real Prop. 20.

other states, the doctrine of survivorship has been abolished by statute;<sup>27</sup> a character of provision which does not, however, abolish joint tenancy.<sup>28</sup>

In some states, the statutes abolishing joint tenancies, or restricting the cases in which such tenancy may arise, have been held not to apply in the case of conveyances or gifts to two or more trustees, since it is desirable that they hold as joint tenants, rather than as tenants in common, so that a division of the legal title upon the death of one may be avoided,<sup>29</sup> and a provision to this effect is frequently contained in the statute.<sup>30</sup>

### § 163. Tenancy in common.

A tenant in common, though owner of an undivided share only in the land, has a several and distinct estate therein, and, except for the fact that he has not the exclusive possession, he has the same rights in respect to his share as a tenant in severalty.<sup>31</sup> So distinct are the interests of tenants in common that, if they join in a lease, it is regarded as the distinct lease of each, and a conveyance by one tenant to another must be made as if to a stranger, a deed of release being insufficient to convey his title.<sup>32</sup> It is immaterial whether the cotenants obtain their titles simultaneously, or from the same person, as it

<sup>27</sup> 3 Sharswood & B. Lead. Cas. Real Prop. 15; Freeman, Cotenancy, § 35; 1 Dembitz, Land Titles, § 27, p. 197.

<sup>28</sup> Vass v. Freeman, 56 N. C. 227; Rowland v. Rowland, 93 N. C. 214; Lockhart v. Vandyke, 97 Va. 356. Nor does such a statute prevent an express limitation over to the survivor of two grantees or devisees. Arnold v. Jack's Ex'rs, 24 Pa. St. 57.

<sup>29</sup> Parsons v. Boyd, 20 Ala. 112; Webster v. Vandevanter, 6 Gray (Mass.) 428.

<sup>30</sup> 1 Stimson's Am. St. Law, § 1371(B) (3); 3 Sharswood & B. Lead. Cas. Real Prop. 26.

<sup>31</sup> 4 Kent, Comm. 368; Challis, Real Prop. 297; 1 Washburn, Real Prop. 416.

<sup>32</sup> Freeman, Cotenancy, § 189; 4 Kent, Comm. 368, 369; 1 Washburn, Real Prop. 416, 417; Rector v. Waugh, 17 Mo. 28, 57 Am. Dec. 251; Spencer v. Austin, 38 Vt. 258, Finch's Cas. 944.

is whether they have each the same *quantum* of estate; this class of tenancy differing in this respect from a joint tenancy. Accordingly, one tenant in common may have an estate in fee and another for life, and one may have acquired his title from one person by conveyance, and the other from another person by descent, and the title of one may have vested yesterday, and that of the other fifty years ago.<sup>33</sup>

— Creation.

A tenancy in common will, as a result of the distinct character of the titles of the several tenants, arise whenever the terms of the instrument under which the property is held show an intent that each tenant shall hold his interest as a separate moiety. So, a tenancy in common has been held to be created by an instrument looking towards a division of the estate, or providing that the land shall be held by two or more persons "equally," or "share and share" alike.<sup>34</sup> The terms of the instrument are, however, of comparatively little importance at the present day, owing to the frequent adoption of statutes providing that a conveyance or devise to two or more shall be presumed to create a tenancy in common.<sup>35</sup>

When the owner of a tract of land conveys a part thereof, without designating or attempting to designate the part so conveyed, the grantor and grantee will become tenants in common of the whole tract, in proportion to the respective quantities of each.<sup>36</sup>

<sup>33</sup> 2 Bl. Comm. 191; 2 Cruise, Dig. tit. 20, § 2; Freeman, Cotenancy, § 86; *Spencer v. Austin*, 38 Vt. 258, Finch's Cas. 944.

<sup>34</sup> 2 Bl. Comm. 193, Christian's note; 4 Cruise, Dig. tit. 32, c. 21, §§ 50-58; 2 Jarman, Wills, 1121; *Fisher v. Wigg*, 1 P. Wms. 14; *Rigden v. Vallier*, 2 Ves. Sr. 257; *Griswold v. Johnson*, 5 Conn. 363; *Gilpin v. Hollingsworth*, 8 Md. 190, 56 Am. Dec. 737; *Pruden v. Paxton*, 79 N. C. 446, 28 Am. Rep. 333; *Weir v. Tate*, 39 N. C. 264; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; *Evans v. Brittain*, 3 Serg. & R. (Pa.) 135; *Martin v. Smith*, 5 Bin. (Pa.) 16.

<sup>35</sup> See ante, § 162.

<sup>36</sup> Freeman, Cotenancy, § 96; *Gibbs v. Swift*, 12 Oush. (Mass.) 393;

At common law, a tenancy in common was never created by the descent of land to two or more heirs of the same person, since this made the heirs coparceners. In this country, however, joint heirs more usually take as tenants in common.<sup>37</sup>

— Termination.

A tenancy in common may be terminated either by uniting all the interests in the land in one tenant, by purchase or other wise, which makes him the owner of the whole in severalty, or by making partition between the several tenants, which gives them each an interest in severalty in a specific part of the land.<sup>38</sup>

§ 164. Coparcenary.

At common law, an estate in coparcenary or parcenary arose when, on the death of the owner of an estate of inheritance, it descended to two or more female heirs, in default of a male heir, and likewise when, by local custom, land descended to two or more male heirs.<sup>39</sup> Coparceners or parceners hold a position intermediate between joint tenants and tenants in common. Three of the unitities referred to in connection with a joint tenancy, namely, those of title, interest, and possession, exist in the case of coparcenary. That of time is not necessary, however, since, on the death of one of the heirs, his heir takes his place as parcener, and in such case the interests of the parceners arise at different times.<sup>40</sup> For the same reason, there is no right of survivorship as in joint tenancies.<sup>41</sup>

*Jackson v. Livingston*, 7 Wend. (N. Y.) 126; *Wallace v. Miller*, 52 Cal. 655.

<sup>37</sup> 4 Kent, Comm. 367; 1 Washburn, Real Prop. 415. See post, § 164.

<sup>38</sup> 2 Bl. Comm. 195; 2 Cruise, Dig. tit. 20, §§ 26-26. See infra, §§ 174, 175.

<sup>39</sup> Litt. §§ 241, 242; 2 Bl. Comm. 187; 4 Kent, Comm. 366; Chailly, Real Prop. 30.

<sup>40</sup> Co. Litt. 164a; 2 Bl. Comm. 188; 2 Cruise, Dig. tit. 19, §§ 3-5. See *Hoffar v. Dement*, 5 Gill (Md.) 132, Finch's Cas. 951.

<sup>41</sup> Litt. § 280; Co. Litt. 164a; 2 Bl. Comm. 188; 4 Kent, Comm. 366; 2 Cruise, Dig. tit. 19, §§ 5, 6.

One parcener may convey his share to a third person, or to another parcener, or may devise it.<sup>42</sup>

A tenancy of this character may be terminated by the transfer by one parcener of his share to a stranger, this destroying the unity of title as regards that share, and thereafter the grantee is a tenant in common as to the others. It may also be terminated by the acquisition by one coparcener of the shares of the others, or by partition.<sup>43</sup>

In this country, this class of tenancy is rather infrequent, land descending to two or more persons being generally regarded, either with or without a statutory provision to that effect, as a tenancy in common.<sup>44</sup> It is, however, still recognized in some states, and there are occasional statutes providing that joint heirs shall take as coparceners.<sup>45</sup>

### § 165. Tenancy by entireties.

A tenancy by entireties (or by the entirety) is essentially a joint tenancy, modified by the theory of the common law that the husband and wife are one person.<sup>46</sup> This tenancy can exist only in case the persons to whom the title passes are husband and wife at the time the instrument conferring title takes effect, and it is not created by a conveyance or devise to persons who subsequently marry.<sup>47</sup>

<sup>42</sup> Challis, Real Prop. 323; 1 Washburn, Real Prop. 413.

<sup>43</sup> 2 Bl. Comm. 189, 191.

<sup>44</sup> 4 Kent, Comm. 367; 1 Washburn, Real Prop. 415; 1 Stimson's Am. St. Law, § 1375; Freeman, Cotenancy, § 35.

<sup>45</sup> 1 Stimson's Am. St. Law, §§ 1375, 2130. See *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Thompson v. Barber*, 12 N. H. 563; *Gilpin v. Hollingsworth*, 3 Md. 190, *Finch's Cas.* 949.

<sup>46</sup> Litt. § 291; Challis, Real Prop. 304, note; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462; *Morris v. McCarty*, 158 Mass. 11; *Marsburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517.

<sup>47</sup> Co. Litt. 137b; *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397; *Holt v. Wilson*, 75 Ala. 58; *Morris v. McCarty*, 158 Mass. 11; *Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42, 13 Am. Dec. 371.

This tenancy may be created even when the husband and wife are not the only grantees in the conveyance or beneficiaries of the devise, as when it is to a man and his wife and another person, in which case the husband and wife would, *prima facie* at least, take a one-half interest only, which they would hold by entireties, while the third person would take the other half; and the same rule would apply, whatever the number of cotenants.<sup>48</sup>

While a conveyance or devise to a husband and wife will ordinarily create a tenancy by entireties, the weight of authority is to the effect that an intention, clearly expressed in the instrument, that they shall take as tenants in common or as joint tenants, will be effective.<sup>49</sup>

The most important incident of a tenancy by entireties is that the survivor of the marriage, whether the husband or the

<sup>48</sup> Litt. § 291; 4 Kent, Comm. 363; 1 Washburn, Real Prop. 425; Jupp v. Buckwell, 39 Ch. Div. 148; Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302; Thornton v. Thornton, 3 Rand. (Va.) 179; Johnson v. Hart, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565; Barber v. Harris, 15 Wend. (N. Y.) 615; Hardenbergh v. Hardenbergh, 10 N. J. Law, 42, 18 Am. Dec. 371. The rule that the husband and wife will, in such case, together take but one share, is, however, it seems, a mere rule of construction. In re March, 27 Ch. Div. 166.

It has been decided that the fact that a conveyance or devise to a man and his wife and to others is expressly to them "as tenants in common" does not affect the rule that the man and wife shall together take but one share. 2 Jarman, Wills, 1116; Warrington v. Warrington, 2 Hare, 54. Contra, Hilton v. Bender, 69 N. Y. 75.

<sup>49</sup> 1 Preston, Estates, 132; 4 Kent, Comm. 363; Hunt v. Blackburn, 128 U. S. 464; Thornburg v. Wiggins, 135 Ind. 178, 41 Am. St. Rep. 422, Finch's Cas. 940; Fladung v. Rose, 58 Md. 13; McDermott v. French, 15 N. J. Eq. 78; Fulper v. Fulper, 54 N. J. Eq. 431, 55 Am. St. Rep. 590; Hiles v. Fisher, 144 N. Y. 313, 43 Am. St. Rep. 762, Finch's Cas. 963; Miner v. Brown, 133 N. Y. 312; Young's Estate, 166 Pa. St. 645; Hadlock v. Gray, 104 Ind. 596. Contra, Stuckey v. Keefe's Ex'rs, 26 Pa. St. 397.

When husband and wife take by inheritance from one person, their titles have been regarded as distinct, so that consequently they do not take by entireties. Knapp v. Windsor, 6 Cush. (Mass.) 157; Brown v. City of Baraboo, 90 Wis. 151. Contra, Gillam's Ex'rs v. Dixon, 65 Pa. St. 395.



wife, is entitled to the whole, and that this right cannot be defeated by a conveyance by the other to a stranger, as in the case of a joint tenancy.<sup>50</sup>

— Effect of modern statutes.

At common law, the husband, having the right to control and dispose of his wife's land during their joint lives,<sup>51</sup> was entitled to all the rents and profits of land held by entireties, and not merely to one-half thereof, and he could convey the land for the term of his life.<sup>52</sup> This power of control in the husband over the wife's share is, however, taken away by the married woman's property acts, hereafter referred to, since it was not an incident of the tenancy by entireties, but was merely one of his common-law marital rights.<sup>53</sup>

<sup>50</sup> 2 Bl. Comm. 182; 1 Preston, Estates, 181; Williams, Real Prop. 226; 4 Kent, Comm. 362; 1 Washburn, Real Prop. 425; Branch v. Polk, 61 Ark. 388, 54 Am. St. Rep. 266; Simpson v. Pearson, 31 Ind. 1, 99 Am. Dec. 577; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762, Finch's Cas. 963; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Varnum v. Abbot, 12 Mass. 478, 7 Am. Dec. 87; Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462; Ketchum v. Walsworth, 5 Wis. 95, 68 Am. Dec. 49; Hardenbergh v. Hardenbergh, 10 N. J. Law, 42, 18 Am. Dec. 371; Wyckoff v. Gardner, 20 N. J. Law, 556, 45 Am. Dec. 388; Torrey v. Torrey, 14 N. Y. 430; Rogers v. Grider, 1 Dana (Ky.) 242; Needham v. Branson, 28 N. C. 426, 44 Am. Dec. 45; Fairchild v. Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117; Taul v. Campbell, 7 Yerg. (Tenn.) 319, 37 Am. Dec. 508; Brownson v. Hull, 16 Vt. 309, 42 Am. Dec. 517.

<sup>51</sup> See post, § 176.

<sup>52</sup> Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361, Finch's Cas. 952; Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462; Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302; Washburn v. Burns, 34 N. J. Law, 18; Jackson v. McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; Fairchild v. Chastelleux, 1 Pa. St. 181, 44 Am. Dec. 117; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; Bennett v. Child, 19 Wis. 362, 33 Am. Dec. 692.

<sup>53</sup> Buttlar v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52; Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762, Finch's Cas. 963; McCurdy v. Canning, 64 Pa. St. 41; Branch v. Polk, 61 Ark. 388, 54 Am. St. Rep. 266; Shinn v. Shinn, 42 Kan. 1; Town of Corinth v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780.

The various state statutes abolishing joint tenancy or the right of survivorship, or declaring that two or more grantees shall take an estate in common, have generally been held not to apply to tenancy by entireties,<sup>54</sup> though some such statutes are so worded as to apply thereto.<sup>55</sup> Likewise, what are known as the "Married Women's Property Acts" are generally held not to abolish the tenancy by entireties,<sup>56</sup> though in some jurisdictions they are given such effect, it being a question of the construction of the particular statute.<sup>57</sup>

Some of the modern statutes authorizing the wife to convey her property as a *feme sole* have been construed as allowing her to dispose of her half interest under the tenancy, subject to the right of survivorship existing in the husband,<sup>58</sup> while in some states neither the husband nor the wife can dispose of his or her half interest without the concurrence of the other.<sup>59</sup>

<sup>54</sup> Freeman, Cotenancy, § 65; Craft v. Wilcox, 4 Gill (Md.) 504. Hemingway v. Scales, 42 Miss. 10, 97 Am. Dec. 425; Hardenbergh v. Hardenbergh, 10 N. J. Law, 42, 18 Am. Dec. 371; Diver v. Diver, 56 Pa. St. 106; Moore v. Moore, 12 B. Mon. (Ky.) 651; Shaw v. Hearsey, 5 Mass. 521; Brownson v. Hull, 16 Vt. 309, 42 Am. Dec. 517; Ketchum v. Walworth, 5 Wis. 95, 68 Am. Dec. 49; Noblitt v. Beebe, 23 Or. 4; Harrison v. Ray, 108 N. C. 215; Thornton v. Thornton, 3 Rand. (Va.) 182.

<sup>55</sup> Hoffman v. Stigers, 28 Iowa, 302; Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462; Gresham v. King, 65 Miss. 387; Wilson v. Wilson, 45 Minn. 398.

<sup>56</sup> Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462; Baker v. Stewart, 40 Kan. 442, 10 Am. St. Rep. 213; Chandler v. Cheney, 37 Ind. 391; Carver v. Smith, 90 Ind. 223, 46 Am. Rep. 210; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Gresham v. King, 65 Miss. 387; Bertles v. Nunan, 93 N. Y. 152, 44 Am. Rep. 361, Finch's Cas. 952; Fisher v. Provin, 25 Mich. 347; Diver v. Diver, 56 Pa. St. 106; Bramberry's Estate, 156 Pa. St. 632, 36 Am. St. Rep. 64.

<sup>57</sup> Walthall v. Goree, 36 Ala. 728; Donegan v. Donegan, 108 Ala. 488, 49 Am. St. Rep. 53; Cooper v. Cooper, 76 Ill. 57; Robinson's Appeal, 88 Me. 17, 51 Am. St. Rep. 367; Clark v. Clark, 56 N. H. 105; Thornley v. Thornley [1893] 2 Ch. 229.

<sup>58</sup> Branch v. Polk, 61 Ark. 388, 54 Am. St. Rep. 266; Buttler v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52; Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 763, Finch's Cas. 963; Atkison v. Henry, 80 Mo. 151.

<sup>59</sup> Chandler v. Cheney, 37 Ind. 391; Naylor v. Minock, 96 Mich. 182.

— Termination.

There can be no partition of land held by the entirety, since this would imply a separate interest in each tenant, contrary to the underlying theory of the tenancy.<sup>60</sup> But a divorce or dissolution of the marriage terminates the tenancy by entirety, and renders the two owners either tenants in common or joint tenants, as they would have been in case they had never been married,<sup>61</sup> and thereafter partition may be obtained by either.<sup>62</sup>

§ 166. Community property.

In Louisiana, Texas, California, Arizona, Idaho, New Mexico, Nevada, and Washington, what is known as the "community system of matrimonial gains" prevails. The central idea of this system is that whatever is acquired by the efforts of either the husband or wife belongs one-half to each, or, as it is expressed, to the community.<sup>63</sup> This system belongs to the civil law, and first found footing in this country during the Spanish and French dominion, but it has been developed on diverse lines by statutory provisions in the different states, and in this development common-law influences have played some part.<sup>64</sup>

*Gray v. Bailey*, 117 N. C. 439; *McCurdy v. Canning*, 64 Pa. St. 41. That the purchaser at execution sale has no rights in the use and profits during the wife's life, see *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 49 Am. St. Rep. 921; *Town of Corinth v. Emery*, 63 Vt. 505, 25 Am. St. Rep. 780; and that the husband's interest cannot be sold on execution, see *Shinn v. Shinn*, 42 Kan. 1.

<sup>60</sup> *Ketchum v. Walsworth*, 5 Wis. 95; *Gray v. Bailey*, 117 N. C. 439; *Chandler v. Cheney*, 37 Ind. 391.

<sup>61</sup> *Donegan v. Donegan*, 103 Ala. 488; *Stelz v. Shreck*, 128 N. Y. 263, *Finch's Cas.* 960; *Harrer v. Wallner*, 80 Ill. 197; *Lash v. Lash*, 53 Ind. 526; *Hopson v. Fowlkes*, 92 Tenn. 697; *Ames v. Norman*, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269.

<sup>62</sup> *Russell v. Russell*, 122 Mo. 235; *Harrer v. Wallner*, 80 Ill. 197.

<sup>63</sup> *Ballinger*, *Commun. Prop.* §§ 6, 11; *De Blane v. Lynch*, 23 Tex. 25; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 539.

<sup>64</sup> See an article by George McKay, Esq., 6 Am. & Eng. Enc. Law, (2d Ed.) p. 292, where the subject of this section is very clearly and

Either the husband or the wife, or both, may have property other than community property, this being known as "separate property," and being usually defined by statute as including, among other property, that belonging to either at the time of the marriage, and property acquired by either after the marriage through gift, devise, or descent or in exchange for separate property.<sup>65</sup> Separate property also includes the rents, issues, and profits of separate property, except in Texas, Louisiana, and Idaho, where the rule is generally otherwise.<sup>66</sup>

All property which is not separate property is community property, there being an express or implied provision to this effect in the statute of each state where the system prevails.<sup>67</sup> Community property therefore includes, among other property, that gained by the exertions or labor of either husband or wife, and property acquired in exchange for such property.<sup>68</sup> Public land which is granted to the husband and wife, or to either of them, is, it seems, to be regarded as community property if the grant is for valuable consideration in pursuance of a contract or

satisfactorily treated. See also *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 539; *Saul v. His Creditors*, 5 Mart. (N. S.; La.) 569, 16 Am. Dec. 212.

<sup>65</sup> Ballinger, *Commun. Prop.* § 53 et seq.; 1 Stimson's Am. St. Law, § 6433; 6 Am. & Eng. Enc. Law, pp. 301, 307; Stewart, *Husb. & Wife*, § 313; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538.

<sup>66</sup> 6 Am. & Eng. Enc. Law, pp. 301, 320-323; Ballinger, *Commun. Prop.* §§ 21-24; Stewart, *Husb. & Wife*, §§ 313, 314; 1 Stimson's Am. St. Law, § 6434; *Marlow v. Barlew*, 53 Cal. 459; *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49; *De Blane v. Lynch*, 23 Tex. 25; *De Garca v. Galvan*, 55 Tex. 56; *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490; *Lake v. Bender*, 18 Nev. 361; *Webb v. Peet*, 7 La. Ann. 92.

<sup>67</sup> 6 Am. & Eng. Enc. Law (2d Ed.) p. 307; Ballinger, *Commun. Prop.* § 51; *Ezell v. Dodson*, 60 Tex. 331.

<sup>68</sup> Ballinger, *Commun. Prop.* § 19; *Wren v. Wren*, 100 Cal. 276, 33 Am. St. Rep. 287; *Cooke v. Bremond*, 27 Tex. 457, 36 Am. Dec. 626; *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176; *Prendergast v. Cassidy*, 8 La. Ann. 96.

legal obligation, but not where it is merely donated.<sup>69</sup> Property acquired after marriage by either the husband or wife is presumed to be community property until it is shown to be separate property.<sup>70</sup>

As a general rule, the husband has the sole and absolute control over the community property, with the sole power of disposing of it.<sup>71</sup>

The community property is liable for all of what are called "community debts," which comprise any debts or liabilities created by the husband during coverture not for his own especial benefit, the presumption being that the debts are such, and not the separate debts of the husband;<sup>72</sup> and it is also liable for all the antenuptial debts of both the husband and wife.<sup>73</sup>

Upon the death of the wife, the husband has, in Louisiana and Texas, control of all the community property for the purpose of settling the community affairs,<sup>74</sup> and in California,

<sup>69</sup> Ballinger, *Commun. Prop.* §§ 25-30; *Cooke v. Bremond*, 86 Am. Dec. 620, note.

<sup>70</sup> Ballinger, *Commun. Prop.* §§ 17, 46, 67, 159-166; *Althof v. Conhelm*, 38 Cal. 230, 99 Am. Dec. 363; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538; *Shaw v. Hill*, 20 La. Ann. 531, 96 Am. Dec. 420; *Labbe's Heirs v. Abat*, 2 La. 553, 22 Am. Dec. 151; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626, and cases cited in note, p. 636; *Morris v. Hastings*, 70 Tex. 28, 3 Am. St. Rep. 570; *Castor v. Peterson*, 2 Wash. 204, 26 Am. St. Rep. 854. Except in California, in the case of a conveyance in writing to the wife. Act March 3, 1893 (St. 1893, p. 71); *Svetinich v. Sheean*, 124 Cal. 216, 71 Am. St. Rep. 50.

<sup>71</sup> Ballinger, *Commun. Prop.* §§ 79-82; 1 *Stimson's Am. St. Law*, § 6433, *Spreckels v. Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170.

In Washington, the husband can convey or incur the community real estate, or render it liable for his debts, only when his wife joins in making the deed or creating the charge. 1 *Hill's Code*, § 1400; *Ballinger*, *Commun. Prop.* § 95; *Holyoke v. Jackson*, 3 Wash. T. 235.

<sup>72</sup> Ballinger, *Commun. Prop.* §§ 118, 119, 149.

<sup>73</sup> *Stewart, Husb. & Wife*, § 315; Ballinger, *Commun. Prop.* §§ 132-135; *Davis v. Compton*, 13 La. Am. 396; *Portis v. Parker*, 22 Tex. 699; *Van Maren v. Johnson*, 15 Cal. 308.

<sup>74</sup> *Stewart, Husb. & Wife*, § 318; *Verrer v. Lora*, 43 La. Ann. 717; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76.

Nevada, and Idaho he takes all the community property as absolute owner.<sup>75</sup> With these exceptions, the half belonging to either the husband or wife descends to his or her heirs or descendants, subject to the payment of debts,<sup>76</sup> except when it has been disposed of by the will of the deceased.<sup>77</sup> If there are no descendants and no will, the survivor, in some states, takes the half belonging to the deceased.<sup>78</sup> The rights of dower and curtesy are incompatible with the theory of the community system, and have no recognition in the states where that system prevails, there being in some states a statute expressly so providing.<sup>79</sup>

### § 167. Partnership property.

Land purchased for partnership purposes with partnership funds is quite frequently treated in text books as being the subject of a distinct form of joint ownership, and sometimes the inexact and misleading expression, "estate in partnership," is employed. As a matter of fact, so far as the legal title is concerned, it is entirely immaterial that the land belongs to a partnership; the right of the partners, as such, and of the firm creditors, being worked out upon the theory of resulting trusts.

Land cannot be conveyed to a partnership as such, it not being recognized as a legal person, and consequently, though the property is intended to belong to the firm, the legal title must be vested in some individual or individuals; and so far as the

<sup>75</sup> 1 Stimson's Am. St. Law, § 3401; 6 Am. & Eng. Enc. Law, 345; *In re Ingram*, 12 Am. St. Rep. 90, note.

<sup>76</sup> 1 Stimson's Am. St. Law, §§ 3402-3404; Ballinger, *Commun. Prop. c. 3*; *Johnston v. San Francisco Savings Union*, 75 Cal. 134, 7 Am. St. Rep. 129; *Bennett v. Fuller*, 29 La. Ann. 663; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480.

<sup>77</sup> Ballinger, *Commun. Prop.* §§ 234, 240; *Brown v. Pridgen*, 56 Tex. 124; *Hill's Estate*, 6 Wash. 285.

<sup>78</sup> See 1 Stimson's Am. St. Law, § 3403; *Rev. St. Ariz. 1887*, § 1467; *Sayles' Civ. St. Tex.* art. 2165; *Hill's Gen. St. Wash.* § 1481.

<sup>79</sup> Ballinger, *Commun. Prop.* §§ 10, 253.

rights of the members of the firm, as such, or of the firm creditors, are concerned, it is immaterial whether the title is in one or more of the partners, or in a stranger.<sup>80</sup> In whomsoever the legal title may be, he is regarded in equity as holding it in trust for the payment of the firm debts, whether in favor of third persons or of members of the firm,<sup>81</sup> and, for this purpose, as before stated,<sup>82</sup> it is usually considered that the land is converted into personalty. After the payment of such claims, it becomes immaterial that the persons to whom the land belongs are partners. The holder or holders of the legal title will thereafter, if the legal title and the beneficial interests do not correspond, hold in trust for the partners in proportion to their respective interests, as in any other case where a consideration is paid by persons other than those to whom the title is conveyed, or more is paid by one of the legal grantees than by another.<sup>83</sup>

The question whether particular land is to be regarded as partnership land in which there is implied such a resulting trust for the purposes of the partnership debts and claims is a question of intention, as determined from the conveyance, the articles of copartnership, the ownership of the funds paid for

<sup>80</sup> *Parsons, Partnership*, § 265; *Mechem, Partnership*, § 84; *Shanks v. Klein*, 104 U. S. 18; *Fairchild v. Fairchild*, 64 N. Y. 477; *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788; *Jarvis v. Brooks*, 27 N. H. 37, 59 Am. Dec. 359; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Diggs' Adm'r v. Brown*, 78 Va. 292.

<sup>81</sup> *Fairchild v. Fairchild*, 64 N. Y. 471; *Jarvis v. Brooks*, 27 N. H. 37, 59 Am. Dec. 359; *Riddle v. Whitehill*, 135 U. S. 621; *Pepper v. Thomas*, 85 Ky. 539; *Paige v. Paige*, 71 Iowa, 318, 60 Am. Rep. 799; *Shaw's Appeal*, 81 Me. 207; *Roberts v. Eldred*, 73 Cal. 394; *Galbraith v. Tracy*, 153 Ill. 54, 46 Am. St. Rep. 867; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 475; *Murrell v. Mandelbaum*, 85 Tex. 22, 34 Am. St. Rep. 777; *Buffum v. Buffum*, 49 Me. 108, 77 Am. Dec. 249.

<sup>82</sup> See ante, § 103.

<sup>83</sup> *Shearer v. Shearer*, 98 Mass. 107; *Traphagen v. Burt*, 67 N. Y. 30; *Davis v. Davis*, 60 Miss. 615; *Riddle v. Whitehill*, 135 U. S. 621; *Kruschke v. Stefan*, 83 Wis. 373.

the land, the uses made thereof, or the entries in the firm books.<sup>84</sup> That the land is both paid for with partnership funds and used for partnership purposes is sufficient to show that it is intended to be partnership property, unless an agreement to the contrary appear.<sup>85</sup> But that the land is paid for with firm funds is not conclusive of such an intention, since the partners may desire to withdraw that amount from the business, and invest it in land.<sup>86</sup> Nor will the fact that land not so purchased was used for partnership purposes have that effect, as when the land was procured by the members before the formation of the partnership.<sup>87</sup> In one or two states it is held that land so conveyed to the partners before the formation of the partnership cannot be shown to be firm property as against one who gave credit to one of the partners as an individual without notice that the land was partnership, and not individual, assets.<sup>88</sup>

<sup>84</sup> *Robinson Bank v. Miller*, 153 Ill. 244, 46 Am. St. Rep. 883; *Ames v. Ames*, 37 Fed. 30; *Collner v. Greig*, 137 Pa. St. 606, 21 Am. St. Rep. 899; *City of Providence v. Bullock*, 14 R. I. 353; *Murrell v. Mandelbaum*, 83 Tex. 22, 34 Am. St. Rep. 777.

<sup>85</sup> *Goldthwaite v. Janney*, 102 Ala. 431, 48 Am. St. Rep. 57, and cases cited in note on page 69; *Jarvis v. Brooks*, 27 N. H. 67, 59 Am. Dec. 359; *Brooke v. Washington*, 8 Grat. (Va.) 256, 56 Am. Dec. 142; *Berry v. Folkes*, 60 Miss. 576; *Spalding v. Wilson*, 30 Ky. 589.

<sup>86</sup> 1 *Bates, Partnership*, § 285; *Collumb v. Read*, 24 N. Y. 505; *Alkire v. Kahle*, 123 Ill. 496, 5 Am. St. Rep. 540; *City of Providence v. Bullock*, 14 R. I. 353; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Lefevre's Appeal*, 69 Pa. St. 122, 8 Am. Rep. 229.

<sup>87</sup> 1 *Bates, Partnership*, § 287; *Robinson Bank v. Miller*, 153 Ill. 244, 46 Am. St. Rep. 883; *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; *Hatchett v. Blanton*, 72 Ala. 423.

<sup>88</sup> *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 45 Am. St. Rep. 350; *Parker v. Bowles*, 57 N. H. 491.

In Pennsylvania, it is even held that land conveyed to partners as tenants in common during the existence of the firm cannot be shown to be partnership property as against one who so gave credit to one of the partners as an individual without notice that the land was partnership assets. *Ebbert's Appeal*, 70 Pa. St. 79; *Collner v. Greig*, 131



## § 168. Ouster of cotenant.

The exclusion of one tenant by his cotenants from the possession or enjoyment of the land is known as an "ouster." Questions as to what constitutes an ouster are important for the determination of the right of one tenant in common, joint tenant, or coparcener to maintain certain classes of remedies against the other, as in the case of ejectment, which lies at the suit of one such cotenant against the other only when he has been ousted,<sup>89</sup> and also because the possession of one of them is not adverse to the other, so as to deprive the latter of the right to assert his title by the lapse of time, unless there has been an ouster of such other.<sup>90</sup>

In the case of cotenants, since each is entitled to the possession, the mere fact that one is in possession and the other is not does not presumptively show an ouster, as is the case as between strangers.<sup>91</sup> Nor will it be shown by the mere appropria-

Pa. St. 606, 21 Am. St. Rep. 899; *Stover v. Stover*, 180 Pa. St. 425, 57 Am. St. Rep. 654.

<sup>89</sup> *Adams, Ejectment*, 92; *Clay v. Field*, 115 U. S. 260; *Abercrombie v. Baldwin*, 15 Ala. 363; *Harmon v. James*, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; *Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735; *Small v. Clifford*, 38 Me. 213; *Lawton v. Adams*, 29 Ga. 273, 74 Am. Dec. 59; *Thomas v. Garvan*, 15 N. C. 223, 25 Am. Dec. 708; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; *Carpenter v. Thayer*, 15 Vt. 552; *Taylor v. Hill*, 10 Leigh (Va.) 457.

<sup>90</sup> *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Blakeney v. Ferguson*, 20 Ark. 547; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Stevens v. Walt*, 112 Ill. 544; *Killmer v. Wuchner*, 74 Iowa, 359; *Ingalls v. Newhall*, 139 Mass. 268; *Van Bibber v. Ferdinand*, 17 Md. 436; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Millard v. McMullin*, 68 N. Y. 352; *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 61 Pa. St. 328. See post, §§ 436-444.

<sup>91</sup> *Co. Litt.* 199b; 2 Cruise, Dig. tit. 18, c. 1, § 63; 4 Kent, Comm. 370; *Wass v. Bucknam*, 38 Me. 356, Finch's Cas. 640; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Johnson v. Toulmin*, 18 Ala. 50; *Stevens v. Walt*, 112 Ill. 544; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *King v. Carmichael*, 136 Ind. 20; *Barnard v. Pope*, 14 Mass. 434, 7 Am. Dec. 225; *Young v. Adams*, 14 B. Mon. (Ky.) 102; *Tulloch v. Worrall*, 49 Pa. 133; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614.

tion by one cotenant of all the rents and profits,<sup>92</sup> though such appropriation may have that effect if accompanied by a notorious claim to the exclusive ownership.<sup>93</sup> The refusal to let a cotenant into possession, with knowledge of his claim of title, accompanied by a denial thereof, constitutes an ouster;<sup>94</sup> but it does not result from the making of a deed for the whole property by one cotenant,<sup>95</sup> though it will generally be presumed if the grantee enters and claims the whole title.<sup>96</sup> The cotenant who is excluded from possession must in all cases have actual or constructive knowledge of the facts constituting the alleged ouster in order to give the acts that character for the purpose of asserting a title by lapse of time.<sup>97</sup>

Owing to the unity of possession existing in the cases of concurrent ownership, each cotenant has the right to be in pos-  
 session

<sup>92</sup> *Johnson v. Toulmin*, 18 Ala. 50; *Hart v. Gregg*, 10 Watts (Pa.) 185, 38 Am. Dec. 166; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 61 Pa. St. 328; *Robidoux v. Cassilegi*, 10 Mo. App. 516.

<sup>93</sup> *Owen v. Morton*, 24 Cal. 373; *Johnson v. Toulmin*, 18 Ala. 50; *Parker v. Proprietors of Locks & Canals on Merrimack River*, 3 Metc. (Mass.) 102, 37 Am. Dec. 121; *Small v. Clifford*, 38 Me. 213; *Lapeyre v. Paul*, 47 Mo. 586.

<sup>94</sup> *Freeman, Cotenancy*, § 235; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Newell v. Woodruff*, 30 Conn. 492; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414; *Hubbard v. Wood's Lessee*, 1 Sneed (Tenn.) 279.

<sup>95</sup> *Freeman, Cotenancy*, § 226; *Hannon v. Hannah*, 9 Grat. (Va.) 146; *Roberts v. Morgan*, 30 Vt. 319.

<sup>96</sup> *Freeman, Cotenancy*, § 224; *Doe d. Horne v. Roe*, 46 Ga. 9; *Parker v. Proprietors of Locks & Canals on Merrimack River*, 3 Metc. (Mass.) 91, 37 Am. Dec. 121; *Prescott v. Nevers*, 4 Mason, 330, Fed. Cas. No. 11,890; *King v. Carmichael*, 136 Ind. 20; *Day v. Howard*, 73 N. C. 1; *Jackson v. Smith*, 13 Johns. (N. Y.) 411.

<sup>97</sup> *Freeman, Cotenancy*, § 229; *Barr v. Gratz's Heirs*, 4 Wheat. (U. S.) 213; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Peckard v. Johnson*, 57 Cal. 180; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Grand Tower Min., Mfg. & Transp. Co. v. Gill*, 111 Ill. 541; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614, 38 Mo. 581, 90 Am. Dec. 443; *Culver v. Rhodes*, 87 N. Y. 348; *Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 225. Compare *Elder v. McClaskey* (C. C. A.) 70 Fed. 529.

sion of any and every part of the land at any time. Consequently, one tenant cannot assert a right to the exclusive possession of any part, though it be smaller in extent than his proportionate share of the whole, and, if he exclude his cotenant from such part, he is guilty of an ouster.<sup>98</sup>

The question of ouster is one for the jury in each particular case, under the instructions of the court.<sup>99</sup>

### § 169. Accounting by cotenant.

At common law, if one cotenant alone took possession of the premises, or collected more than his share of the rents and profits, the other or others had no right of action against him for use and occupation, or for his share of the rents and profits, unless the one sought to be charged had been made the bailiff of the others. By St. 4 Anne, c. 16, § 27 (A. D. 1705), however, a joint tenant or tenant in common receiving more than his just share and proportion of the rents and profits might be made liable to the other tenant.<sup>100</sup> This statute has been regarded as in force in some states in this country,<sup>101</sup> and in others a similar statute has been enacted.<sup>102</sup>

<sup>98</sup> Freeman, Cotenancy, §§ 228, 248; *Carpentier v. Webster*, 27 Cal. 544.

<sup>99</sup> Freeman, Cotenancy, § 232; *Carpentier v. Mendenhall*, 28 Cal. 484, 37 Am. Dec. 135; *Workman v. Guthrie*, 29 Pa. St. 495, 73 Am. Dec. 654.

<sup>100</sup> Co. Litt. 200b; 4 Kent, Comm. 369; 2 Cruise, Dig. tit. 12, c. 1, § 64; *Id.* tit. 20, c. 1, § 9; Freeman, Cotenancy, § 270.

<sup>101</sup> *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 330; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296; *Flack v. Gosnell*, 76 Md. 88, 35 Am. St. Rep. 413; *Report of the Judges*, 3 Bin. (Pa.) 599 (Appendix); *Huff v. McDonald*, 22 Ga. 161, 68 Am. Dec. 487; *Enterprise Oil & Gas Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746.

<sup>102</sup> 1 Stimson, Am. St. Law, § 1378; 3 Sharswood & B. Lead. Cas. Real Prop. 98; *Holmes v. Best*, 58 Vt. 547; *Fulmer's Appeal*, 128 Pa. St. 24, 15 Am. St. Rep. 662; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Huff v. McDonald*, 22 Ga. 161, 68 Am. Dec. 487.

That the statute does not apply by analogy to coparceners, see *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911.

The statute of Anne, according to the English decisions, gives a right of action for rents and profits actually received by a cotenant from third persons only, and not on account of the occupation of the land and utilization of its products by the cotenant himself; this view being based not only upon the language of the statute itself, but also on the ground that it would be unjust that the cotenant in possession, who has a right to the use of the land, and who perhaps makes it productive by his labors, should be compelled to divide his profits with another who does not choose to also exercise his right of occupancy.<sup>103</sup> In this country, the statute, or similar state statutes, have perhaps more usually received a like construction.<sup>104</sup> If, however, one tenant is actually ousted or excluded by a cotenant from the whole or any part of the property, the former may recover to the extent of the value of the use of which he has been deprived, though the latter does not receive rents or profits from others.<sup>105</sup> And one may, of course, have exclusive possession under an express or implied agreement to pay the others a rent therefor.<sup>106</sup>

<sup>103</sup> *Henderson v. Eason*, 17 Q. B. 701, 6 Gray's Cas. 652; *Job v. Patton*, L. R. 20 Eq. 84.

<sup>104</sup> *Freeman, Cotenancy*, § 275; *Newbold v. Smart*, 67 Ala. 326; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296; *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218; *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571; *Peck v. Carpenter*, 7 Gray (Mass.) 283, 66 Am. Dec. 477; *Badger v. Holmes*, 6 Gray (Mass.) 118; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458; *Enterprise Oil & Gas Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746; *Norris v. Gould*, 15 Wkly. Notes Cas. (Pa.) 187; *Webster v. Calef*, 47 N. H. 289; *Le Barron v. Babcock*, 122 N. Y. 153, 19 Am. St. Rep. 488; *Buckelew v. Snedeker*, 27 N. J. Eq. 82.

<sup>105</sup> *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407; *Zapp v. Miller*, 109 N. Y. 51; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296; *Osborn v. Osborn*, 62 Tex. 495; *Badger v. Holmes*, 6 Gray (Mass.) 118.

<sup>106</sup> *Freeman, Cotenancy*, § 164; *Cowper v. Fletcher*, 6 Best & S. 470; (392)

In some states, a view of the statute has been taken different from that above referred to, and one tenant is allowed to recover from a cotenant having exclusive possession his proportional share of the profits obtained by the latter's own occupation and use of the land.<sup>107</sup>

The statute of Anne has sometimes been held to authorize an action of *assumpsit* between cotenants for money had and received, as well as an account,<sup>108</sup> though the contrary view has been taken in England.<sup>109</sup>

§ 170. Contracts and conveyances by cotenant.

One cotenant has no implied authority, as a result of the relation, to bind another cotenant by a contract in regard to the common property, or, as a rule, by any other character of act.<sup>110</sup> Such acts by one cotenant, however, as can be regarded

*Boley v. Barutlo*, 120 Ill. 192; *Luther v. Arnold*, 8 Rich. Law (S. C.) 24, 62 Am. Dec. 422.

<sup>107</sup> *Medford v. Frazier*, 58 Miss. 241; *McPherson v. McPherson*, 33 N. C. 391, 53 Am. Dec. 416; *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. Rep. 552; *Thompson v. Bostick*, McMul. Eq. (S. C.) 75; *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372; *Early v. Friend*, 16 Grat. (Va.) 21, 78 Am. Dec. 649; *White v. Stuart*, 76 Va. 546; *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487; *Annely v. De Saussure*, 26 S. C. 497, 4 Am. St. Rep. 725. See, also, *Gage v. Gage*, 66 N. H. 282.

Occasionally the state statute expressly provides for liability in such case. *Woolley v. Schrader*, 116 Ill. 29; *Cutler v. Currier*, 54 Me. 81; *Knowles v. Harris*, 5 R. I. 402.

<sup>108</sup> *Freeman, Cotenancy*, §§ 280-284; *Brigham v. Eveleth*, 9 Mass. 538; *Shepard v. Richards*, 2 Gray (Mass.) 424; *Richardson v. Richardson*, 72 Me. 403.

<sup>109</sup> *Thomas v. Thomas*, 5 Exch. 32, 6 Gray's Cas. 650.

<sup>110</sup> *Freeman, Cotenancy*, §§ 168-173, 182; *Pearis v. Covillaud*, 6 Cal. 617, 65 Am. Dec. 543; *Omaha & Grant Smelting & Refining Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Clark v. Parker*, 106 Mass. 555; *Dexter Lime-Rock Co. v. Dexter*, 6 R. I. 353; *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395; *City of St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197, 9 Am. St. Rep. 334; *State v. Klein* (N. J. Law) 27 Atl. 902; *Hanks v. Enloe*, 33 Tex. 624; *Crippen v. Morss*, 49 N. Y. 67.

as beneficial to his cotenants, will, it seems, be regarded as the acts of all, provided no liability is directly imposed thereby upon the others.<sup>111</sup>

A cotenant cannot, by his conveyance of his undivided interest in a specific part of the land, affect the rights of the other cotenants, and consequently his grantee will take merely his interest therein, with no greater right than he himself had to be allotted that particular portion of the land in case of partition.<sup>112</sup> A court of equity will, however, according to some decisions, in making partition, allot the portion so conveyed to the grantee thereof if by so doing it does not injuriously affect the other cotenants;<sup>113</sup> and such a conveyance, if ratified by the cotenants, has the effect, it seems, of giving the grantee an absolute right to that particular portion of the land.<sup>114</sup>

In some states it is apparently the law that a conveyance of his interest in a specific part of a tract of land by one cotenant thereof, if not ratified by his cotenants, is absolutely nugatory

<sup>111</sup> Freeman, Cotenancy, §§ 174-178; *Rud v. Tucker*, Cro. Eliz. 802; *Crary v. Campbell*, 24 Cal. 637; *Loomis v. Pingree*, 43 Me. 299.

<sup>112</sup> Freeman, Cotenancy, § 198; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Worthington v. Staunton*, 16 W. Va. 208; *Charleston, C. & C. R. Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667; *Sewell v. Holland*, 61 Ga. 608; *Markoe v. Wakeman*, 107 Ill. 251; *Howze v. Dew*, 90 Ala. 178, 24 Am. St. Rep. 783; *Warthen v. Siefert*, 139 Ind. 233; *Tainter v. Cole*, 120 Mass. 162; *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429; *Jewett's Lessee v. Stockton*, 3 Yerg. (Tenn.) 492; *Dorn v. Dunham*, 24 Tex. 366; *Robinet v. Preston's Heirs*, 2 Rob. (Va.) 278; *Boggess v. Meredith*, 16 W. Va. 1.

<sup>113</sup> *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689; *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589; *Worthington v. Staunton*, 16 W. Va. 209; *McKee v. Barley*, 11 Grat. (Va.) 340; *Holcomb v. Coryell*, 11 N. J. Eq. 548.

<sup>114</sup> Freeman, Cotenancy, § 188; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112; *Great Falls Co. v. Worster*, 15 N. H. 412; *Dall v. Brown*, 5 Cush. (Mass.) 289; *Worthington v. Staunton*, 16 W. Va. 208; *Eaton v. Tallmadge*, 24 Wis. 217; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470; *Gordon v. City of San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73; *Crocker v. Tiffany*, 9 R. I. 505. But see *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

except as between the grantor and the grantee, and that it need not be recognized in any way by the cotenants;<sup>115</sup> but, more generally, the conveyance is regarded as valid, for the purpose of giving the grantee the right of possession with the cotenants of the part conveyed, though it cannot affect the rights of the cotenants to such part upon a partition.<sup>116</sup>

<sup>115</sup> *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76, 6 Gray's Cas. 609; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 168; *Duncan v. Sylvester*, 16 Me. 388, 6 Gray's Cas. 670; *Thompson v. Barber*, 12 N. H. 565; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Green v. Arnold*, 11 R. I. 364; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. So it has been held that a mortgage made by one of several coheirs upon his undivided interest in one of two tracts of land belonging to the ancestor is not only invalid if subsequently in the partition he is not allotted such mortgaged tract, but the mortgagee cannot demand that the court require the payment to him of the sum due for owelty of partition. *Marks v. Sewall*, 120 Mass. 174, 6 Gray's Cas. 676.

That such a conveyance is valid as against the grantor, see *Varnum v. Abbot*, 12 Mass. 474, 6 Gray's Cas. 613; *Cunningham v. Pattee*, 99 Mass. 250; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470.

Conceding that a conveyance by a cotenant of his undivided share in a single tract of land is entirely invalid except as against himself, it is sometimes suggested that the rule is different when the joint ownership extends to two or more distinct tracts, and that his conveyance of one of such tracts is valid in so far as it does not injure his cotenants. *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268, 6 Gray's Cas. 618; *Butler v. Roys*, 25 Mich. 53; *Primm v. Walker*, 38 Mo. 98; *Markoe v. Wakeman*, 107 Ill. 262; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Freeman, Cotenancy*, § 208. Contra, *Thompson v. Barber*, 12 N. H. 565, 6 Gray's Cas. 620; *Cunningham v. Pattee*, 99 Mass. 250, 6 Gray's Cas. 676; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470.

<sup>116</sup> *Freeman, Cotenancy*, §§ 199-204; *McKee v. Barley*, 11 Grat. (Va.) 346; *Barnhart v. Campbell*, 50 Mo. 599; *White's Lessee v. Sayre*, 2 Ohio, 110; *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429; *Crook v. Vandervoort*, 13 Neb. 505; *Camoron v. Thurmond*, 56 Tex. 22. See *Butler v. Roys*, 25 Mich. 53; *Stark v. Barrett*, 15 Cal. 361; *Markoe v. Wakeman*, 107 Ill. 263.

## § 171. Contribution as between cotenants.

A joint tenant, tenant in common, or coparcener cannot make improvements on the property without the consent of his cotenant, and then demand that the latter contribute a part of the cost thereof.<sup>117</sup> If, however, the cotenant agrees to pay part of the cost of the improvements, he is liable accordingly, and such an agreement may be implied as well as express.<sup>118</sup>

In equity it is held that a cotenant who makes improvements in good faith will be entitled, on partition of the property, to have assigned him as his share the portion which he has improved, if this can be done without injury to the other cotenants;<sup>119</sup> and, when this cannot be done, the other cotenants may be required, as a condition of partition, to pay to the improving tenant the amount to which their shares have been benefited by the improvements made by him in good faith, or he may be allowed for them out of the proceeds of the sale of the property

<sup>117</sup> *Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 142, 23 Am. Dec. 387; *Walter v. Greenwood*, 29 Minn. 87; *Stevens v. Thompson*, 17 N. H. 103; *Mumford v. Brown*, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; *Thurston v. Dickinson*, 2 Rich. Eq. (S. C.) 317, 46 Am. Dec. 56; *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353; *Kidder v. Rixford*, 16 Vt. 169, 42 Am. Dec. 504; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500; *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Husband v. Aldrich*, 135 Mass. 317.

<sup>118</sup> *Baird v. Jackson*, 98 Ill. 78; *Kidder v. Rixford*, 16 Vt. 169, 42 Am. Dec. 504; *Reed v. Jones*, 8 Wis. 421.

<sup>119</sup> *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Drennen's Adm'r v. Walker*, 21 Ark. 539; *Louvalle v. Menard*, 6 Ill. 39, 41 Am. Dec. 161; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *Crafts v. Crafts*, 13 Gray (Mass.) 360; *Hall v. Piddock*, 21 N. J. Eq. 311, 6 Gray's Cas. 673; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500; *Kelsey's Appeal*, 113 Pa. St. 119, 57 Am. Rep. 444; *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note; *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34; *Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480, and note. Contra, *Husband v. Aldrich*, 135 Mass. 317.



in the partition proceeding.<sup>120</sup> Moreover, a tenant making improvements is regarded in equity as entitled to the amount of the increase in the rent or profits due to such improvements, as against a claim by his cotenants for a part of the rent or profits.<sup>121</sup>

One tenant who, after requesting his cotenant to assist him in making repairs necessary for the preservation of a building or other erection on the land, and, on the cotenant's refusal so to do, makes them himself, may, by the weight of authority in this country, demand contribution from the other of a proportionate part of the cost.<sup>122</sup> In England and Massachusetts,

<sup>120</sup> *Hall v. Piddock*, 21 N. J. Eq. 311, 6 Gray's Cas. 673; *Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *Martindale v. Alexander*, 26 Ind. 105, 89 Am. Dec. 458; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Ward v. Ward's Heirs*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note; *Killmer v. Wuchner*, 79 Iowa, 722, 18 Am. St. Rep. 392; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502; *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34; *Johnson v. Pelot*, 24 S. C. 255, 58 Am. Rep. 253; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949. But that this will not be done unless special equities exist in favor of the cotenant making the improvements, see *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500.

<sup>121</sup> *Freeman, Cotenancy*, § 258; *Annely v. De Saussure*, 26 S. C. 497, 4 Am. St. Rep. 725; *Hannah v. Carver*, 121 Ind. 278; *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34; *Worthington v. Hiss*, 70 Md. 172; *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.). 138, 23 Am. Dec. 387.

A cotenant making improvements in the belief that he was sole owner has been allowed compensation under the betterment acts. *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50.

<sup>122</sup> *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Mumford v. Brown*, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; *Stevens v. Thompson*, 17 N. H. 103; *Beaty v. Bordwell*, 91 Pa. St. 441; *Kidder v. Rixford*, 16 Vt. 172, 42 Am. Dec. 504; *Farrand v. Gleason*, 56 Vt. 633; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Alexander v. Ellison*, 79 Ky. 148.

Occasionally the cases suggest that no actual request to the other cotenant to make repairs is necessary in order to cast a liability on him to make contribution, but that it may be implied from the relation

however, it has been decided that there is no such exception to the general principle that one who voluntarily expends money cannot recover any part thereof from another person who did not expressly or impliedly request the expenditure, and that, if one cotenant refuses to join in repairs, the only remedy which the other has is to demand a partition.<sup>123</sup>

A right of contribution also exists in case one tenant pays off a lien or incumbrance on the property, such as a claim for taxes.<sup>124</sup>

### § 172. Acquisition of adverse title.

In this country, it is considered that the community of interest between cotenants of land is such that it is not consistent with good faith or with the duty which each owes to the other that either of them should purchase and set up as against the others an outstanding adverse title, and consequently a conveyance of such a title to one tenant is regarded as inuring to the benefit of all, provided the other or others contribute a proportionate part of the cost of procuring it.<sup>125</sup> A few decisions

of cotenancy. *Fowler v. Fowler*, 50 Conn. 256; *Haven v. Mehlgarten*, 19 Ill. 91; *Moss v. Rose*, 27 Or. 595, 50 Am. St. Rep. 743.

<sup>123</sup> *Calvert v. Aldrich*, 99 Mass. 74, *Finch's Cas.* 973, 96 Am. Dec. 693; *Leigh v. Dickeson*, 15 Q. B. Div. 60. At common law, the writ de reparatione facienda lay at the instance of one cotenant to compel another to join with him in making repairs. *Co. Litt.* 200b; 4 *Kent*, Comm. 370. See *Calvert v. Aldrich*, 99 Mass. 76, 96 Am. Dec. 693; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

Without regard to whether one can recover by suit the cost of repairs which have been made by him, he is entitled to an allowance therefor in case of a suit by his cotenant against him for an accounting of rents and profits which are partially produced by the repairs. *Pickering v. Pickering*, 63 N. H. 468, 6 *Gray's Cas.* 663, *Finch's Cas.* 976; *Goodenow v. Ewer*, 16 Cal. 461; *Dech's Appeal*, 57 Pa. St. 467.

<sup>124</sup> *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28; *Titworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611; *Dickinson v. Williams*, 11 Cush. (Mass.) 258; *Watkins v. Eaton*, 30 Me. 529; *Clark v. Lindsey*, 47 Ohio St. 437; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

<sup>125</sup> *Van Horne v. Fenda*, 5 Johns. Ch. (N. Y.) 388, 6 *Gray's Cas.* 624: (398)

hold, however, that the rule applies only when the cotenants claim under the same title, and that, when tenants in common claim under different titles, there is no such relation of trust and confidence as calls for the application of the rule.<sup>126</sup>

This rule applies to a purchase by one cotenant at a foreclosure or execution sale,<sup>127</sup> or at a sale for taxes.<sup>128</sup> Likewise,

*Rothwell v. Dewees*, 2 Black (U. S.) 619, 6 Gray's Cas. 633; *Flagg v. Mann*, 2 Sumn. 490, Fed. Cas. No. 4,847; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Mandeville v. Solomon*, 39 Cal. 125; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118; *Tittsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 74; *Clark v. Lindsey*, 47 Ohio St. 437; *Dray v. Dray*, 21 Or. 59; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678.

The same principle has been applied as against the husband of a cotenant purchasing an outstanding title. *Rothwell v. Dewees*, 2 Black (U. S.) 613, 6 Gray's Cas. 633; *Robinson v. Lewis*, 68 Miss. 69, 24 Am. St. Rep. 254. See *Freeman, Cotenancy*, § 160.

A cotenant may, however, purchase a title which is not adverse; and so a colessee may purchase the reversion. *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227.

The rule referred to in the text has been considerably criticised as being based on an assumption of relations of confidence between cotenants which do not, in fact, exist, except in exceptional cases. See 9 Harv. Law Rev. 427.

<sup>126</sup> *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Moon v. Jennings*, 119 Ind. 130, 12 Am. St. Rep. 383; *Roberts v. Thorn*, 25 Tex. 728, 6 Gray's Cas. 637, 78 Am. Dec. 552; *Frentz v. Klotzsch*, 28 Wis. 312. And see *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388. Such a qualification of the rule is not mentioned in the decisions generally, and has been expressly repudiated. *Bracken v. Cooper*, 80 Ill. 221. And see *Rothwell v. Dewees*, 2 Black (U. S.) 619.

<sup>127</sup> *Smith v. Osborne*, 86 Ill. 606; *Gibson v. Winslow*, 46 Pa. St. 380, 34 Am. Dec. 552; *Kneels v. Barnhart*, 71 N. Y. 474; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569.

One tenant may, however, purchase at execution sale the share of a cotenant. *Freeman, Cotenancy*, § 165; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Gunter v. Laffan*, 7 Cal. 588; *Elston v. Piggott*, 94 Ind. 14; *Burr v. Mueller*, 65 Ill. 258.

<sup>128</sup> *Cohoa v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449; *Thompson*

a redemption from a tax sale or a purchase of a tax title within the redemption period inures to the benefit of all the cotenants,<sup>120</sup> though the tenant redeeming or purchasing is entitled to contribution from the others, and has a lien securing this right.<sup>120</sup>

The rule forbidding a cotenant to assert an adverse title against the others applies only so long as the cotenancy continues, and accordingly does not apply when they have been evicted by a stranger;<sup>121</sup> and if the land has been sold for taxes, and the time of redemption has expired, the relation is regarded as having ceased, and one who was a cotenant may purchase the tax title for himself.<sup>122</sup> The rule has been likewise held not to apply as between cotenants occupying antagonistic positions, as when one claims the whole title, to the exclusion of

*v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Johnson v. Brauch*, 9 S. D. 116, 62 Am. St. Rep. 857; *Downer's Adm'r's v. Smith*, 38 Vt. 464; *Goralski v. Kostuski*, 179 Ill. 177, 70 Am. St. Rep. 98.

<sup>120</sup> *Freeman, Cotenancy*, § 158; *Conn v. Conn*, 58 Iowa, 747, 6 Gray's Cas. 641; *Minter v. Durham*, 13 Or. 470; *Maul v. Rider*, 51 Pa. St. 377; *Easton v. Scofield*, 66 Minn. 425; *Page v. Webster*, 8 Mich. 263, 6 Gray's Cas. 631; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Battin v. Woods*, 27 W. Va. 58.

<sup>120</sup> *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637; *Hurley v. Hurley*, 148 Mass. 444; *Wilmot v. Lathrop*, 67 Vt. 671. See ante, note 124.

In some cases, the rule prohibiting the purchase by one cotenant at a tax sale is based, not on the confidential relations of the cotenants, but upon the theory that, since the cotenant is under an obligation to pay the taxes, he cannot acquire a title by his neglect of this obligation. *Hurley v. Hurley*, 148 Mass. 444; *Dubois v. Campau*, 24 Mich. 360; *Downer's Adm'r's v. Smith*, 38 Vt. 464.

<sup>121</sup> *Freeman, Cotenancy*, §§ 161, 162; *Coleman v. Coleman*, 3 Dana (Ky.) 398, 28 Am. Dec. 86; *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569; *Alexander v. Sully*, 50 Iowa, 192.

<sup>122</sup> *Kirkpatrick v. Mathiot*, 4 Watts & S. (Pa.) 251, 6 Gray's Cas. 628; *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637; *Reinboth v. Zerbe Run Imp. Co.*, 29 Pa. St. 139. Compare *Battin v. Woods*, 27 W. Va. 58.

the others, the relation of trust and confidence on which the rule is based not then existing.<sup>182</sup>

The cotenants entitled to the benefit of the rule must, within a reasonable time, contribute or offer to contribute their proportion of the price paid, and a failure so to do will be regarded as a repudiation of the transaction and abandonment of its benefits, and likewise, until this is done, they cannot demand a partition.<sup>184</sup>

### § 173. Actions by cotenants.

As a general rule, tenants in common should sue separately in a real action, since each has a separate and distinct freehold, while in trespass and other personal actions based on injury to the possession, which they have in common, they must join, unless there has been a severance of the claims.<sup>185</sup> Joint tenants likewise should sue together for injuries to the possession, and, as they hold by but one title, they must also sue together when the title to the land is involved.<sup>186</sup>

<sup>182</sup> *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312, 13 Barb. 561; *Larman v. Huey's Heirs*, 13 B. Mon. (Ky.) 436; *Wheeler v. Taylor*, 32 Or. 421; *King v. Rowan*, 10 Heisk. (Tenn.) 675; *Wright v. Sperry*, 21 Wis. 336.

<sup>184</sup> *Flagg v. Mann*, 2 Sumn. 487, Fed. Cas. No. 4,847; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Mandeville v. Solomon*, 39 Cal. 125; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *Boskowitz v. Davis*, 12 Nev. 446; *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *Buchanan v. King's Heirs*, 22 Grat. (Va.) 414; *Tittsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Hurley v. Hurley*, 148 Mass. 444.

<sup>185</sup> Litt. §§ 311, 315; *Freeman, Cotenancy*, § 331; *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489; *Throckmorton v. Burr*, 5 Cal. 400; *Hill v. Gibbs*, 5 Hill (N. Y.) 56; *Austin v. Hall*, 18 Johns. (N. Y.) 286; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *Stevenson v. Cofferin*, 20 N. H. 151; *Irwin's Adm'r v. Brown's Ex'rs*, 35 Pa. St. 331; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *May v. Slade*, 24 Tex. 207.

<sup>186</sup> Litt. § 311; 1 Washburn, Real Prop. 410; *Dewey v. Lambier*, 7 Cal. 347; *Webster v. Vandeventer*, 6 Gray (Mass.) 428. For statutory provisions on the subject, see 2 Sharswood & B. Lead. Cas. Real Prop. 29.

In ejectment, joint tenants and coparceners may sue either jointly or severally, according to the nature of the fictitious demise on which the action is based.<sup>137</sup> Tenants in common, on the other hand, since they have separate estates only, cannot make a joint demise, and accordingly, by some authorities, they cannot join in ejectment.<sup>138</sup> By other authorities it is stated that, though tenants in common cannot make a joint demise, they may, in one action, recover on separate demises of their undivided interests,<sup>139</sup> and the statute in some states provides that they may join.<sup>140</sup>

One tenant in common may, according to some authorities, recover the whole property, as against a stranger, for the benefit of all the cotenants, on the theory that, except as against his cotenants, he is entitled to possession of the whole.<sup>141</sup> According to other authorities, however, he can recover only his undivided share in the property.<sup>142</sup>

<sup>137</sup> Freeman, Cotenancy, §§ 339, 340; Adams, Ejectment, 210; Raper v. Lonsdale, 12 East, 39.

<sup>138</sup> Mantle v. Wollington, Cro. Jac. 166; White v. Pickering's Lessee, 12 Serg. & R. (Pa.) 435.

<sup>139</sup> Jackson v. Sidney, 12 Johns. (N. Y.) 185; Bronson v. Paynter, 20 N. C. 393; Wheat v. Morris, 21 D. C. 118; Carroll v. Norwood's Heirs, 5 Har. & J. (Md.) 155. See Adams, Ejectment, 210. In Jackson v. Bradt, 2 Caines (N. Y.) 173, Hoyle v. Stowe, 13 N. C. 318, and Bronson v. Paynter, 20 N. C. 393, it was even held that tenants in common could recover on a joint demise.

<sup>140</sup> Freeman, Cotenancy, § 341; Newell, Ejectment, 143-149.

<sup>141</sup> Treat v. Reilly, 35 Cal. 129; Allen v. Higgins, 9 Wash. 446, 43 Am. St. Rep. 847; King v. Bullock, 9 Dana (Ky.) 41; Newman v. Bank of California, 80 Cal. 368, 13 Am. St. Rep. 169; Sharon v. Davidson, 4 Nev. 416; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771; Robinson v. Roberts, 31 Conn. 145; Phillips v. Medbury, 7 Conn. 568; Overcash v. Ritchie, 89 N. C. 384; Sowers v. Peterson, 59 Tex. 216; Robinson v. Sherwin, 36 Vt. 69.

<sup>142</sup> King v. Hyatt, 51 Kan. 504, 37 Am. St. Rep. 304; Dewey v. Brown, 2 Pick. (Mass.) 387; Jackson v. Van Bergen, 1 Johns. Cas. (N. Y.) 101; Mobley v. Bruner, 59 Pa. St. 483, 98 Am. Dec. 360; Butrick v. Tilton, 141 Mass. 93; Marshall v. Palmer, 91 Va. 344, 50 Am. St. Rep. 838; Gray v. Givens, 26 Mo. 291; Johnson v. Hardy, 43 Neb. 368, 47 Am. St. Rep. 765.

## § 174. Voluntary partition.

Joint tenants, tenants in common, and coparceners may make partition by agreement among themselves; this involving merely the transfer to each cotenant by the other cotenants of a certain portion, designated by metes and bounds, of the whole property.

According to the English authorities, and also the decisions in a number of states, a partition by agreement must, to be valid under the Statute of Frauds, be in writing.<sup>143</sup> In perhaps a majority of the states, however, a parol partition is upheld when followed by possession by the various tenants of the portions allotted to them,—a view which is based on different grounds by different courts. Thus it is stated that such a partition is valid in the case of a tenancy in common because it involves merely a severance of the possession between the various owners, and not a transfer of title, as this is already severed.<sup>144</sup> Sometimes it is stated that a partition will be presumed from the exclusive possession by one tenant of a part of the premises for a considerable length of time.<sup>145</sup> Occasionally, the state Statute of Frauds, applying in terms only to a sale of lands, is held not to include a partition.<sup>146</sup> And sometimes the theory ap-

<sup>143</sup> Browne, St. Frauds, § 68; Johnson v. Wilson, Willes, 248; Woodhull v. Longstreet, 18 N. J. Law, 414; Duncan v. Sylvester, 16 Me. 390, 6 Gray's Cas. 670; Ballou v. Hale, 47 N. H. 347; Dow v. Jewell, 18 N. H. 340; Gardiner Mfg. Co. v. Heald, 5 Me. 384, 17 Am. Dec. 248; Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22; Woodhull v. Longstreet, 18 N. J. Law, 405.

<sup>144</sup> Jackson v. Bradt, 2 Calnes (N. Y.) 169; Wood v. Fleet, 36 N. Y. 501, 93 Am. Dec. 528; City of Natchez v. Vandervelde, 31 Miss. 706; Hauk v. McComas, 98 Ind. 460; Shepard v. Rinks, 78 Ill. 188; Byers v. Byers, 183 Pa. St. 509; 63 Am. St. Rep. 765; Bussell v. Gallagher, 28 Wis. 678.

<sup>145</sup> Lavalle v. Strobel, 89 Ill. 370; Markoe v. Wakeman, 107 Ill. 251; Russell's Heirs v. Marks' Heirs, 3 Metc. (Ky.) 37. And see Gregg v. Blackmore, 10 Watts (Pa.) 192.

<sup>146</sup> Meacham v. Meacham, 91 Tenn. 532; Moore v. Kerr, 46 Ind. 470.

In Texas, the decisions are based on the ground that the statute applies only to a sale of land, and not to the sale of an "interest" in

pears to be that one taking part in such a parol partition is estopped to deny its validity as against one who has received his share and erected improvements thereon.<sup>147</sup> A parol partition, followed by the taking of possession of their allotted parts by the various cotenants, may be upheld in a court exercising equitable powers on the ground that this constitutes such part performance as takes the case out of the statute, and authorizes a decree for specific performance.<sup>148</sup>

Upon a compulsory partition at common law between coparceners, a warranty was implied in favor of each on the part of the others that the title to the part of the land received by him was good, it not being considered just that one compelled to be a party to a partition should suffer thereby; and the statute of 31 Hen. VIII. c. 1 (A. D. 1539), provided that the same right should accrue to joint tenants and tenants in common in case of compulsory partition.<sup>149</sup> In the case of voluntary partition, however, a warranty was not implied, either as between coparceners, joint tenants, or tenants in common, the reason on which such a warranty was based in the case of a compulsory partition being entirely absent.<sup>150</sup> Occasionally, how-

land, therein differing from the English statute. *Stuart v. Baker*, 17 Tex. 419; *Aycock v. Kimbrough*, 71 Tex. 330.

<sup>147</sup> *Platt v. Hubbell*, 5 Ohio, 243; *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Bruce v. Osgood*, 113 Ind. 360.

<sup>148</sup> *Ebert v. Wood*, 1 Binn. (Pa.) 218, 6 Gray's Cas. 669, 2 Am. Dec. 436; *Goodhue v. Barnwell*, Rice, Eq. (S. C.) 236; *Tomlin v. Hilyard*, 43 Ill. 302; *Buzzell v. Gallagher*, 28 Wis. 678. See *Hazen v. Barnett*, 50 Mo. 507; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79.

<sup>149</sup> *Rawle, Covenants*, § 277; *Litt.* § 241. See *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245; *Grigsby v. Peak*, 68 Tex. 235, 2 Am. St. Rep. 487.

<sup>150</sup> *Rawle, Covenants*, § 277; *Morrice's Case*, 6 Coke, 12b, 6 Gray's Cas. 668; *Rector v. Waugh*, 17 Mo. 13; *Beardsley v. Knight*, 10 Vt. 185, 23 Am. Dec. 193; *Weiser v. Weiser*, 5 Watts (Pa.) 279; *Rountree v. Denison*, 59 Wis. 522.



ever, the courts have implied a warranty upon a voluntary partition.<sup>151</sup>

### § 175. Compulsory partition.

At common law, a tenancy in common or a joint tenancy could not be partitioned except by the agreement of all the owners, while a tenancy in parcenary could be partitioned on a writ of partition. The right to a writ of partition was, however, extended to joint tenants and tenants in common by 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32 (A. D. 1540), and other statutes regulating the procedure were subsequently passed.<sup>152</sup>

In the time of Elizabeth, if not earlier, the court of chancery began to take jurisdiction of suits for partition,<sup>153</sup> and by a statute passed in 1833 a bill in equity was made the only form of proceeding.<sup>154</sup> In this country, the jurisdiction of courts of equity has always been recognized, but in many of the states there are statutory provisions giving concurrent jurisdiction to common-law courts, or to the courts having probate jurisdiction, particularly in the case of partition of land belonging to a decedent's estate.<sup>155</sup>

<sup>151</sup> *Huntley v. Cline*, 93 N. C. 458; *Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 74; *Morris v. Harris*, 9 Gill (Md.) 26

In Pennsylvania, the courts have acted under the mistaken impression that there was, at common law, an implied warranty in the case of a voluntary partition between parceners, though not as between other cotenants, and have accordingly implied a warranty in the analogous case of tenants in common claiming by descent from a single ancestor. *Patterson v. Lanning*, 10 Watts (Pa.) 135, 36 Am. Dec. 154; *Feather v. Strohoecker*, 3 Pen. & W. (Pa.) 505, 24 Am. Dec. 342. See *Rawle, Covenants*, § 278, and notes.

<sup>152</sup> Litt. §§ 247, 290, 318; Co. Litt. 169a, 187a; 2 Bl. Comm. 185, 189, 194.

<sup>153</sup> Co. Litt. 169a, Hargrave's note, 23; 2 Cruise, Dig. tit. 18, c. 2, § 42 et seq; 1 Spence, *Equitable Jurisdiction*, 651; *Freeman, Cotenancy*, § 423.

<sup>154</sup> St. 3 & 4 Wm. IV. c. 27, § 36.

<sup>155</sup> *Freeman, Cotenancy*, § 428; 2 Dembits, *Land Titles*, 1168, § 155; 3 (405)

In England, no person can demand a partition unless he has an interest in possession, as distinguished from one in remainder or reversion, and this rule is generally in force in this country.<sup>156</sup> Nor, unless the statute contains a provision to the contrary, can partition be obtained as against a reversioner or remainderman by one who is the sole tenant in possession, the purpose of this proceeding being to distribute the possession between persons concurrently entitled thereto.<sup>157</sup>

A cotenant, in order to obtain partition, must, according to the view more generally prevailing, have actual or constructive possession, with a valid legal title, and the court will not undertake, in the suit for partition, to determine conflicting claims.<sup>158</sup> In a number of states, however, the statutes either expressly, or by the construction given them by the courts, authorize an adjudication, in the partition proceeding, of questions of title which may arise.<sup>159</sup>

Pomeroy, Eq. Jur. § 1378 et seq. For a summary of the statutes, see Freeman, Cotenancy, § 461a, note; 2 Dembitz, Land Titles, 1170, § 155.

<sup>156</sup> Freeman, Cotenancy, §§ 440, 446; 3 Pomeroy, Eq. Jur. § 1387, note; Evans v. Bagshaw, L. R. 8 Eq. 469, 5 Ch. App. 340; Wilkinson v. Stuart, 74 Ala. 198; Nichols v. Nichols, 28 Vt. 230, 67 Am. Dec. 699; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Sullivan v. Sullivan, 66 N. Y. 37; Cannon v. Lomax, 29 S. C. 369, 18 Am. St. Rep. 739; Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795. Contra, under particular statutes, Scofield v. Hilliard, 48 Ill. 453; Smith v. Gaines, 38 N. J. Eq. 65; Cook v. Webb, 19 Minn. 170; Deshong v. Deshong, 186 Pa. St. 227, 65 Am. St. Rep. 855; Atkinson v. Brady, 114 Mo. 200, 35 Am. St. Rep. 744.

<sup>157</sup> Selders v. Gilles, 141 Pa. St. 93; Metcalfe v. Miller, 96 Mich. 459, 85 Am. St. Rep. 617; Hodgkinson's Petition, 12 Pick. (Mass.) 374; Jameson v. Hayward, 106 Cal. 682, 46 Am. St. Rep. 268. See cases cited in note to Aydlett v. Pendleton, 32 Am. St. Rep. 778.

<sup>158</sup> Freeman, Cotenancy, § 447; Pomeroy, Eq. Jur. § 1388; Pierce v. Rollins, 83 Me. 172; Fenton v. Steere, 76 Mich. 405; Seymour v. Ricketts, 21 Neb. 240; Haeussler v. Missouri Iron Co., 110 Mo. 188, 33 Am. St. Rep. 431; Whitten v. Whitten, 36 N. H. 326; Brock v. Eastman, 23 Vt. 658.

<sup>159</sup> Freeman, Cotenancy, § 450; 2 Dembitz, Land Titles, § 155. See Weston v. Stoddard, 137 N. Y. 119; Holloway v. Holloway, 97 Mo. 628, 10 Am. St. Rep. 339; Gore v. Dickinson, 98 Ala. 363; Marshall v. Cre-  
(406)

In proceedings for partition, the court first determines the share to which each cotenant is entitled, and then the actual partition of the land by metes and bounds is made by commissioners or referees or a sheriff's jury, and their report, if satisfactory, is ratified by the court, and a final judgment or decree in accordance therewith is entered.<sup>160</sup> Such a decree, if rendered by a court of equity, operating, like all decrees in equity, *in personam* and not *in rem*,<sup>161</sup> does not, apart from statute, vest the title to his allotted share in each co-owner, and the co-owners are in such a case required by the court to make conveyances to each other. By statute, however, in most states, the decree, or a conveyance in accordance therewith by the commissioners or referees, is sufficient to pass the title in severalty to the various parties.<sup>162</sup>

If the property cannot be equally divided, a court of equity may equalize the shares by a decree that one taking the larger share shall pay a certain sum, called "owelty" (equality) of partition, to one receiving a less share, as a condition of carrying out the partition.<sup>163</sup>

By statute in most, if not all, of the states, the court may order a sale of the property if it is impossible to divide it equally, or to do so without prejudice to the interests of some of the parties. Apart from statute, the court has no power to order such a sale unless all the parties in interest agree thereto, and, even under the statutes, a sale will not be ordered unless the state of facts named in the statute clearly appear.<sup>164</sup>

hore, 13 Metc. (Mass.) 464; Street v. Benner, 20 Fla. 700; Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 53 Am. St. Rep. 804; Gage v. Bissell, 119 Ill. 298.

<sup>160</sup> Freeman, Cotenancy, c. 26.

<sup>161</sup> Story, Eq. Jur. § 652.

<sup>162</sup> Freeman, Cotenancy, § 527; 2 Dembitz, Land Titles, 1178.

<sup>163</sup> Freeman, Cotenancy, § 507; 3 Pomeroy, Eq. Jur. § 1389; Cox v. McMullin, 14 Grat. (Va.) 82; Cheatham v. Crews, 88 N. C. 38; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726.

<sup>164</sup> Freeman, Cotenancy, § 537 et seq.; 3 Pomeroy, Eq. Jur. § 1390; 3 Dembitz, Land Titles, §§ 153, 1156.

Property held in tenancy by entireties, and likewise community property, cannot be partitioned, though, after the termination of the marriage relation by divorce, and the consequent end of that peculiar form of tenancy, partition may be obtained.<sup>108</sup>

<sup>108</sup> Freeman, Cotenancy, §§ 64, 444, 445; *Kirkwood v. Domnan*, 30 Tex. 645, 26 Am. St. Rep. 770; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 531.

## **CHAPTER VIII.**

### **ESTATES AND INTERESTS ARISING FROM MARRIAGE**

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##### I. THE HUSBAND'S RIGHTS DURING COVERTURE.

At common law, the husband has an estate in his wife's freehold property other than future estates, which continues during their joint lives. Of the wife's chattels real, the husband has absolute control, with the right to dispose of them during his life, and they go to him if he survives her, while, if not so disposed of by him, they go to her on his death.

In equity, the husband's rights in his wife's property are sometimes modified, and they may be entirely excluded by provisions to that effect in the instrument transferring the property to the wife.

By statute in most, if not all, of the states, the husband's common-law rights in the wife's property are greatly modified or entirely excluded.

#### § 176. Rights at common law.

At common law, in those things in which the wife has a freehold estate, the husband has, by right of marriage, an estate carved out of his wife's estate, which may endure until his or her death, and which is therefore itself a freehold estate.<sup>1</sup> He is entitled to all the rents and profits, free from

<sup>1</sup> Co. Litt. 351a; 1 Roper, *Husb. & Wife*, 3; 2 Kent, *Comm.* 120; *Babb v. Perley*, 1 Ma. 6; *Finch's Cas.* 27; *Payne v. Parker*, 10 Ma. (410)

any claim by the wife.<sup>2</sup> He can alien the estate without the concurrence of his wife,<sup>3</sup> and it is liable to execution for his debts.<sup>4</sup>

The husband is not, however, considered as having the sole seisin, but this is in him and his wife jointly, in right of his wife, and accordingly they must sue jointly for any injury to the inheritance.<sup>5</sup> But since the husband alone is interested in the rents and profits, he can sue alone for them, or for any injury to them.<sup>6</sup>

This estate of the husband continues till the termination of coverture by his death or that of his wife,<sup>7</sup> or by divorce,<sup>8</sup>

181, 25 Am. Dec. 221; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 165; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Elliott v. Teal*, 5 Sawy. 249, Fed. Cas. No. 4,396.

He has such an estate, even in land assigned to her for dower in the estate of a previous husband, she having a freehold interest therein. *Neil v. Johnson*, 11 Ala. 615; *Barber v. Root*, 10 Mass. 260; *Van Note v. Downey*, 28 N. J. Law, 219; *Bachman v. Chrisman*, 23 Pa. St. 162.

<sup>2</sup> *Williams*, Real Prop. 223; *Nunn's Adm'r v. Givhan's Adm'r*, 45 Ala. 370; *Royston v. Royston*, 21 Ga. 161; *Clapp v. Inhabitants of Stoughton*, 10 Pick. (Mass.) 463; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236.

<sup>3</sup> *Co. Litt.* 325b, *Butler's note*, 280; *Robertson v. Norris*, 11 Q. B. 916; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Trask v. Patterson*, 29 Me. 499; *Butterfield v. Beall*, 3 Ind. 203; *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Jones v. Freed*, 42 Ark. 357.

<sup>4</sup> 2 Kent, Comm. 131; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Nicholls v. O'Neill*, 10 N. J. Eq. 90; *Beale v. Knowles*, 45 Me. 479; *Cheek v. Waldrum*, 25 Ala. 152.

<sup>5</sup> 1 Wm. Saund. 253, note; *Polyblank v. Hawkins*, 1 Doug. 329; *Nicholls v. O'Neill*, 10 N. J. Eq. 88; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 161; *Wyatt v. Simpson*, 3 W. Va. 394.

<sup>6</sup> 3 Kent, Comm. 131; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Dold's Trustee v. Geiger's Adm'r*, 2 Grat. (Va.) 98; *Mattocks v. Stearns*, 9 Vt. 326; *Fairchild v. Chastelleux*, 1 Pa. St. 176; *Clapp v. Inhabitants of Stoughton*, 10 Pick. (Mass.) 463.

<sup>7</sup> 3 Kent, Comm. 130; *Robertson v. Norris*, 11 Q. B. 916; *Payne v.*

or until there is issue of the marriage born alive, when this estate in right of the wife gives place to an estate of curtesy initiate in the husband's own right.<sup>9</sup> If the wife survive her husband, her estate of inheritance remains to her and her heirs, after his death, unaffected by any alienation made by him, or debts which he may have incurred, since he has no power, by his acts, to affect more than his own interest.<sup>10</sup>

— In chattels real of wife.

The wife's chattels real become, at common law, the property of the husband for certain purposes. He may dispose of them during his lifetime without her consent, they are liable for his debts, and the rents and profits belong to him, and after her death he takes them absolutely. If she survive him, and he has not disposed of them during his life, they belong to her.<sup>11</sup> He cannot dispose of them by will, as he can in the case of personal chattels.<sup>12</sup>

§ 177. Equitable modifications of husband's rights.

At an early day, courts of equity introduced the doctrine

Parker, 10 Me. 181, 25 Am. Dec. 221; *Evans v. Kingsberry*, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

<sup>9</sup> *Wright v. Wright's Lessee*, 2 Md. 429, 56 Am. Dec. 723; *Barber v. Root*, 10 Mass. 260; *Mattocks v. Stearns*, 9 Vt. 326; *Oldham v. Henderson*, 5 Dana (Ky.) 254.

<sup>10</sup> *Roper, Husband & Wife*, 3; 2 *Pollock & Maitland, Hist. Eng. Law*, 405; 2 *Kent, Comm.* 130; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398.

<sup>11</sup> *Williams, Real Prop.* 227; 1 *Roper, Husband & Wife*, 56; *Bruce v. Wood*, 1 Metc. (Mass.) 542; *Mellus v. Snowman*, 21 Me. 201; *Rogers v. Brooks*, 30 Ark. 612; *Evans v. Kingsberry*, 2 Rand. (Va.) 120, 14 Am. Dec. 779; *Stroebe v. Fehl*, 22 Wis. 337.

<sup>12</sup> *Co. Litt.* 46b, 300a, 351a; 2 *Bl. Comm.* 434; 2 *Kent, Comm.* 134; *Moody v. Matthews*, 7 Ves. 174; *Mitford v. Mitford*, 9 Ves. 99; *Lawes v. Lumpkins*, 18 Md. 334; *Meriwether v. Booker*, 5 Litt. (Ky.) 254; *Allen v. Hooper*, 50 Me. 371; *Barron v. Barron*, 24 Vt. 375, 290; *Riley's Adm'r v. Riley*, 19 N. J. Eq. 229.

<sup>13</sup> *Co. Litt.* 351a; 2 *Bl. Comm.* 434; 2 *Kent, Comm.* 134.



of the wife's "equity to a settlement," by which, when the husband came into equity for the purpose of relief as regards his wife's property, real or personal, or jurisdiction was otherwise obtained of the wife's property, he was compelled to make a provision out of it for the support of his wife and children, this being merely an application of the equitable maxim that he who seeks equity must do equity.<sup>13</sup>

The equity to a settlement being found to afford but imperfect protection to the wife, courts of equity in time permitted property of every kind to be settled upon the wife to her own separate and exclusive use, free from the control of her husband, and from liability for his debts.<sup>14</sup> Property thus settled upon the wife received generally the designation of her "sole and separate estate," and may conveniently be termed her "equitable separate estate," to distinguish it from her "statutory separate estate," hereafter considered.<sup>15</sup>

It was at one time regarded as necessary that the legal title to the property so freed from the husband's control be

<sup>13</sup> 2 Kent, Comm. 139; 2 Pomeroy, Eq. Jur. §§ 1114-1118; *Sturgis v. Champreys*, 5 Mylne & C. 97; *Elibank v. Montolieu*, 5 Ves. 737; 1 White & T. Lead. Cas. Eq. 623; *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 464; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249; *Barron v. Barron*, 24 Vt. 375; *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733; *Duvall v. Farmers' Bank*, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; *Page v. Estes*, 19 Pick. (Mass.) 269; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; *Barron v. Barron*, 24 Vt. 392.

<sup>14</sup> 2 Kent, Comm. 162; 2 Story, Eq. Jur. § 1378 et seq.; 2 Perry, Trusts, c. 22; 2 Pomeroy, Eq. Jur. §§ 1098-1110; *Bank of Greensboro v. Chambers*, 30 Grat. (Va.) 202, 32 Am. Rep. 661; *Botts v. Gooch*, 97 Mo. 82, 10 Am. St. Rep. 286; *Richardson v. De Giverville*, 107 Mo. 422, 23 Am. St. Rep. 426; *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184.

<sup>15</sup> The word "estate" is here used, it is to be observed, in the sense of property, as when we speak of a decedent's "estate" a use of the word which is to be distinguished from its use to signify a certain quantum of ownership measured by duration.

vested in trustees, and this is the regular mode in which such a provision for the wife is made; but it later became settled that, if property be given or devised to a married woman for her separate and exclusive use, even without the intervention of trustees, her interest will be protected from the claims of her husband and of his creditors; the husband, in such case, though he obtains a legal estate in the property for their joint lives, being regarded as a trustee for the wife.<sup>16</sup> The words used most frequently to create this estate are "sole and separate use," but any language is sufficient, provided it shows a clear intention to exclude all control by the husband.<sup>17</sup>

The instrument vesting the property in the wife may restrict her powers over it, and may even absolutely prohibit its alienation by her, this exception to the general rule forbidding absolute restraints on alienation being allowed in order that she may be protected from the effects of the husband's persuasion.<sup>18</sup> In England and in some of the states of this country, in the absence of such a restraint on alienation, the wife is free to convey or charge such estate as she may choose. In other states, a different view is taken, and the wife is held to have such powers of disposition only as are

<sup>16</sup> 2 Story, Eq. Jur. § 1380; Williams, Real Prop. 224; Fears v. Brooks, 12 Ga. 195, Finch's Cas. 571; Riley v. Riley, 25 Conn. 154, 161; Jones v. Clifton, 101 U. S. 225; Boykin v. Ciples, 2 Hill, Eq. (S. C.) 200, 29 Am. Dec. 67; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101; Wood v. Wood, 83 N. Y. 575, 579; Long's Adm'r v. White's Adm'rs, 5 J. J. Marsh. (Ky.) 226; Armstrong v. Ross, 20 N. J. Eq. 109; Bennet v. Davis, 2 P. Wms. 316; Harkins v. Coalter, 2 Port. (Ala.) 463; Fears v. Brooks, 12 Ga. 195; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101.

<sup>17</sup> 2 Perry, Trusts, §§ 648-650; 1 Pomeroy, Eq. Jur. § 1108; Stewart, Husband & Wife, § 200; 2 Story, Eq. Jur. §§ 1331-1334; Fears v. Brooks, 12 Ga. 195, Finch's Cas. 571.

<sup>18</sup> 2 Perry, Trusts, § 646; 2 Pomeroy, Eq. Jur. § 1107; Brandon v. Robinson, 18 Ves. 434; Gray, Restraints, Allen. Prop. §§ 140, 272.

expressly given by the instrument creating the estate.<sup>19</sup> The power of a married woman to make a conveyance of property which is held to her separate use is furthermore usually restricted by the general requirement that the consent of her husband must be given in writing to any conveyance by her of her real property.<sup>20</sup>

The rights of the husband are suspended only during coverture, and, on the wife's death, he has the same rights in her separate estate as in her property not so limited, unless such rights are excluded by the terms of the instrument vesting the property in her, or by some agreement to that effect,<sup>21</sup> or unless she dispose of the property by will, in those jurisdictions where her right to so dispose of it is recognized.<sup>22</sup>

#### § 178. Statutory modifications of husband's rights.

The husband's common-law interest in his wife's real property and chattels real, as well as in her personal chattels, has been abrogated or greatly diminished by what are known as the "married women's property acts." Property thus held by the wife, freed either wholly or in part from any claim or control by the husband, is known as the wife's "statutory

<sup>19</sup> Williams, Real Prop. p. 225, note; 2 Pomeroy, Eq. Jur. §§ 1104, 1105; Stewart, Husband & Wife, §§ 203-205, 208, 344; 2 Perry, Trusts, §§ 661, 665; Taylor v. Meads, 4 De Gex, J. & S. 597; Ewing v. Smith, 3 Desaus. (S. C.) 417, 5 Am. Dec. 557, and note; Thomas v. Folwell, 2 Whart. (Pa.) 11, 30 Am. Dec. 230.

<sup>20</sup> 2 Perry, Trusts, § 656; Schouler, Domestic Relations, § 133; 2 Story, Eq. Jur. § 1391. See post, § 501.

<sup>21</sup> 2 Pomeroy, Eq. Jur. § 1110; Stewart, Husband & Wife, § 214; Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151; Payne v. Payne, 11 B. Mon. (Ky.) 138; Richardson v. Stodder, 100 Mass. 528. See post, § 208.

<sup>22</sup> Taylor v. Meads, 4 De Gex, J. & S. 597; Schull v. Murray, 32 Md. 9; Wells v. Bransford, 28 Ala. 200, 212; Cutter v. Butler, 25 N. H. 343, 351, 57 Am. Dec. 330; Pool v. Blakie, 53 Ill. 495.

separate estate."<sup>23</sup> The wife's real property acquired by her before marriage is, it seems, in all the states, her statutory separate property,<sup>24</sup> while in most of the states real property acquired by her after marriage, by devise, descent, purchase, or otherwise, is likewise withdrawn by statute from the husband's control.<sup>25</sup> This statutory separate property is not liable for the husband's debts,<sup>26</sup> and, as is in effect stated in its definition, the husband's rights of control and disposition thereover are either wholly or partially excluded.<sup>27</sup> The husband has, however, such a right of possession as is incidental to his right to live with his wife, since these statutes do not affect the family relations.<sup>28</sup>

The power of the wife to dispose of such separate estate is usually determined by the provisions of the statute by

<sup>23</sup> Stewart, Husband & Wife, §§ 150, 232, 243; 1 Washburn, Real Prop. 282, note; Vreeland v. Schoonmaker, 16 N. J. Eq. 517.

<sup>24</sup> 1 Stimson, Am. St. Law, § 6420.

<sup>25</sup> 1 Stimson, Am. St. Law, § 6422.

<sup>26</sup> 1 Stimson, Am. St. Law, §§ 6410, 6420; 22 Am. & Eng. Enc. Law (1st Ed.) 55 et seq.; Aldridge v. Muirhead, 101 U. S. 397; Bridges v. McKenna, 14 Md. 258; Rudd v. Peters, 41 Ark. 177; Hunter's Appeal, 40 Pa. St. 194; Dean v. Bailey, 50 Ill. 481, 99 Am. Dec. 533; Wheeler v. Jennings, 16 B. Mon. (Ky.) 476; Buckley v. Wells, 33 N. Y. 518; Stratton v. Bailey, 80 Me. 345; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Martin v. Remington, 100 Wis. 540, 68 Am. St. Rep. 941.

Occasionally a statute has excluded the liability of the wife's property for the husband's debts without affecting his common-law rights thereto. See Weems v. Weems, 19 Md. 334; Johnson v. Chapman, 35 Conn. 550.

<sup>27</sup> Perry v. Mechanics' Mut. Ins. Co., 11 Fed. 485; Sampley v. Watson, 43 Ala. 377; Chevete v. Mason, 4 G. Greene (Iowa) 231; Levi v. Earl, 30 Ohio St. 147; Hach v. Hill (Mo.) 14 S. W. 739; Mygatt v. Coe, 152 N. Y. 457, 57 Am. St. Rep. 521; Wells v. Batta, 112 N. C. 283, 34 Am. St. Rep. 506.

<sup>28</sup> Stewart, Husband & Wife, § 233; Cole v. Van Riper, 44 Ill. 53; Reagle v. Reagle, 179 Pa. St. 89; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; Bledsoe v. Simms, 53 Mo. 305. See Mygatt v. Coe, 152 N. Y. 457, 57 Am. St. Rep. 521.

which it is created. Her statutory separate real property she cannot, perhaps in the majority of states, dispose of by conveyance without the joinder, or at least the written consent, of her husband, though in some states the statute clearly gives her power so to do.<sup>29</sup>

A fuller discussion of these various statutes and of their construction by the courts must be sought in treatises dealing with the property rights of husband and wife, and, owing to the very great divergencies between the different statutes, an accurate knowledge of the law in this regard in any state can be obtained only by a study of the local statutes, and the decisions thereunder.

## II. DOWER.

Dower is the estate to which a widow is entitled, at common law, for the period of her life, in one-third of the lands and tenements of which her husband was seised in fee simple or fee tail, and which her issue, if any, might inherit.<sup>30</sup>

<sup>29</sup> Schouler, *Domestic Relations*, §§ 133, 150; 22 Am. & Eng. Enc. Law, 41 et seq. That his joinder is necessary, see *Naylor v. Field*, 29 N. J. Law, 287; *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17; *Cole v. Van Riper*, 44 Ill. 58; *Brady v. Gray*, 17 Ky. Law Rep. 512; *Sutton v. Casseleggi*, 77 Mo. 397; *Dunham v. Wright*, 53 Pa. St. 167; *Austin v. Brown*, 87 W. Va. 634; *Greenholts v. Haeffer*, 53 Md. 184. That his joinder is unnecessary, see *Brown v. Kimbrough*, 55 Ga. 41; *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690; *Farr v. Sherman*, 11 Mich. 33; *Libby v. Chase*, 117 Mass. 105; *Springer v. Berry*, 47 Ma. 330.

Under a statute giving the wife the same rights and powers over her separate property as if unmarried, she has been held to have the right to dispose of it alone, *Beal v. Warren*, 2 Gray (Mass.) 447; while a different effect has been given to a statute merely authorizing her to hold and enjoy her property as if unmarried, *Cole v. Van Riper*, 44 Ill. 58; *Naylor v. Field*, 29 N. J. Law, 287; *Moore v. Cornell*, 63 Pa. St. 320.

<sup>30</sup> There were formerly in England other kinds of dower besides that which still survives, and which is distinguished by the name of "common-law dower." These were dower by special custom,

While at common law it was necessary that the husband have seisin of the land or tenements, it is sufficient, it seems, at the present day, that the husband have a present estate of inheritance, and that there be no adverse possession in another.

The right to dower exists, though the title passed out of the husband immediately after its acquisition by him, but it is inferior to rights which accrued to another from the husband by the transaction which vested title in the latter.

Dower is usually allowed in lands in which the husband had an equitable interest corresponding to a legal estate of inheritance, including lands claimed under a contract of purchase, mortgaged lands, and also in personalty regarded in equity as land. There is no right of dower if the husband had merely a bare legal interest.

There is no dower in land in which the husband had only a future estate expectant on the termination of a prior freehold interest.

Dower exists in land held by the husband in tenancy in common or coparcenary, but not in that held in joint tenancy, except as a result of statutory changes. In land belonging to a partnership, the wives of the partners are usually entitled to dower in the surplus after payment of the firm obligations.

Dower is barred or defeated by:

(1) A conveyance by the husband before marriage, if not made in fraud of his wife's rights, though a conveyance by him after marriage will not have that effect.

(2) The destruction of the husband's estate either by title

dower ad ostium ecclesiae, dower ex assensu patris, and dower de la plus beale. The latter was abolished with the abolition of tenure in chivalry by the statute of 12 Car. II. c. 24. Dower by special custom never existed in this country, though special modifications of the dower right exist in various localities as a result of statutory provisions. Dower ad ostium ecclesiae and dower ex assensu patris involved voluntary endowment by the husband, and were abolished in England by the dower act of 3 & 4 Wm. IV. c. 105, § 13. They never existed in this country, but they are to some extent now represented by the institutions of jointure and marriage settlements. See 2 Bl. Comm. 132.

paramount, by entry for breach of condition, or by sale under a mortgage or other lien.

(3) A written release by the wife in favor of one having a freehold estate in the land, this being usually contained in the husband's conveyance or mortgage of the land.

(4) A testamentary provision by the husband in favor of the wife in lieu of her dower rights, provided she elect to accept thereof.

(5) An antenuptial contract by the wife releasing dower in consideration of another provision made for her, this being quite generally known as "jointure."

(6) A divorce, or, in some states, a divorce for the wife's fault only.

(7) The elopement and adultery of the wife, in some states.

(8) Conduct on the wife's part constituting an estoppel as against her right to claim dower.

Until the husband's death, the wife has a mere contingent right in her husband's lands, known as "dower inchoate," which she may release, but not convey. After his death, her dower right ceases to be contingent, and is known as "dower consummate," and it may be conveyed by her in equity, and, in some states, at law. She has, however, no dower estate till dower has been assigned to her.

The ascertainment and setting off to the widow of the part of the husband's property in which the estate of dower shall exist is known as the "assignment of dower." The assignment must be of one-third the productive value of the property at the time of assignment, except that improvements by an alienee of the husband are not to be included in the valuation.

If dower is not assigned to the widow, she may institute proceedings to compel assignment, and may therein usually recover damages for delay in assignment, or may, in an equitable proceeding, have an account of rents and profits.

Dower has been abolished by statute in some states; the widow being sometimes given an absolute share in the husband's land in lieu of dower, while in some states she has the right to elect between dower and a statutory share.

The widow has the right to remain in her husband's house for a period of forty days from his death, or, by statute in many states, for a longer period. This right is termed the "widow's quarantine."

### § 179. Necessity of marriage.

A lawful marriage is necessary to give a right to dower,<sup>31</sup> though a marriage which is voidable only, and not void, is sufficient if not annulled during the life of the husband.<sup>32</sup> As in other cases, the legality of the marriage for this purpose is determined by the law of the place where it is celebrated.<sup>33</sup>

### § 180. Seisin of the husband.

It is stated, especially in the older books, that, to entitle the widow to dower, the husband must have been "seised during coverture."<sup>34</sup> So far as this involves the exclusion of dower in land transferred by the husband before marriage, its effect will be considered elsewhere,<sup>35</sup> but at present we are concerned with the question of what circumstances render the husband "seised," and to what extent such "seisin" in him

<sup>31</sup> Co. Litt. 33a; *Higgins v. Breen*, 9 Mo. 497; *Jones v. Jones*, 28 Ark. 19, *Finch's Cas.* 656; *Cropey v. Ogden*, 11 N. Y. 228. Accordingly, there is no dower if either party to the marriage had a spouse living at the time of the marriage. *Smith v. Smith*, 5 Ohio St. 32, *Finch's Cas.* 657; *Smart v. Whaley*, 6 Smedes & M. (Miss.) 308; *De France v. Johnson*, 26 Fed. 891; *Price v. Price*, 124 N. Y. 539. Or if the husband was non compos mentis at that time. *Jenkins v. Jenkins' Heirs*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; 2 Bl. Comm. 130; 1 Scribner, *Dower*, 122. But see *Wiser v. Lockwood's Estate*, 42 Vt. 720.

<sup>32</sup> Co. Litt. 33a; 1 Cruise, Dig. tit. 4, c. 1, § 18; 1 Scribner, *Dower*, 114, 135; *Bonham v. Badgley*, 7 Ill. 622; *Tompert's Ex'rs v. Tompert*, 13 Bush (Ky.) 326, 26 Am. Rep. 197.

<sup>33</sup> 1 Scribner, *Dower*, 147; *Putnam v. Putnam*, 3 Pick. (Mass.) 433; *Dickson v. Dickson's Heirs*, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444.

<sup>34</sup> Litt. § 30; Co. Litt. 31a; 2 Bl. Comm. 131; *Park, Dower*, 24.

<sup>35</sup> See post, § 183.



is to be regarded as an existing requirement in the case of dower. Since the transfer of land does not now, as at common law, involve actual livery of seisin, these questions may readily arise when one, having title to land by a valid transfer from another, dies without having taken possession of the land, leaving a widow.<sup>36</sup>

As before stated, the effect of a conveyance under the Statute of Uses is to transfer the seisin out of the grantor;<sup>37</sup> and consequently, provided the grantor was not dis-seised, the grantee has seisin for all purposes, including that of dower,<sup>38</sup> and any conveyance, if supported by a sufficient consideration, would no doubt be regarded as taking effect under the Statute of Uses, if necessary to support dower. Even under the statutory provision, existing in many states, that land may be conveyed by a simple deed, without livery of seisin, or without act or ceremony other than such deed,<sup>39</sup> it might be considered that a deed is equivalent to livery of

<sup>36</sup> In some comparatively early decisions in this country the recording of a conveyance was regarded as equivalent to livery of seisin. *Thomas v. Thomas*, 32 N. C. 123; *Talbott v. Armstrong*, 14 Ind. 254; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; *Ward v. Fuller*, 15 Pick. (Mass.) 185; *Patton v. Brown*, Brunner, Col. Cas. 185, Fed. Cas. No. 10,832; *Patton v. Rely*, Brunner, Col. Cas. 180, Fed. Cas. No. 10,838; *Rogers' Lessee v. Cawood*, 1 Swan (Tenn.) 142, 55 Am. Dec. 729. But, as a general rule, in view of the purpose of the recording laws, the failure to record the conveyance to the husband would certainly not affect the widow's right of dower except as against a subsequent bona fide purchaser for value from the grantor of the husband. See *Pickett v. Lyles*, 5 Rich. (S. C.) 275; *Sutton v. Jervis*, 31 Ind. 265.

<sup>37</sup> *Ante*, § 88.

<sup>38</sup> *Park, Dower*, 34; 1 *Scribner, Dower*, 265. In these books it is stated that seisin in law is conferred by the statute. As stated in a previous section of this work, seisin in deed passes by a conveyance under the statute. See *ante*, § 88.

<sup>39</sup> 1 *Stimson, Am. St. Law.* § 1470. As to the conflicting views whether the English statute 8 & 9 Vict. c. 106, providing that corporeal tenements and hereditaments shall be deemed to lie in grant as well as in livery, makes a grant effective to confer seisin, see article by Charles Sweet, Esq., 12 *Law Quart. Rev.* 245.

seisin, and will confer the seisin on the grantee for all purposes, provided, at least, there is no adverse possession of the land.

Without reference, however, to the character of the conveyance, the term "seisin" has, as before indicated,<sup>40</sup> been applied, since the Statute of Uses, at least among conveyancers, to the case of one "having the legal estate, either in possession or reversion; provided that it has not been turned into a mere right of entry, as where a wrongdoer has obtained actual possession."<sup>41</sup> This view, that the seisin, in the absence of adverse possession, follows the legal title, has occasionally been adopted by courts in this country,<sup>42</sup> and there is a strong implication to the same effect in the decisions which, while in terms stating, in regard to dower, that the husband must have been seised during coverture, mean thereby merely that he must have had an estate of a certain character,<sup>43</sup> as well as in those which, while stating that the proof by the widow of seisin in the husband is sufficient if she shows that he was in possession under claim of title, mean thereby merely that this is sufficient evidence of title.<sup>44</sup>

<sup>40</sup> Ante, § 15.

<sup>41</sup> Goodeve, *Real Prop.* (3d Ed., by Sir H. Elphinstone) 365, approved by Charles Sweet, Esq., 12 *Law Quart. Rev.* 245.

<sup>42</sup> *Farwell v. Rogers*, 99 *Mass.* 33; *McIntyre v. Costello*, 14 *N. Y. St. Rep.* 370; *Day v. Solomon*, 40 *Ga.* 32; *Green v. Litter*, 8 *Cranch* (U. S.) 247; *Atwood v. Atwood*, 22 *Pick. (Mass.)* 283; 1 *Stimson, Am. St. Law*, § 1400. See, also, *Pledger v. Ellerbe*, 6 *Rich. Law* (S. C.) 266, 60 *Am. Dec.* 123. As to the necessity of seisin for curtesy, see post, § 205.

<sup>43</sup> *Blood v. Blood*, 23 *Pick. (Mass.)* 80; *Butler v. Cheatham*, 3 *Bush* (Ky.) 594; *Apple v. Apple*, 1 *Head* (Tenn.) 348; *Barnes v. Raper*, 90 *N. C.* 189; *Mann v. Edson*, 39 *Me.* 25; *Pledger v. Ellerbe*, 6 *Rich. Law* (S. C.) 266, 60 *Am. Dec.* 123; *Tate v. Jay*, 31 *Ark.* 579; *Ware v. Washington*, 6 *Smedes & M. (Miss.)* 737; *Rands v. Kendall*, 15 *Ohio*, 671; *Pritts v. Ritchey*, 29 *Pa. St.* 71.

<sup>44</sup> *Gordon v. Dickison*, 131 *Ill.* 141; *Mann v. Edson*, 39 *Me.* 25; *Griggs v. Smith*, 13 *N. J. Law*, 22; *Jackson v. Waltermire*, 7 *Cow.*

In some states, owing to decisions on the analogous subject of curtesy,<sup>45</sup> it may no doubt be considered that, even when there was adverse possession of the land, the widow will be given dower, but generally, it would seem, a different view will be taken, in the absence of a statutory provision on the subject. Accordingly, the widow of one who had a right to re-enter for breach of a condition, and failed to do so, is not entitled to dower.<sup>46</sup>

In England and in a few states in this country, it is now provided by statute that a widow shall be dowable of land as to which her husband had a right of action or entry merely, thus dispensing with the requirement of seisin.<sup>47</sup>

Seisin in law, as distinguished from seisin in deed, has always been regarded as sufficient to support dower, and consequently it is stated by the older writers that, though the husband fail to enter on land which passes to him by descent, the widow is entitled to dower.<sup>48</sup>

#### § 181. Duration of the seisin—Transitory seisin.

In order that the widow be entitled to dower, the husband's ownership or "seisin" need not have continued for any particular time, it being sufficient that it was but momentary, the title passing out of him immediately after its acquisition.<sup>49</sup>

(N. Y.) 353; *Torrence v. Carbry*, 27 Miss. 697; *Pickett v. Lyles*, 5 Rich. (S. C.) 275.

<sup>45</sup> Post, § 205.

<sup>46</sup> *Park, Dower*, 25; 1 Cruise, Dig. tit. 6, c. 1, § 20; *Ellis v. Kyger*, 30 Mo. 600; *Thompson v. Thompson*, 46 N. C. 430.

<sup>47</sup> *Challis, Real Prop.* 281; 1 Stimson, Am. St. Law, § 3211; 1 Scribner, *Dower*, 258.

<sup>48</sup> Co. Litt. 31a; *Park, Dower*, 31; 1 Cruise, Dig. tit. 6, c. 1, § 19; 2 Bl. Comm. 131; 4 Kent, Comm. 37. See, as to seisin in law, ante, § 15.

<sup>49</sup> *McCauley v. Grimes*, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; *Stanwood v. Dunning*, 14 Me. 290; *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243; *Griggs v. Smith*, 12 N. J. Law, 22; *Sutherland v.*

It is generally in connection with the question of the duration of the seisin or title that consideration is given to a class of cases in which the title to land is acquired and disposed of by separate instruments, which, however, constitute together but one transaction, and in such cases the title of the husband, frequently termed "transitory seisin," is not considered to be of such a character as to support dower, as against the rights of those in favor of whom a disposition is thus simultaneously made by the husband.<sup>50</sup> In such cases, the husband is considered not to have a beneficial interest as against the person in favor of whom rights are created, but to be in effect a mere "conduit of title."<sup>51</sup>

The most common instance of the application of this principle is seen in the cases in which a purchaser of property, on receiving a deed thereof, gives to his vendor a "purchase-money mortgage," as it is called, to secure the payment of the whole or a part of the purchase price. In such case, the deed and mortgage are considered parts of one transaction, and the purchaser does not have such a title as will give a right of dower to his wife as against the mortgagee, though

Sutherland, 69 Ill. 481. In *Broughton v. Randall*, Cro. Eliz. 502, a case often referred to by the text writers, where a father and son, who were joint tenants, were hanged at the same time, and the son appeared to struggle longer than the father, it was held that he was seised, after his father's death, for such a period as to entitle his widow to dower.

<sup>50</sup> 2 Bl. Comm. 132; 1 Scribner, Dower, 271; 4 Kent, Comm. 83; *Amcotts v. Catherich*, Cro. Jac. 615, 6 Gray's Cases, 728; *Adams v. Hill*, 29 N. H. 202, 6 Gray's Cas. 736; *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552, Finch's Cas. 664; *Moore v. Esty*, 5 N. H. 479; *Hugunin v. Cochrane*, 51 Ill. 302, 2 Am. Rep. 303; *Johnson v. Plume*, 77 Ind. 166; *Stanwood v. Dunning*, 14 Me. 290, 6 Gray's Cas. 733; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243.

<sup>51</sup> See *McCauley v. Grimes*, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Douglass v. Dickson*, 11 Rich. Law (S. C.) 417; 2 Bl. Comm. 132, Coleridge's notes.

as against all others she is entitled to dower.<sup>52</sup> In some states there is a statutory provision confirmatory of this rule in favor of the holder of a purchase-money mortgage.<sup>53</sup> The same principle applies when the purchaser of the property, instead of giving a purchase-money mortgage to the vendor, gives a mortgage, in pursuance of a prior agreement, and as a part of the same transaction, to a third person, who furnishes the purchase money, and the right of dower is subordinate to the mortgage so given.<sup>54</sup> And even though no mortgage be given, the vendor's lien for the price, which in many states arises by operation of law, takes precedence of dower.<sup>55</sup>

#### § 182. Things in which the dower right exists.

There is a right of dower only in lands and tenements.<sup>56</sup>

<sup>52</sup> 4 Kent, Comm. 39; 1 Scribner, Dower, 273; *Stow v. Tift*, 15 Johns. (N. Y.) 458; *Kirchwey's Cas.* 356; *Mayburry v. Brien*, 15 Pet. (U. S.) 39; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Hurst v. Dulaney*, 87 Va. 444; *Sheldon v. Hoffnagle*, 51 Hun (N. Y.) 478; *Smith v. Stanley*, 37 Me. 11, 58 Am. Dec. 771; *Welch v. Buckins*, 9 Ohio St. 331.

In order to constitute the deed by the vendor and the mortgage by the vendee, or any other two instruments, parts of the same transaction, within the rule, they must be delivered at approximately the same time. *Rawlings v. Lowndes*, 34 Md. 639; *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552, *Finch's Cas.* 664; *Seekright v. Moore*, 4 Leigh (Va.) 30, 24 Am. Dec. 704. But see *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 269, 37 Am. Dec. 654.

<sup>53</sup> 1 Stimson, Am. St. Law, § 3213 (B); 1 Sharswood & B. Lead. Cas. Real Prop. 327.

<sup>54</sup> *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76, *Finch's Cas.* 665; *Adams v. Hill*, 29 N. H. 202, 6 Gray's Cas. 736; *King v. Stetson*, 11 Allen (Mass.) 407; *Thomas v. Hanson*, 44 Iowa, 651; *Smith v. Stanley*, 37 Me. 11, 58 Am. Dec. 771; *Glenn v. Clark*, 53 Md. 580; *Roush v. Miller*, 39 W. Va. 638; *Cunningham v. Knight*, 1 Barb. (N. Y.) 399. Compare *Smith v. McCarty*, 119 Mass. 519.

<sup>55</sup> 1 Scribner, Dower, 555; *Brooks v. Woods*, 40 Ala. 538; *Thorn v. Ingram*, 25 Ark. 52; *Price v. Hobbs*, 47 Md. 359; *Unger v. Leiter*, 32 Ohio St. 210; *Cocke v. Bailey*, 42 Miss. 81; *Huginin v. Cochrane*, 51 Ill. 302, 2 Am. Rep. 303.

<sup>56</sup> Litt. § 86; 2 Bl. Comm. 131.

— Incorporeal things real.

Since there is a right to dower in lands and "tenements," and this latter term is regarded as inclusive of incorporeal things real,<sup>65</sup> it exists, subject to an important exception hereinafter referred to, in what we designate as "rights as to the use and profits of another's land."<sup>66</sup> Thus, there is a right to dower in rent charged on another's land in favor of the deceased husband and his heirs,<sup>67</sup> and also in a fishing privilege, or other right of profit.<sup>68</sup>

In rights in another's land, however, which "lie in appendancy," as it is sometimes expressed,—that is, which are incident to the husband's ownership of other land, or of another estate therein,—there is no independent right of dower, though indirectly the widow obtains dower therein by reason of her dower right in the land or estate therein to which such right may be appendant.<sup>69</sup> Accordingly, there is no right to dower in an easement, apart from the land to which it is appurtenant.<sup>70</sup> And, in the case of a rent reserved on a lease for years, the dower right therein exists merely by reason of the existence of such right in the reversion to which the rent is incident.<sup>71</sup>

32 Me. 412. And see *Wilcox v. Randall*, 7 Barb. (N. Y.) 622. As to exchange, see post, § 375.

<sup>65</sup> 1 Stimson's Am. St. Law, § 3218; 1 Sharswood & B. Lead. Cas. Real Prop. p. 246.

<sup>66</sup> Ante, § 4.

<sup>67</sup> Park, Dower, 110 et seq.

<sup>68</sup> Co. Litt. 32a; 1 Scribner, Dower (2d Ed.) 198; *Chaplin v. Chaplin*, 3 P. Wms. 229; *Chase's Case*, 1 Bland Ch. (Md.) 227.

<sup>69</sup> Co. Litt. 32a; Park, Dower, 112.

<sup>70</sup> Park, Dower, 114; 1 Scribner, Dower, 199.

<sup>71</sup> See 1 Washburn, Real Prop. 168; *Wyman v. Oliver*, 75 Me. 421. See post, § 305.

<sup>72</sup> Co. Litt. 32a; 4 Kent, Comm. 40; *Stoughton v. Leigh*, 1 Taunt. 402, 6 Gray's Cas. 729; *Weir v. Tate*, 39 N. C. 264; *Boyd v. Hunter*, 44 Ala. 705; *Williams v. Cox*, 3 Edw. Ch. (N. Y.) 172; *Herbert v. Wren*, 7 Cranch (U. S.) 272.

There is no dower in a mere personal privilege to use water,<sup>72</sup> or in a revocable license,<sup>73</sup> neither of which can be regarded as within the description of lands or tenements for any purpose. There is, it has been held, a right of dower in a ferry,<sup>74</sup> presumably because a ferry franchise is a thing real.<sup>75</sup>

§ 183. The quantum of the husband's estate.

Since the estate of dower is derived out of the estate of the husband, his estate must, in order that she be endowed, be one of inheritance,—that is, either a fee simple or a fee tail.<sup>76</sup> Accordingly, there can be no dower when the husband had merely a life estate.<sup>77</sup>

There is no right of dower at common law if the husband had merely a chattel interest in land, such as a term for years, however long it may run,<sup>78</sup> or even though it be re-

<sup>72</sup> As to use surplus waters of a canal. *Kingman v. Sparrow*, 12 Barb. (N. Y.) 201.

<sup>73</sup> *Duncan v. Navassa Phosphate Co.*, 137 U. S. 647.

<sup>74</sup> *Stevens' Heirs v. Stevens*, 3 Dana (Ky.) 371.

<sup>75</sup> See *Park, Dower*, 111, and ante, § 5.

<sup>76</sup> Litt. § 86; 2 Bl. Comm. 131; *Kennedy v. Kennedy*, 29 N. J. Law, 185; *Weir v. Tate*, 39 N. C. 264.

<sup>77</sup> *Harriot v. Harriot*, 25 App. Div. (N. Y.) 245; *Thompson v. Vance*, 1 Metc. (Ky.) 669.

Even though the husband be seised of an estate per autre vie, and die before the cestui que vie, there is no right of dower. *Gillis v. Brown*, 5 Cow. (N. Y.) 388; *Fisher v. Grimes*, 1 Smedes & M. Ch. (Miss.) 107.

There is no dower where a fee tail is by statute made a life estate with a remainder in fee simple. *Burris v. Page*, 12 Mo. 358; *Trumbull v. Trumbull*, 149 Mass. 200.

Where one has an equitable estate for life, and a legal remainder, his widow is not entitled to dower, since the rule in *Shelley's Case* cannot apply. *Kenyon v. Kenyon*, 17 R. I. 539. See ante, § 131.

<sup>78</sup> *Park, Dower*, 47; *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725; *Goodwin v. Goodwin*, 33 Conn. 314, *Finch's Cas.* 8; *Ware v. Washington*, 6 Smedes & M. (Miss.) 737. In some states, however, there are statutes giving dower in estates for a considerable period of years, named in the statute. See 1 *Scribner, Dower*, 364.

newable forever,<sup>79</sup> nor can there be dower in an estate at will.<sup>80</sup>

If the husband be seised, during coverture, of an estate of inheritance, the right to dower will not be defeated by the determination of the estate by its natural limitation, since the dower right is an interest implied in the creation of the estate. Accordingly, if a tenant in fee die without heirs, so that the property escheats, the right of dower is not affected.<sup>81</sup> And so there is dower in a fee tail, though the estate terminate, for other purposes, on the death of the husband without issue.<sup>82</sup>

In the case of an estate in fee which is subject to a special limitation by which it is to cease upon a certain event, there is no right to dower after such event, since the estate never, in contemplation of law, had any possible existence thereafter.<sup>83</sup> When a grant is upon condition subsequent, if the grantor or his heir enter for breach of the condition, the grantee's estate is considered as void *ab initio*, the entry having relation to the time of the grant. As a consequence, the wife of the grantee has no right to dower after such entry.<sup>84</sup> The fact, however, that the husband's estate is subject to be defeated on the happening of some particular event, owing to a special limitation or a condition, does not affect the right of dower, so long as the estate is not actually defeated.<sup>85</sup>

<sup>79</sup> Spangler v. Stanler, 1 Md. Ch. 36.

<sup>80</sup> Duncan v. Navassa Phosphate Co., 137 U. S. 647.

<sup>81</sup> 4 Kent, Comm. 49; Park, Dower, 158.

<sup>82</sup> Litt. § 53; Park, Dower, 158; 1 Cruise, Dig. tit. 6, c. 2, § 4; 4 Kent, Comm. 49; Smith's Appeal, 23 Pa. St. 9; Tomlinson v. Nickell, 24 W. Va. 148. See, also, opinion of Gibson, C. J., in Evans v. Evans, 9 Pa. St. 190, Finch's Cas. 669.

<sup>83</sup> Park, Dower, 162; 1 Scribner, Dower, 197.

<sup>84</sup> Park, Dower, 153; 1 Scribner, Dower, 291; 4 Kent, Comm. 49; Emerson v. Harris, 6 Metc. (Mass.) 475.

<sup>85</sup> Park, Dower, 50; 1 Cruise, Dig. tit. 6, c. 2, § 6; 1 Scribner, Dower, 290, 297.



Though an estate in fee in the husband is subject to an executory limitation, which may take effect upon the death of the husband, as when he is given a fee simple, with a limitation over to another in case he die without children, the widow is nevertheless entitled to dower, even after the executory limitation takes effect, since dower is an incident of a fee-simple estate, and the nature of a fee simple is not altered by the presence of a limitation over.<sup>86</sup> A different view, however, seems to be involved in decisions to the effect that, when a fee-simple estate is given in default of appointment under a power, the exercise of the power will

<sup>86</sup> 1 Washburn, Real Prop. 212 et seq.; 1 Scribner, Dower (2d Ed.) 297 et seq.; Buckworth v. Thirkell, 3 Bos. & P. 652, note, 6 Gray's Cas. 690; Moody v. King, 2 Bing. 447, 6 Gray's Cas. 767; Evans v. Evans, 9 Pa. St. 190, Finch's Cas. 669; Kennedy v. Kennedy, 29 N. J. Law, 185; Greene v. Reynolds, 72 Hun (N. Y.) 565; Northcut v. Whipp, 12 B. Mon. (Ky.) 65; Milledge v. Lamar, 4 Desaus. (S. C.) 617; Clark v. Clark, 84 Hun (N. Y.) 362; Pollard v. Slaughter, 92 N. C. 72, 53 Am. Rep. 402; Jones v. Hughes, 27 Grat. (Va.) 560. See, also, the citations upon the same question in regard to curtesy, post, § 208. A different view is taken in Edwards v. Bibb, 54 Ala. 475, Finch's Cas. 671.

The right to dower in such a case has been the subject of an immense amount of discussion by the text writers (see 1 Scribner, Dower, 297 et seq.), but the question would now seem to be quite well settled by the decisions. To the present writer, if he may venture to express an opinion where the greatest legal minds have differed, it seems that the rule as laid down in the decisions is a logical one, having regard to the general effect of an executory limitation. An express direction, in the gift of an estate in fee simple to the husband, that dower shall not attach, is, except when otherwise provided by statute, as in England at the present day, invalid, as repugnant to the estate (Mildmay's Case, 6 Coke, 41; Park, Dower, 82; 1 Scribner, Dower, 287), and it seems difficult to see why a greater effect should be given to an executory limitation as implying such a direction. A contrary rule would apparently involve the erroneous view, unfortunately rather prevalent, that an estate in fee simple ceases to be such an estate, and becomes a determinable or qualified fee, if it is subject to be divested by an executory limitation. See ante, § 185, note 210.

defeat the right to dower of the wife of the tenant in fee simple.<sup>87</sup>

— Estates inheritable by issue.

The estate must be one which might possibly descend to a child of the marriage, in case one be born, and; accordingly, if the husband has an estate given to him and the heirs of his body by a certain wife, a subsequent wife has no right of dower.<sup>88</sup> But issue need not be actually born, as in the case of curtesy, nor need the wife be physically able to bear issue.<sup>89</sup>

§ 184. Dower in equitable estates and interests.

Though generally the incidents and attributes of legal estates were by chancery given to equitable estates, an exception was made as regards dower, which was not allowed in such estates in England until the rule was changed by statute.<sup>90</sup> In this country, while in some cases the original English rule was followed,<sup>91</sup> a different rule generally pre-

<sup>87</sup> Ray v. Pung, 5 Barn. & Ald. 561, 6 Gray's Cas. 766; Peay v. Peay, 2 Rich. Eq. (S. C.) 409; Link v. Edmondson, 19 Mo. 437. See Maundrell v. Maundrell, 10 Ves. 255. Such a conveyance to the husband was one of the "devices" employed in England to defeat dower before the passing of the dower act. See 1 Scribner, Dower, 294.

<sup>88</sup> Litt. § 53; 2 Bl. Comm. 131; Park, Dower, 79; Amcotts v. Catherich, Cro. Jac. 615, 6 Gray's Cas. 728; Northcut v. Whipp, 13 B. Mon. (Ky.) 65.

<sup>89</sup> Co. Litt. 40b; 1 Scribner, Dower (2d Ed.) 229. But at common law there was no dower if the wife was under nine. Id.

<sup>90</sup> Park, Dower, 124 et seq.; 4 Kent, Comm. 43; 1 Roper, Husb. & Wife, 354; Bottomley v. Fairfax, Finch, Prec. 236, 6 Gray's Cas. 729, 1 Ames' Cas. 375, and note; D'Arcy v. Blake, 2 Schoales & L. 388, 1 Ames' Cas. 376. The rule was changed in England by the Dower Act, 3 & 4 Wm. IV. c. 105 (A. D. 1833).

<sup>91</sup> See Mayburry v. Brien, 15 Pet. (U. S.) 38; Hopkins v. Frey, 2 Gill (Md.) 359; Blakeney v. Ferguson, 20 Ark. 547; Mann v. Edson, 39 Me. 25; Farnum v. Loomis, 2 Or. 29; Hopkinson v. Dumas, 13 N. H. 301, Finch's Cas. 675.

vails, frequently by express provision of statute.<sup>92</sup> In some states, statutes allowing dower in an equitable estate have been construed to be applicable only when the husband has not disposed of his interest before his death.<sup>93</sup>

—Interests under contract of purchase.

As before explained, one to whom another has contracted to convey land has what is regarded as an equitable estate in the land,<sup>94</sup> and this principle is applied, in some jurisdictions, to the extent of giving the widow of such vendee dower in land purchased and paid for by the husband, but which had not been conveyed to him at the time of his death.<sup>95</sup> According to some decisions, the husband must

<sup>92</sup> *Yeo v. Mercereau*, 18 N. J. Law, 337; *Nicoll v. Ogden*, 39 Ill. 323, 31 Am. Dec. 311; *Stroup v. Stroup*, 140 Ind. 179; *Davis v. Green*, 102 Mo. 170; *Fortune v. Watkins*, 94 N. C. 304; *Everitt v. Everitt*, 71 Iowa, 221; *Robinson v. Miller*, 40 Ky. 38; *Rowton v. Rowton*, 1 Hen. & M. (Va.) 92; *Link v. Edmondson*, 19 Mo. 437; *Church v. Church*, 3 Sandf. Ch. (N. Y.) 434; *Thompson v. Cochran*, 7 Humph. (Tenn.) 72, 46 Am. Dec. 68; *Shoemaker v. Walker*, 2 Serg. & R. (Pa.) 554; *Stevens v. Smith*, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205.

For statutory provisions, see, also, 1 Stimson's Am. St. Law, § 3212; 1 Scribner, Dower, 420 et seq.; 1 Sharswood & B. Lead. Cas. Real Prop. 312. And compare *Phelps v. Phelps*, 143 N. Y. 197, construing the New York statute.

<sup>93</sup> *In re Ransom*, 17 Fed. 331; *Hamilton v. Hughes*, 6 J. J. Marsh. (Ky.) 531; *Glenn v. Clark*, 53 Md. 530; *Miller v. Wilson*, 15 Ohio, 103.

<sup>94</sup> See ante, § 110.

<sup>95</sup> *Young v. Young*, 45 N. J. Eq. 27; *Gully v. Ray*, 13 B. Mon. (Ky.) 107; *Owen v. Robbins*, 19 Ill. 545, and cases in notes following. Contra, *Bowman v. Bailey*, 20 S. C. 550.

The statute sometimes contains a special provision as to the rights of the widow of a purchaser who has not paid all of the purchase money. See 1 Stimson's Am. St. Law, § 3212 (B); *Bowen v. Lingle*, 119 Ind. 560; *Boyd v. Harrison*, 36 Ala. 533; *Lipscomb v. De Lemon*, 63 Ala. 592; *Tink v. Walker*, 148 Ill. 234; *Reed v. Whitney*, 7 Gray (Mass.) 533; *Hart v. Logan*, 49 Mo. 47; *Woraham v. Callison*, 43 Mo. 206.

have paid all, and not merely a part, of the purchase price, before his death, in order that his widow be endowed.<sup>86</sup> And even in states where this view does not obtain, the widow is given dower only as to the surplus after payment of the balance of the purchase money due.<sup>87</sup> Nor is there any dower right if, before the purchase price was entirely paid, the husband transferred to another his interest under the contract of purchase.<sup>88</sup>

— **Mortgaged land.**

By the making of a mortgage, as will be hereafter explained, in England and a number of states in this country, the legal title is transferred, and thereafter an equitable title only, known as the "equity of redemption," remains in the mortgagor. In this equity of redemption, as in other equitable interests, the English courts refused to recognize any right of dower.<sup>89</sup> But a different view has generally been taken by the courts of this country, it being held that, though land of the husband is subject to a mortgage, which takes precedence of dower, the wife is entitled to dower

<sup>86</sup> *Walters v. Walters*, 132 Ill. 467; *Lobdell v. Hayes*, 4 Allen (Mass.) 187; *Lane v. Courtney*, 1 Heisk. (Tenn.) 331; *Morgan v. Smith*, 25 S. C. 337. And see *Barnes v. Gay*, 7 Iowa, 26; *Beebe v. Lyle*, 73 Mich. 114; *Latham v. McLain*, 64 Ga. 320. Contra, *Church v. Church*, 3 Sandf. Ch. (N. Y.) 434; *Bunting v. Foy*, 66 N. C. 193; *Klutts v. Klutts*, 58 N. C. 80; *Brewer v. Vanarsdale's Heirs*, 6 Dana (Ky.) 204; *Steuart v. Beard*, 4 Md. Ch. 319; *Malin v. Coult*, 4 Ind. 535; *Thompson v. Cochran*, 7 Humph. (Tenn.) 72, 46 Am. Dec. 63; *Harrison v. Griffith*, 4 Bush (Ky.) 146; *Williams v. Kierney*, 6 N. Y. St. Rep. 560.

<sup>87</sup> *Thompson v. Cochran*, 7 Humph. (Tenn.) 72; *Crane v. Palmer*, 8 Blackf. (Ind.) 120; *Barnes v. Gay*, 7 Iowa, 26; *Williams v. Kierney*, 6 N. Y. St. Rep. 560; *Caroon v. Cooper*, 63 N. C. 386.

<sup>88</sup> *Heed v. Ford*, 16 B. Mon. (Ky.) 114; *Worsham v. Callison*, 49 Mo. 206; *Owen v. Robbins*, 19 Ill. 545; *Blittinger v. Baker*, 29 Pa. St. 71.

<sup>89</sup> *Park, Dower*, 137; *Stelle v. Carroll*, 13 Pet. (U. S.) 201; *Maybury v. Brien*, 15 Pet. (U. S.) 32.

therein as against all persons except the owner of the mortgage.<sup>100</sup> In a considerable number of states there is a statutory provision to this effect.<sup>101</sup>

If the mortgage is paid by the husband before his death, or by his personal representative after his death, the widow is entitled to the benefit of such payment, and may, accordingly, have dower as if the mortgage had never existed.<sup>102</sup> But if the mortgage is paid, after the death of the husband, by an heir or devisee, or other person interested in the land, the widow must contribute a proportional part of the amount paid.<sup>103</sup> If the mortgage is paid by a purchaser from the husband as a part of the contract of purchase, it is as if it were paid by the husband, and the mortgage is ex-

<sup>100</sup> 4 Kent, Comm. 44; *Mills v. Van Voorhies*, 20 N. Y. 413, 6 Gray's Cas. 799; *Cox v. Garst*, 105 Ill. 342; *Coles v. Coles*, 15 Johns. (N. Y.) 319; *Van Duyne v. Thayre*, 14 Wend. (N. Y.) 234, 19 Wend. 162; *Snow v. Stevens*, 15 Mass. 278; *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Jones v. Bragg*, 33 Mo. 337, 84 Am. Dec. 49; *Manning v. Laboree*, 33 Me. 343; *Wade v. Miller*, 32 N. J. Law, 296; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; *Daniel v. Leitch*, 13 Grat. (Va.) 195. Contra, *In re Thompson's Estate*, 6 Mackey, D. C. 536.

If the mortgage is made by the husband, and the wife does not join therein, as shown hereafter, her dower right takes precedence even of the mortgage. See post, § 189.

<sup>101</sup> 1 Stimson's Am. St. Law, §§ 3214, 3216 (A); 1 Sharswood & B. Lead. Cas. Real Prop. 815; 1 Scribner, Dower, 472 et seq.

<sup>102</sup> 1 Scribner, Dower, 550; *Selb v. Montague*, 102 Ill. 446; *Wedge v. Moore*, 6 Cush. (Mass.) 8; *Norris v. Morrison*, 45 N. H. 490. And the widow may, in some states, demand payment of the mortgage from the personal estate left by the husband. *Peckham v. Hadwen*, 8 R. I. 160, 6 Gray's Cas. 814; *Creecy v. Pearce*, 69 N. C. 67, 6 Gray, Cas. 819. See 1 Scribner, Dower, 511. See, also, post, § 544.

<sup>103</sup> *Selb v. Montague*, 102 Ill. 446; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Norris v. Morrison*, 45 N. H. 490; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Hawley v. Bradford*, 9 Paige (N. Y.) 200; *Burnet v. Burnet*, 46 N. J. Eq. 144. And see *Scott v. Hancock*, 13 Mass. 162. Contra, as against the devisee, *Kling v. Ballantine*, 40 Ohio St. 391. And see *Main v. Ginthert*, 92 Ind. 190. See the question discussed in 4 Harv. Law Rev. 42.

tinguished as against the widow's claim of dower, while it is otherwise if the purchaser voluntarily pays it.<sup>104</sup>

— Effect of equitable conversion.

Since, by the doctrine of equitable conversion,<sup>105</sup> money directed to be laid out in land is regarded as land, there is a right of dower in such money in jurisdictions where dower is allowed in equitable interests.<sup>106</sup> In case of conversion by paramount authority, as when land is sold by order of court to pay debts, to make partition, or on foreclosure of a mortgage, dower will, if the husband be dead, be allowed in the proceeds of sale, as if they constituted land.<sup>107</sup>

<sup>104</sup> *McCabe v. Swap*, 14 Allen (Mass.) 188, 6 Gray's Cas. 816; *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 732; *Seib v. Montague*, 102 Ill. 446; *Everson v. McMullen*, 113 N. Y. 293, *Kirchwey's Cas.* 371, 10 Am. St. Rep. 445; *Pollard v. Noyes*, 60 N. H. 184; *Hatch v. Palmer*, 58 Ma. 271; *Carter v. Goodin*, 3 Ohio St. 75.

As a general rule, the widow seeking to redeem on account of her dower right must pay the whole amount of the mortgage, like any other person seeking to redeem. *Gibson v. Crehore*, 5 Pick. (Mass.) 145; *Bell v. City of New York*, 10 Paige (N. Y.) 49; *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Norris v. Morrison*, 45 N. H. 490. But it has been decided that, where the holder of a mortgage which takes precedence of the right of dower of the widow purchases the property from the husband or the husband's estate, the widow may redeem by paying her proportionate share of the mortgage debt. *Woods v. Wallace*, 30 N. H. 384, 6 Gray's Cas. 810; *Van Vronker v. Eastman*, 7 Metc. (Mass.) 157. But see *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467. See 1 Scribner, Dower, 488 et seq.

<sup>105</sup> See ante, § 103.

<sup>106</sup> *Haggard v. Rout's Heirs*, 6 B. Mon. (Ky.) 247. In England, under the doctrine denying dower in equitable interests, dower was not allowed in money directed to be laid out in land. *Park, Dower*, 136; 1 Scribner, Dower, 450.

<sup>107</sup> *Cook's Ex'r v. Cook's Adm'r*, 20 N. J. Eq. 375; *Chaney's Heirs v. Chaney's Adm'r*, 38 Ala. 35; *Ratcliffe v. Mason*, 92 Ky. 190; *Mac-cubbin v. Cromwell*, 2 Har. & G. (Md.) 443; *Church v. Church*, 3 Sandf. Ch. (N. Y.) 424; *Jefferies v. Allen*, 33 S. C. 268; *Chaffee v.*

**§ 185. Bare legal estates.**

If the estate of the husband is purely legal, the title being held by him in trust for another or others, the widow is not entitled to dower in equity, and she will be restrained from asserting such a claim at law.<sup>108</sup> Accordingly, there is no dower in land which the husband, before marriage, contracted to convey, since by such a contract, as before explained, the vendor becomes a mere trustee for the purchaser.<sup>109</sup> If, however, the husband's title be in part beneficial, he having the legal title in trust for himself and others, his widow will have dower to the extent of his beneficial interest.<sup>110</sup>

**— Interest of mortgagee.**

Since a mortgagee is considered as having, at most, a mere legal estate for the purpose of enforcing his security, and, in

Franklin, 11 R. I. 578. For statutes to this effect, see 1 Stimson's Am. St. Law, § 3216.

As to the wife's rights to a portion of the proceeds of a sale in foreclosure or partition proceedings during the husband's life, see post, § 197.

<sup>108</sup> 1 Scribner, Dower, 409; Noel v. Jevon, Freem. Ch. 43, Kirckwey's Cas. 345, 6 Gray's Cas. 729; 1 Ames, Cas. Trusts, 374, and note; Powell v. Monson & Brimfield Mfg. Co., 3 Mason, 347, Fed. Cas. No. 11,356; Robison v. Codman, 1 Sumn. 121, Fed. Cas. No. 11,970; King v. Bushnell, 121 Ill. 656; Derush v. Brown, 8 Ohio, 412; Hopkinson v. Dumas, 42 N. H. 296, Finch's Cas. 675; Ocean Beach Ass'n v. Brinley, 34 N. J. Eq. 438; Bartlett v. Gouge, 5 B. Mon. (Ky.) 152; Waller v. Waller's Adm'r, 33 Grat. (Va.) 83; White v. Drew, 42 Mo. 561.

<sup>109</sup> 1 Scribner, Dower, 410; Aaron v. Bayne, 28 Ga. 107; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Fontaine v. Dunlap, 82 Ky. 321; Hunkins v. Hunkins, 65 N. H. 95; Chapman v. Chapman's Trustee, 92 Va. 537.

<sup>110</sup> Robison v. Codman, 1 Sumn. 121, Fed. Cas. No. 11,970; Cockrill v. Armstrong, 31 Ark. 580; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; Brown v. Cave, 23 S. C. 251.

many of the states, no more than a lien, his widow is not entitled to dower.<sup>111</sup>

### § 186. Dower in future estates.

If the husband's estate in the land is merely a reversion or remainder after an estate of freehold in another, the seisin is in that other, and not in him, and consequently the wife is not entitled to dower unless such prior estate terminate during coverture, and before the husband has aliened his reversion or remainder.<sup>112</sup> If, however, the estate preceding that of the husband is one for years only, the husband's estate is not technically a future estate, and his widow is entitled to dower.<sup>113</sup> If the husband is seised of an estate for his life, and also a remainder in fee, but there is an intervening vested estate of freehold in another person, which does not terminate during coverture, the husband has not such a present estate of inheritance as will support dower, since the life estate does not, in such case, merge in the fee.<sup>114</sup>

<sup>111</sup> 4 Kent, Comm. 48; *Foster v. Dwinel*, 49 Ma. 44; *Crittenden v. Johnson*, 11 Ark. 94; *Reed v. Shepley*, 6 Vt. 602.

<sup>112</sup> *Park, Dower*, 53; *Durando v. Durando*, 23 N. Y. 331, 6 Gray's Cas. 739, *Finch's Cas.* 650; *Duncomb v. Duncomb*, 3 Lev. 437; *Houston v. Smith*, 38 N. C. 312; *Young v. Morehead*, 94 Ky. 608; *Wilmarth v. Bridges*, 113 Mass. 407; *Otis v. Parshley*, 10 N. H. 403; *Gardner v. Greene*, 5 R. I. 104, 6 Gray's Cas. 762; *Cocke's Ex'r v. Phillips*, 12 Leigh (Va.) 248. Accordingly, there is no right of dower in land which the husband inherited from his mother subject to an estate of curtesy in his father, unless the father dies during the son's coverture. *Leach v. Leach*, 21 Hun (N. Y.) 381.

In Ohio, the statute gives dower in a future estate owned by the husband at the time of his death (1 *Stimson's Am. St. Law*, § 3211), and in Pennsylvania the widow is entitled to her statutory share in a future estate (*Cote's Appeal*, 79 Pa. St. 235).

<sup>113</sup> *Co. Litt.* 32a; 1 *Scribner, Dower*, 230; *Boyd v. Hunter*, 44 Ala. 705; *Sykes v. Sykes*, 49 Miss. 190; *Weir v. Tate*, 39 N. C. 264.

<sup>114</sup> *Park, Dower*, 57; 1 *Scribner, Dower*, 233; *Eldredge v. Forrestal*, 7 Mass. 253; *Moore v. Esty*, 5 N. H. 479. Compare *House v. Jackson*, 50 N. Y. 161.

As to the abstruse question of the effect of an intervening con-



## —Dower out of dower.

From this requirement that the husband shall have a present estate of freehold, and not merely a reversion or remainder, arises the maxim "*Dos de dote peti non debet*," which means simply that a widow is not entitled to dower in land in which the husband had only a reversion after the termination of an estate of dower outstanding in the widow of a previous owner. To illustrate the principle more at length, upon the assignment of dower, the dower estate is regarded as a continuation of the husband's estate, there being, in contemplation of law, no estate intervening between them, and consequently the heir has, as to the land assigned for dower, merely a reversion expectant upon the termination of the dower estate, and no present estate of freehold from which dower can be assigned to his widow in case he dies during the life of his ancestor's widow.<sup>115</sup>

The rule applies to land which is obtained by devise, as well as that obtained by descent, the widow of the devisee not being entitled to dower in the portion of the land which has been assigned as dower to the testator's widow, since in this case, also, the latter's dower estate is a direct continuation of the testator's estate, so as to leave no intervening estate in the devisee to support dower in his wife.<sup>116</sup>

tingent estate of freehold, see 1 Scribner, Dower (2d Ed.) 235 et seq.; 4 Kent, Comm. 40.

<sup>115</sup> Co. Litt. 31a; Dunham v. Osborn, 1 Paige (N. Y.) 634; Reitzel v. Eckard, 65 N. C. 673; In re Cregler, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 635; Safford v. Safford, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; McLeery v. McLeery, 65 Me. 172, 20 Am. Rep. 683.

<sup>116</sup> Durando v. Durando, 23 N. Y. 331, 6 Gray's Cas. 739, Finch's Cas. 658; Eldredge v. Forrestal, 7 Mass. 253.

But in the case of land not devised but conveyed by a father to his son, as in the case of a conveyance to any other person, the grantee is seized during his life, and consequently, though the father's widow is entitled to dower in all the land, the widow of

The right of the heir's widow to dower in all his land is not affected by a mere right to dower in the ancestor's widow, but dower must have been actually assigned to the latter in order to affect the former,<sup>117</sup> though the assignment is sufficient to bring the case within the rule if it is made after the death of the heir.<sup>118</sup> If, however, dower is actually assigned to the heir's widow, before dower is assigned to the ancestor's widow, the former is entitled to dower in the whole premises upon the death of the ancestor's widow, and not in two-thirds only, since her life estate, acquired before the assignment to the ancestor's widow, can be defeated by the latter's estate, subsequently arising, only to the extent of that estate.<sup>119</sup>

### § 187. Dower in land jointly owned.

The interest of one as tenant in common or as coparcener with others is subject to dower, the undivided share being, except for purposes of possession, regarded as a separate tenement, of which the tenant is solely seised.<sup>120</sup> In the case of land held in joint tenancy, however, the rule is different, and, so long as the joint tenancy exists, the widow of one joint tenant is not entitled to dower. This is the case even

the son is also entitled to dower in all the land, subject only to the dower estate of the father's widow for her life. Co. Litt. 31a; Dunham v. Osborn, 1 Paige (N. Y.) 634; Reitzel v. Eckard, 65 N. C. 673.

<sup>117</sup> Co. Litt. 31a; Robinson v. Miller, 2 B. Mon. (Ky.) 284; Null v. Howell, 111 Mo. 273; McLeery v. McLeery, 65 Me. 172, 20 Am. Rep. 683.

<sup>118</sup> 1 Scribner, Dower (2d Ed.) 326; McLeery v. McLeery, 65 Me. 172, 20 Am. Rep. 683; In re Cregier, 1 Barb. Ch. (N. Y.) 598.

<sup>119</sup> Co. Litt. 31b; Reitzel v. Eckard, 65 N. C. 673; In re Cregier, 1 Barb. Ch. (N. Y.) 598; Steele v. La Frambois, 68 Ill. 456.

<sup>120</sup> Litt. § 45; Challis, Real Prop. 280; Reynard v. Spence, 4 Beav. 103; Ross v. Wilson, 58 Ga. 249; Cook v. Walker, 70 Me. 232; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Jackson v. Edwards, 22 Wend. (N. Y.) 498; Harvill v. Holloway, 24 Ark. 19; Rockwell v. Rockwell, 81 Mich. 493; Whitney v. Whitney, 45 N. H. 311.

when the husband effects a severance by a conveyance to a third person, though a severance will entitle the widow to dower if the husband thereafter remains solely seised.<sup>121</sup> It has been held, however, in states where the right of survivorship has been abolished, that the widow is entitled to dower.<sup>122</sup>

— — Effect of partition.

Where land jointly owned is partitioned, the wife of one cotenant is entitled to dower in such part of the land as is set off to her husband in severalty, and, as a general rule, in such part only.<sup>123</sup> If there is a sale of the land by order of court for the purpose of making partition, during the husband's life, the wife, if a party to the proceedings, loses her dower right in the land.<sup>124</sup>

<sup>121</sup> Litt. § 45; Park, Dower, 40; 1 Scribner, Dower, 337; Mayburry v. Brien, 15 Pet. (U. S.) 21; Babbitt v. Day, 41 N. J. Eq. 392, Finch's Cas. 685; Cockrill v. Armstrong, 31 Ark. 580.

<sup>122</sup> Reed v. Kennedy, 2 Strob. (S. C.) 67; Davis v. Logan, 9 Dana (Ky.) 185; Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243.

<sup>123</sup> Potter v. Wheeler, 13 Mass. 504; Totten v. Stuyvesant, 3 Edw. Ch. (N. Y.) 500; Mosher v. Mosher, 32 Me. 412; Holley v. Glover, 36 S. C. 404, 31 Am. St. Rep. 883; Lloyd v. Conover, 25 N. J. Law, 47.

If the portions assigned in severalty to the various owners are not in proportion to their undivided interests, as when the equalization is effected by an award of owelty, the widow of a co-owner who receives the lesser proportional share is not, it has been held, restricted to dower in the land set apart to her husband. Mosher v. Mosher, 32 Me. 412.

<sup>124</sup> Greiner v. Klein, 28 Mich. 12; Warren v. Twilley, 10 Md. 39; Jordan v. Van Epps, 85 N. Y. 427. And see Verry v. Robinson, 35 Ind. 14, 37 Am. Dec. 346.

In some cases she is held to be barred, though not a party to the proceedings. Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Holley v. Glover, 36 S. C. 404, 31 Am. St. Rep. 883.

As to whether she is entitled to share in the proceeds of sale, see post, § 197.

— Lands belonging to partnership.

Since, in this country, land belonging to a partnership is regarded as converted into personalty only for the purpose of paying firm debts, and settling firm accounts,<sup>125</sup> after these ends have been attained, any surplus remaining is land, in which there exists a right of dower in favor of the wives of the partners, according to the latter's respective interests.<sup>126</sup> There may, however, be an express or implied agreement among the partners that the land shall be considered personalty for all purposes, and in such case there is no right whatever to dower.<sup>127</sup> On the other hand, land belonging to the partners, even though acquired with partnership funds, may belong to them as tenants in common or as joint beneficiaries of a trust, and in such case the wife of a partner is entitled to dower, without regard to the partnership liabilities.<sup>128</sup>

§ 188. Estoppel to deny husband's title.

In some cases in this country it has been decided that one claiming as a grantee under the husband is estopped to deny the title of the husband for the purpose of defeating the

<sup>125</sup> See ante, § 108.

<sup>126</sup> *Parsons, Partnership*, § 273; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Willet v. Brown*, 65 Mo. 138, 27 Am. Rep. 266; *Bopp v. Fox*, 63 Ill. 540, Finch's Cas. 686; *Grissom v. Moore*, 106 Ind. 296, 55 Am. Rep. 742; *Greenwood v. Marvin*, 111 N. Y. 423; *Foster's Appeal*, 74 Pa. St. 391, 15 Am. Rep. 553; *Loubat v. Nourse*, 5 Fla. 350; *Mowry v. Bradley*, 11 R. I. 370; *Campbell v. Campbell*, 80 N. J. Eq. 415, 6 Gray's Cas. 82; *Free v. Beatley*, 95 Mich. 426; *Hill v. Cornwall*, 95 Ky. 512; *Paige v. Paige*, 71 Iowa, 318, 60 Am. Rep. 799. Contra, *Parrish v. Parrish*, 88 Va. 529.

<sup>127</sup> *Lowe v. Lowe*, 13 Bush (Ky.) 688; *Mallory v. Russell*, 71 Iowa, 63, 60 Am. Rep. 776; *Greene v. Greene's Surviving Partner*, 1 Ohio, 535, 13 Am. Dec. 642; *Woodriddle v. Wilkins*, 3 How. (Miss.) 360.

<sup>128</sup> *Ware v. Owens*, 42 Ala. 212; *Drewry v. Montgomery*, 28 Ark. 256; *Ratcliffe v. Mason*, 92 Ky. 190; *Markham v. Merrett*, 7 How. (Miss.) 437, 40 Am. Dec. 76; *Perin v. Megibben* (C. C. A.) 53 Fed. 86. And see *Hughes v. Allen*, 66 Vt. 95.

widow's claim of dower,<sup>129</sup> while in others such an application of the doctrine of estoppel in favor of the widow is not recognized;<sup>130</sup> but even courts adopting the former view state that the grantee may show that the character of the title was not such as to support dower, as, for instance, that it was merely as mortgagee or trustee;<sup>131</sup> and a grantee of the husband may always assert an outstanding title purchased by him from a third person, in order to defeat the dower claim.<sup>132</sup>

### § 189. Effect of conveyance by husband.

A conveyance by the husband before marriage will bar the wife's dower, since one of the essentials of dower—seisin or title during coverture—is then wanting.<sup>133</sup> But this gen-

<sup>129</sup> *Lewis v. Meserve*, 61 Me. 374; *Woolridge v. Wilkins*, 3 How. (Miss.) 360; *Carter v. Hallahan*, 61 Ga. 314; *Hyatt v. Ackerson*, 14 N. J. Law, 564; *Pledger v. Ellerbe*, 6 Rich. Law (S. C.) 266, 60 Am. Dec. 123; *Wedge v. Moore*, 6 Cush. (Mass.) 3, 6 Gray's Cas. 753. Compare *Foster v. Dwinel*, 49 Me. 44.

<sup>130</sup> *Gaunt v. Waduman*, 3 Bing. N. C. 69, 6 Gray's Cas. 742; *Gardner v. Greene*, 5 R. I. 104, 6 Gray's Cas. 762; *Owen v. Robbins*, 19 Ill. 545; *Moore v. Esty*, 5 N. H. 479. Such is apparently the present rule in New York. See *Sparrow v. Kingman*, 1 N. Y. 242, 6 Gray's Cas. 746, and 2 Scribner, *Dower* (2d Ed.) 239, in which treatise this question of estoppel is fully treated.

<sup>131</sup> *Gammon v. Freeman*, 31 Me. 243; *Edmondson v. Welsh*, 27 Ala. 578; *Foster v. Dwinel*, 49 Me. 44; *Moore v. Esty*, 5 N. H. 479.

<sup>132</sup> *Coakley v. Perry*, 3 Ohio St. 344, 6 Gray's Cas. 759; *Sparrow v. Kingman*, 1 N. Y. 242, 6 Gray's Cas. 746, overruling *Bowne v. Potter*, 17 Wend. (N. Y.) 164, 6 Gray's Cas. 743; *McLeery v. McLeery*, 65 Me. 172, 20 Am. Rep. 683. And see *Edmondson v. Montague*, 14 Ala. 370.

<sup>133</sup> *Park, Dower*, 24, 236; *Pratt v. Skolfield*, 45 Me. 386; *Blood v. Blood*, 23 Pick. (Mass.) 80; *Bliss v. West*, 58 Hun (N. Y.) 71.

In England, prior to the dower act of 3 & 4 Wm. IV. c. 105, various devices were resorted to by the husband to bar dower, by the creation of trusts, or of powers of appointment, or by taking an assignment of an "attendant term." These devices were never utilized in this country, and in England, since the above act, it is sufficient for

eral rule is subject to an exception in this country in case the conveyance by the husband is in fraud of dower,—that is, intended to deprive the wife of dower,—and in such case she is entitled to dower as if the deed had not been made.<sup>184</sup> One may, however, it is said, before his marriage, make a reasonable provision for his children by a former marriage.<sup>185</sup>

Except when the statute otherwise provides, the husband cannot, by making a conveyance of the property during coverture, without the wife's joinder, bar the latter's dower.<sup>186</sup> The only possible exception to this rule exists in the case of a dedication of land by the husband for public use, which, it has occasionally been decided, excludes the dower right.<sup>187</sup>

the husband merely to declare by deed or will his desire to deprive his wife of dower. See Williams, Real Prop. 234, 236, 303, 418.

<sup>184</sup> 2 Bigelow, Fraud, 147; Kelly v. McGrath, 70 Ala. 76, 45 Am. Rep. 75; Petty v. Petty, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211, and note; Littleton v. Littleton, 18 N. C. 327; Cranson v. Cranson, 4 Mich. 230, 66 Am. Dec. 534; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Youngs v. Carter, 10 Hun (N. Y.) 194; Brooks v. McMeekin, 37 S. C. 285; Ward v. Ward, 63 Ohio St. 125.

In England, a conveyance is not void because intended to be in fraud of dower (Park, Dower, 236), though conveyances in fraud of curtesy are void. See post, § 209.

<sup>185</sup> Fennessey v. Fennessey, 84 Ky. 519, 4 Am. St. Rep. 210; Champlin v. Champlin, 16 R. I. 314; Gaines v. Gaines' Ex'r, 9 B. Mon. (Ky.) 295; Littleton v. Littleton, 18 N. C. 327.

<sup>186</sup> 4 Kent, Comm. 50; Grissom v. Moore, 106 Ind. 296, 55 Am. Rep. 742; Sutherland v. Sutherland, 69 Ill. 481; Grady v. McCorkle, 57 Mo. 172, 17 Am. Rep. 676; Purcell v. Lang, 97 Iowa, 610; House v. Jackson, 50 N. Y. 161; Gaines' Adm'r v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Dick v. Doughten, 1 Del. Ch. 320; Rose v. Rose, 63 N. C. 391. It is so provided by statute in some states. 1 Stimson's Am. St. Law, § 3249.

<sup>187</sup> 2 Scribner, Dower, 577; Gwynne v. City of Cincinnati, 3 Ohio, 24, 17 Am. Dec. 576; Duncan v. City of Terre Haute, 85 Ind. 104.

Dower has even been held to be excluded by a conveyance for merely quasi public purposes, as for a railroad. Baker v. Atchison, T. & S. F. R. Co., 122 Mo. 396; Venable v. Wabash Western Ry. Co.

In a number of the states of this country, however, it is provided by statute that the widow shall be dowable only of land of which the husband is seised or possessed at the time of his death,<sup>138</sup> while in some her right to dower in equitable, as distinct from legal, interests is so restricted;<sup>139</sup> and under such statutes the husband may, by a conveyance during coverture, bar the wife's dower. But even a statute enabling the husband to convey lands free from dower does not authorize a conveyance by him for an inadequate consideration for the mere purpose of barring dower, the same principle being applied to such a case as to a conveyance by the husband before marriage.<sup>140</sup>

A mortgage by the husband alone during coverture stands on the same footing as an absolute conveyance by him, so far as regards the right of dower, and consequently it is not generally sufficient to affect the dower rights of the wife, even though it be foreclosed.<sup>141</sup>

112 Mo. 121. And see, to the same effect, *Park, Dower*, 246. *Contra, Nye v. Taunton Branch R. Co.*, 113 Mass. 277, holding that a conveyance by the husband to a railroad company does not exclude dower.

If the land is condemned after the husband's death and assignment of dower, the widow is entitled to compensation, as any other owner of a life interest. *Todemier v. Aspinwall*, 43 Ill. 401; *In re William & Anthony Streets*, 19 Wend. (N. Y.) 678; *Borough of York v. Welsh*, 117 Pa. St. 174.

<sup>138</sup> 1 Stimson's Am. St. Law, § 3202 (e). See *Beard v. Knox*, 5 Cal. 253, 63 Am. Dec. 125; *Flowers v. Flowers*, 89 Ga. 632; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500.

In England, and occasionally in this country, it is expressly provided that the husband may bar dower by his sole conveyance. *Challis, Real Prop.* 281; *Jiggitts v. Jiggitts*, 40 Miss. 718.

<sup>139</sup> See ante, § 184, note 93.

<sup>140</sup> *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211, and note; *Killing v. Reidenhauer*, 6 Serg. & R. (Pa.) 531; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Flowers v. Flowers*, 89 Ga. 632. So, by statute. *Littleton v. Littleton*, 18 N. C. 231; *Brewer v. Connell*, 11 Humph. (Tenn.) 500.

<sup>141</sup> *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465; *Gold v. Ryan*, 14 Ill.

The fact that one to whom the husband conveyed the land was a purchaser for value without notice of the existence of a wife having dower rights does not affect her claim for dower,<sup>142</sup> unless, according to some decisions, her conduct was of such a misleading character as to estop her from making the claim.<sup>143</sup>

### § 190. Destruction of husband's estate.

Since the right to dower is dependent on the husband's estate, if the latter is defeated by reason of a title paramount, the dower right is also defeated.<sup>144</sup> A recovery against the husband in an action for the land must, however, in order to exclude dower, be on an actual title; and if by the collusion of the husband, it does not have this effect. This was so at common law, but was likewise declared by the statute of Westminster II. c. 4 (A. D. 1285), and in a number of states in this country there is a similar statute.<sup>145</sup>

53; *McMahon v. Russell*, 17 Fla. 698; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Scott v. Lane*, 109 N. C. 154; *Wedge v. Moore*, 6 Cush. (Mass.) 8. See 1 *Stimson's Am. St. Law*, § 3213.

But in Pennsylvania the rule is otherwise, it seems, and a mortgage made by the husband during coverture takes precedence of dower. *Scott v. Croasdale*, 1 Yeates (Pa.) 75. But not if in fraud of dower. *Killinger v. Reidenhauer*, 6 Serg. & R. (Pa.) 531.

As previously stated, the dower right does not take precedence of a mortgage given as a part of the same transaction by which the property was received, as when a purchase money mortgage is immediately given. See ante, § 181.

<sup>142</sup> *Williams v. Lambe*, 3 Brown Ch. 264; *Mitchell v. Farrish*, 69 Md. 235; *Reel v. Elder*, 62 Pa. St. 308; *Dick v. Doughten*, 1 Del. Ch. 320; *Finch's Cas.* 701; *Cruise v. Billmire*, 69 Iowa, 397.

<sup>143</sup> See post, § 196.

<sup>144</sup> *Park, Dower*, 141; 4 Kent, Comm. 48; *Emerson v. Harris*, 6 Metc. (Mass.) 475; *Cheek v. Waldrum*, 25 Ala. 152; *Stribling v. Ross*, 16 Ill. 122; *McClure v. Fairfield*, 153 Pa. St. 411.

It is on this principle that entry for breach of a condition defeats dower, this being considered as equivalent to a recovery by title paramount. See ante, § 183, note 84.

<sup>145</sup> 1 *Scribner, Dower*, 608; 4 Kent, Comm. 48; 1 *Sharswood & B. Lead. Cas. Real Prop.* 332; 1 *Stimson's Am. St. Law*, § 3249.



— Enforcement of mortgage or other lien.

By the foreclosure of a mortgage, the estate of the husband is terminated, as will be subsequently explained, and consequently, if the mortgage takes precedence of the dower right, as having been made before the marriage, or before the land passed to the husband, or as having been joined in by the wife, the right of dower is barred.<sup>146</sup> But dower is not barred by foreclosure of a mortgage made by the husband after marriage, in which the wife did not join, unless, at least, her right of dower was put in issue in the foreclosure proceeding, and she was a party thereto.<sup>147</sup> And even when dower is subordinate to the mortgage, if there is a foreclosure sale of the property after the husband's death, the widow is, on the theory of conversion by paramount authority, given dower out of the surplus proceeds of sale.<sup>148</sup>

The dower right is also liable to be divested or impaired by the enforcement of any other lien which may have existed on the property before marriage, or before it passed to the husband;<sup>149</sup> but it is superior to a lien to which the property

<sup>146</sup> *Cheek v. Waldrum*, 25 Ala. 152; *Kemerer v. Bournes*, 53 Iowa, 172; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Brackett v. Baum*, 50 N. Y. 8; *Roan v. Holmes*, 32 Fla. 295; *Farwell v. Cotting*, 8 Allen (Mass.) 211; *Shope v. Schaffner*, 140 Ill. 470. The statute quite frequently so provides. 1 Stimson's Am. St. Law, § 3214.

<sup>147</sup> *Dillman v. Will County Nat. Bank*, 138 Ill. 282; *Walsh v. Willson*, 130 Mass. 124; *Davis v. Townsend*, 32 S. C. 112; *Clapp v. Galloway*, 56 Mich. 272; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Merchants' Bank v. Thomson*, 55 N. Y. 7.

<sup>148</sup> *Hawley v. Bradford*, 9 Paige (N. Y.) 201, 37 Am. Dec. 390; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 60; *Mandel v. McClave*, 46 Ohio St. 407; *Hewitt v. Cox*, 55 Ark. 225; *Burrall v. Bender*, 61 Mich. 608; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Hinchman v. Stiles*, 9 N. J. Eq. 361. See statutes to this effect. 1 Stimson's Am. St. Law, § 3216. As to her rights to share in the proceeds of sale in case of foreclosure during her husband's life, see post, § 197.

<sup>149</sup> 4 Kent, Comm. 50; *Trustees of Poor, Queen Annes Co., v. Pratt*,

becomes subject in the hands of the husband after marriage;<sup>150</sup> except, it seems, in states in which dower exists only in those lands of which the husband died seised, where it would be divested by a sale to enforce the lien.<sup>151</sup> Accordingly, it is generally superior to the rights of the husband's creditors against the land, if such claims were not reduced to judgment, or otherwise made liens on the land before marriage.<sup>152</sup>

— Appropriation for public use.

When land is condemned for public use during the husband's life, the wife loses her right of dower therein.<sup>153</sup>

§ 191. Release of dower by wife.

The wife may release her right of dower, either inchoate or consummate, to a person seised of a freehold interest in the land.<sup>154</sup> Such a release is, however, usually ineffective

10 Md. 5, Finch's Cas. 687; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Dingman v. Dingman, 39 Ohio St. 172; McMahon v. Kimball, 3 Blackf. (Ind.) 1; Brown v. Bronson, 35 Mich. 415; Shiell v. Sloan, 22 S. C. 151; Brown v. Williams, 31 Me. 403.

<sup>150</sup> Owen v. Slatter, 26 Ala. 547, 62 Am. Dec. 745; Taylor v. Fowler, 18 Ohio, 567, 51 Am. Dec. 469; Grady v. McCorkle, 57 Mo. 172, 17 Am. Rep. 676.

<sup>151</sup> See Den d. Davidson v. Frew, 14 N. C. 3, 22 Am. Dec. 703, and note.

<sup>152</sup> Nutter v. Fouch, 86 Ind. 451; Roan v. Holmes, 33 Fla. 395; Roberts v. Nelson, 86 Mo. 21; Pense v. Hixon, 8 Iowa, 402; Butler v. Fitzgerald, 43 Neb. 192; Taylor v. Fowler, 18 Ohio, 567, 51 Am. Dec. 469; Tate v. Jay, 31 Ark. 576; Combs v. Young's Heirs, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

In Pennsylvania, however, the rule is different, and there the dower right is subordinate to the husband's debts. Porter v. Lazear, 109 U. S. 84, affirming Lazear v. Porter, 87 Pa. St. 513; Directors of Poor, Blair Co., v. Royer, 43 Pa. St. 146.

<sup>153</sup> Moore v. City of New York, 8 N. Y. 110, 59 Am. Dec. 473; French v. Lord, 69 Me. 537; Duncan v. City of Terre Haute, 35 Ind. 104. See post, § 197.

<sup>154</sup> See post, § 197.

unless the husband joins therein, sometimes by express provision of statute, and sometimes by reason of the general rule that a married woman cannot dispose of interests in land without the joinder of her husband.<sup>155</sup> And the fact that the release is made to one to whom the husband has previously conveyed the land does not dispense with the necessity of his joinder.<sup>156</sup> If the widow marries again, her second husband must join in her release of her dower right in her first husband's land.<sup>157</sup>

In the absence of statutes authorizing such transactions between husband and wife, the wife cannot usually, after the marriage, release her dower directly to her husband, or agree with him to relinquish it, in consideration of other provisions made by him for her.<sup>158</sup>

<sup>155</sup> *Ulp v. Campbell*, 19 Pa. St. 361; *Page v. Page*, 6 Cush. (Mass.) 196; *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352; *French v. Peters*, 33 Me. 396; *Marvin v. Smith*, 46 N. Y. 571; *Knox v. Brady*, 74 Ill. 476.

<sup>156</sup> *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, Fed. Cas. No. 11,356; *Page v. Page*, 6 Cush. (Mass.) 196; *Shaw v. Russ*, 14 Me. 432. Contra, *Shepherd v. Howard*, 2 N. H. 507. The statute sometimes expressly allows a release without the husband's joinder. 1 Stimson's Am. St. Law, § 3245(2); 2 Scribner, Dower, 293.

A wife who is a minor cannot release her dower unless there is statutory authority for her so doing. *Oldham v. Sale*, 1 B. Mon. (Ky.) 76; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 778; *Glenn v. Clark*, 53 Md. 580; *Markham v. Merrett*, 7 How. (Miss.) 437, 40 Am. Dec. 76; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

One who is insane cannot release her dower rights (*Ex parte McElwain*, 29 Ill. 442), nor has her guardian power so to do (*Eslava v. Lepretre*, 21 Ala. 504, 529, 56 Am. Dec. 266). In some states, however, the statute provides for the giving of such release on application to the court. See 1 Sharswood & B. Lead. Cas. Real Prop. 377.

<sup>157</sup> *Osborn v. Horine*, 19 Ill. 124.

<sup>158</sup> *Pillow v. Wade*, 31 Ark. 678; *Rowe v. Hamilton*, 3 Greene (Ma.) 63; *Wilber v. Wilber*, 52 Wis. 298; *New York Life Ins. Co. v. Mayer*,

(449)

The release of dower, since it involves an interest in land, is within the Statute of Frauds, and must be by an instrument in writing.<sup>159</sup>

In some states it is held that a release of dower can be taken advantage of only by the person to whom it is made, or those who may claim under such person, on the theory, generally, that it operates by estoppel only, and, as hereafter shown, an estoppel by deed affects only parties and privies.<sup>160</sup> In other states, the release, to the extent to which it is intended to operate, extinguishes the right of dower in favor of all persons whomsoever.<sup>161</sup>

— Joinder in husband's conveyance.

Formerly, in England, the only mode by which the wife

14 Daly, 318, affirmed 108 N. Y. 655. So, by statute. *Temperance House v. Fowle*, 20 Or. 163.

The rule has been applied to agreements between husband and wife by which they are to live separate, a relinquishment of dower in such an agreement being regarded as invalid. *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Guidet v. Brown*, 54 How. Pr. (N. Y.) 409; *Carson v. Murray*, 3 Paige (N. Y.) 483. Contra, *Garbut v. Bowling*, 81 Mo. 214; *Hitner's Appeal*, 54 Pa. St. 110.

After a divorce, the wife may release her dower to her former husband. *Savage v. Crill*, 19 Hun, 4, affirmed 80 N. Y. 630.

<sup>159</sup> 2 Scribner, Dower, 283; *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Keeler v. Tatnell*, 23 N. J. Law, 62. And see *Worthington v. Middleton*, 6 Dana (Ky.) 200.

<sup>160</sup> *Dearborn v. Taylor*, 18 N. H. 153; *White v. White*, 16 N. J. Law, 202, 31 Am. Dec. 232; *French v. Lord*, 69 Me. 537; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Nickell v. Tomlinson*, 27 W. Va. 697. See *Mandel v. McClave*, 46 Ohio St. 407, 15 Am. St. Rep. 627. So, a release given by a wife to her husband's grantee is not available to one who subsequently obtains the land by foreclosure of a mortgage given by the husband without the wife's joinder. *Littlefield v. Crocker*, 30 Me. 192.

<sup>161</sup> *Elmendorf v. Lockwood*, 57 N. Y. 322; *Boorum v. Tucker*, 51 N. J. Eq. 135, affirmed *Hartshorne v. Boorum*, 52 N. J. Eq. 537; *Morton v. Noble*, 57 Ill. 176; *Johnson v. Van Velsor*, 43 Mich. 203. But see *Hinchliffe v. Shea*, 103 N. Y. 153, *Finch's Cas.* 643.

could voluntarily extinguish her right of dower, except in localities where there was a custom to the contrary, was by joinder with her husband in the levy of a fine or the suffering of a recovery.<sup>162</sup> In this country, however, while these methods were adopted to some extent, a custom arose at an early day, which has universally prevailed, of barring dower by the joinder of the wife in a deed of the land by the husband;<sup>163</sup> and this method of barring dower is valid in cases where the conveyance is by way of mortgage, as well as when it is absolute.<sup>164</sup> The state statutes usually provide that dower may be relinquished in this way.<sup>165</sup>

The conveyance should contain apt words indicating the wife's intention to release her dower;<sup>166</sup> and, accordingly, her mere joinder in the execution of her husband's deed has been regarded as insufficient.<sup>167</sup> But the conveyance need

<sup>162</sup> Park, Dower, 192 et seq.; 2 Bl. Comm. 137; Williams, Real Prop. 233; 4 Kent, Comm. 51. See Chase's Case, 1 Bland Ch. (Md.) 227, 17 Am. Dec. 277.

<sup>163</sup> 2 Scribner, Dower (2d Ed.) 238 et seq.; 1 Washburn, Real Prop. 199 et seq.; Powell v. Monson & Brimfield Mfg. Co., 3 Mason, 347, Fed. Cas. No. 11,356; Fowler v. Shearer, 7 Mass. 14; Elemendorf v. Lockwood, 57 N. Y. 323; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76. Such mode of barring dower was adopted in England in the act abolishing fines and recoveries. St. 3 & 4 Wm. IV. c. 74 (A. D. 1833). See Williams, Real Prop. 231.

<sup>164</sup> See St. Clair v. Morris, 9 Ohio, 15, 34 Am. Dec. 415; McCabe v. Bellows, 7 Gray (Mass.) 148, 66 Am. Dec. 467; Dundas v. Hitchcock, 12 How. (U. S.) 256; McMahon v. Russell, 17 Fla. 698; Scanlan v. Scanlan, 134 Ill. 630; Jones v. Bragg, 33 Mo. 337, 84 Am. Dec. 49; Russell v. Umphlet, 27 Ark. 339; Daly v. Willis, 5 Lea (Tenn.) 100; Davis v. Jenkins, 93 Ky. 353, 40 Am. St. Rep. 197.

<sup>165</sup> 1 Sharswood & B. Lead. Cas. Real Prop. 371; 1 Stimson's Am. St. Law, §§ 6500, 6504.

<sup>166</sup> Hall v. Savage, 4 Mason, 273, Fed. Cas. No. 5,944; Stevens v. Owen, 25 Me. 94; Lothrop v. Foster, 51 Me. 367; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; McFarland v. Febiger's Heirs, 7 Ohio, 194, 23 Am. Dec. 632; Davis v. Jenkins, 93 Ky. 353, 40 Am. St. Rep. 197.

<sup>167</sup> Catlin v. Ware, 9 Mass. 218, 3 Gray's Cas. 621, 6 Am. Dec. 56;

not refer to dower *eo nomine*, and it is sufficient if she join with the husband in the granting part, so as to become a party thereto.<sup>168</sup>

By the statutes of most of the states, it is necessary that the wife acknowledge the conveyance, the requirements in this respect being usually the same as those imposed in the case of a conveyance of the land of a married woman, and, in some states, she must be examined separately and apart from her husband, in order to determine that she is not acting under coercion by him.<sup>169</sup> These requirements as to acknowledgment have been generally regarded as absolute, so that a noncompliance therewith will render the instrument ineffective as a release of dower.<sup>170</sup>

— — Effect of avoidance of conveyance.

If a deed by the husband, in which the wife joins for the purpose of releasing dower, is set aside as being intended to defraud the husband's creditors, the wife's right of dower is revived, since, in such case, there is no one having title, in

Prather v. McDowell, 8 Bush (Ky.) 46; Cox v. Wells, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; McFarland v. Febiger's Heirs, 7 Ohio, 194, 23 Am. Dec. 632. Contra, Burge v. Smith, 27 N. H. 332; Johnson v. Montgomery, 51 Ill. 185.

<sup>168</sup> Learned v. Cutler, 18 Pick. (Mass.) 9; Smith v. Handy, 16 Ohio, 192; Gillilan v. Swift, 14 Hun (N. Y.) 574; Jones v. City of Des Moines, 43 Iowa, 209; Daly v. Willis, 5 Lea (Tenn.) 100; Dutton v. Stuart, 41 Ark. 101.

<sup>169</sup> See 1 Stimson's Am. St. Law, §§ 6500, 6501, 6504; 1 Sharswood & B. Lead. Cas. Real Prop. 372; 2 Scribner, Dower (2d Ed.) 323 et seq.

<sup>170</sup> Kirk v. Dean, 2 Bin. (Pa.) 341; Stidham v. Matthews, 29 Ark. 650; McDowell v. Little, 33 Mo. 523; Sheppard v. Wardell, 1 N. J. Law, 452; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Moore v. Thomas, 1 Or. 201.

But that the failure to comply with the statute as to acknowledgment affects merely the right to have the deed recorded, and so to charge third persons with notice thereof, see Lake v. Gray, 30 Iowa, 415.

favor of whom the release can operate.<sup>171</sup> Dower is also revived by recovery against the husband by the grantee on a covenant of seisin in the conveyance, since this has the effect of avoiding the deed.<sup>172</sup>

§ 192. Testamentary provision in lieu of dower.

If the husband's will contains a provision for his widow, which is intended to be in lieu of dower, and she accepts it, she cannot also claim dower. If the will expressly states that the provision therein is in lieu of dower, and the widow accepts it, there can be no question as to the exclusion of her dower right;<sup>173</sup> but more frequently there is no such express declaration in the will, and the testator's intention in this regard has to be determined by a consideration of the question whether its provisions are plainly inconsistent with a claim of dower.<sup>174</sup>

<sup>171</sup> *Hinchliffe v. Shea*, 103 N. Y. 153, *Finch's Cas.* 648; *Malloney v. Horan*, 49 N. Y. 111, reversing 53 Barb. 29; *Cox v. Wilder*, 2 Dill. 45, *Fed. Cas. No.* 3,308; *Summers v. Babb*, 13 Ill. 483; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475; *Richardson v. Wyman*, 62 Me. 280, 16 Am. Rep. 459; *Bohannon v. Combs*, 97 Mo. 446, 10 Am. St. Rep. 328; *Ridgway v. Mastings*, 23 Ohio St. 294, 13 Am. Rep. 251. On the same theory, when a mortgage in which the wife joined in order to release dower was defeated by a sale of the land under a prior lien, the release by the wife was held to be there after a nullity. *Hinchliffe v. Shea*, 103 N. Y. 153, *Finch's Cas.* 648.

<sup>172</sup> *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49.

<sup>173</sup> 1 *Pomeroy*, *Eq. Jur.* § 496; *Leak v. Randall*, cited in *Vernon's Case*, 4 Coke, 4a; *Bushe's Case*, 2 Dyer, 220a; *Gosling v. Warburton*, *Cro. Eliz.* 128; *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30; *Hall's Case*, 1 Bland (Md.) 203, 17 Am. Dec. 275; *Chapin v. Hill*, 1 R. I. 446.

<sup>174</sup> *French v. Davies*, 2 Ves. Jr. 572; *Birmingham v. Kirwan*, 2 Schoales & L. 444, 6 Gray's Cas. 322; *Worthen v. Pearson*, 33 Ga. 387, 81 Am. Dec. 213; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494; *Church v. Bull*, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; *Bennett v. Packer*, 70 Conn. 357; *Gordon v. Stevens*, 2 Hill Eq. (S. C.) 47, 27 Am. Dec. 445.

In any case, in the absence of a statutory provision to the contrary, in order to exclude dower, the intention so to do must clearly appear. "As the right to dower is itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported."<sup>175</sup> Occasionally this rule is incorporated in the statute.<sup>176</sup> In some states, it has, however, been changed by an express statutory declaration that a testamentary provision for the widow shall be in lieu of dower unless a contrary intention on the part of the testator appear.<sup>177</sup>

The effect of certain forms of testamentary provision, with reference to the question whether the presumption against election is thereby overcome, may be considered as settled by the decisions, and reference will be made to a few of these.<sup>178</sup> A mere devise to the widow of part of the lands in which she has a dower right is not of itself inconsistent with her claim of dower,<sup>179</sup> but, in case the devise to the wife is

<sup>175</sup> *Birmingham v. Kirwan*, 2 Schoales & L. 444, 6 Gray's Cas. 822, per Lord Redesdale. To the same effect, see *Herbert v. Wren*, 7 Cranch (U. S.) 370; *Konvalinka v. Schlegel*, 104 N. Y. 125, *Finch's Cas.* 705, 58 Am. Rep. 494; *Hilliard v. Binford's Heirs*, 10 Ala. 977; *Alling v. Chatfield*, 42 Conn. 276; *Braxton v. Freeman*, 6 Rich. Law (S. C.) 35, 57 Am. Dec. 775; *In re Gotzian's Estate*, 34 Minn. 159, 57 Am. Rep. 43; *White v. White*, 16 N. J. Law, 202, 31 Am. Dec. 233; *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; *Higginbotham v. Cornwell*, 8 Grat. (Va.) 83, 56 Am. Dec. 180.

<sup>176</sup> 1 Stimson's Am. St. Law, § 3244.

<sup>177</sup> 1 Stimson's Am. St. Law, § 3244; 1 Sharswood & B. Lead. Cas. Real Prop. 362; 1 Pomeroy, Eq. Jur. § 494, and notes.

<sup>178</sup> See 1 Pomeroy, Eq. Jur. § 492 et seq., 11 Am. & Eng. Enc. Law (2d Ed.) 57 et seq., and 2 Scribner, Dower, 439 et seq., for a full consideration of the subject.

<sup>179</sup> *Lawrence v. Lawrence*, 2 Vern. 365, 3 Brown, Parl. Cas. 488;



followed by a specific devise to one who was dependent on the testator, a right of dower might be calculated to so diminish the latter devise as to be inconsistent therewith.<sup>180</sup> A devise of land to the widow for her life or during widowhood does not of itself affect her dower right in other land.<sup>181</sup> Whether such a devise for life or widowhood is necessarily inconsistent with her right to dower in the very land so devised is a question on which the authorities are in conflict, with perhaps the weight of authority supporting the view that there is no such inconsistency.<sup>182</sup>

The gift of an annuity or rent to the wife, charged either partly or entirely on property in which she is dowable, is not necessarily inconsistent with her claim to dower in such property;<sup>183</sup> nor is a devise to trustees or executors to sell so inconsistent with dower, whether or not there is a direction that a part of the proceeds be given to the widow, the sale in

*Lefevre v. Lefevre*, 59 N. Y. 434; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514.

<sup>180</sup> *Herbert v. Wren*, 7 Cranch (U. S.) 370, 378; *Alling v. Chatfield*, 42 Conn. 276.

An intention to exclude dower is not conclusively shown by the fact either that the testamentary provision is of greater value than the dower interest (*Evans' Lessee v. Webb*, 1 Yeates [Pa.] 424, 1 Am. Dec. 308), or that it is of less value (*Cunningham's Estate*, 137 Pa. St. 621, 21 Am. St. Rep. 901).

<sup>181</sup> *Lawrence v. Lawrence*, 2 Vern. 365, 3 Brown, Parl. Cas. 483; *Daugherty v. Daugherty*, 69 Iowa, 677; *Lefevre v. Lefevre*, 59 N. Y. 434; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706.

<sup>182</sup> *Bull v. Church*, 5 Hill (N. Y.) 206; *Church v. Bull*, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *In re Franke's Estate*, 97 Iowa, 704. Contra, *Hamilton v. Buckwalter*, 2 Yeates (Pa.) 389, 1 Am. Dec. 350. The question arises generally in case of the widow's remarriage, or in case the statute gives the widow a fee-simple estate in place of the life estate of common-law dower.

<sup>183</sup> 1 *Pomeroy*, Eq. Jur. § 509; *Birmingham v. Kirwan*, 2 Schoales & L. 444, 6 Gray's Cas. 822; *Cowan v. Allen*, 26 Can. Sup. Ct. 292; *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539. But see *White v. White*, 16 N. J. Law, 211, 31 Am. Dec. 232.

such case being made subject to dower.<sup>184</sup> The dower right has been held to be intended to be excluded by a testamentary provision for her, accompanied by a devise to trustees with full power in the trustees to manage and control the land devised to them, since this is inconsistent with the wife's life estate in any of such land;<sup>185</sup> and, in some decisions, a devise to the widow of equal shares with others has been held to show an intention to exclude dower.<sup>186</sup>

— Election by widow.

As above stated, in order that a testamentary provision for the widow may bar her right of dower, it is necessary that she accept it, she having what is known as the right to elect whether she will take her dower or the testamentary gift. In order that the election be binding, it must be made with full knowledge on the widow's part of the situation of her husband's estate, and the relative values of her dower interest and the testamentary provision;<sup>187</sup> and an election made by her without such knowledge may be retracted, provided she restore what she may have received

<sup>184</sup> *Konvalinka v. Schlegel*, 104 N. Y. 125, *Finch's Cas.* 705; *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. Law & Eq. 353; *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Hall v. Hall*, 8 Rich Law (S. C.) 407, 64 Am. Dec. 758; *Kinsey v. Woodward*, 3 Har. (Del.) 459.

<sup>185</sup> *Birmingham v. Kirwan*, 2 Schoales & L. 444, 6 Gray's Cas. 822; *Hall v. Hill*, 1 Dru. & War. 94; *Tobias v. Ketchum*, 32 N. Y. 319.

<sup>186</sup> *Chalmers v. Storil*, 2 Ves. & B. 222; *Colgate's Ex'r v. Colgate*, 23 N. J. Eq. 372. And see *Durfee's Petition*, 14 R. I. 47; *Higginbotham v. Cornwell*, 8 Grat. (Va.) 83, 56 Am. Dec. 130. This line of decisions has, however, been criticised. 1 *White & T. Lead. Cas. Eq.* 531; 1 *Pomeroy, Eq. Jur.* § 502. See *In re Hatch's Estate*, 63 Vt. 300.

<sup>187</sup> *Anderson's Appeal*, 36 Pa. St. 476; *Millikin v. Welliver*, 37 Ohio St. 460; *United States v. Duncan*, 4 McLean, 99, Fed. Cas. No. 15,002; *Stone v. Vandermark*, 146 Ill. 312; *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932.

thereby.<sup>188</sup> Ignorance of the right to dower has been held not to invalidate the election, since this is ignorance of the law, which is not excused.<sup>189</sup> The right of election is personal to the widow, and consequently cannot be exercised by her representatives after her death.<sup>190</sup>

— Time of election.

The statute in many states provides that the widow's election shall be made within a certain time after the death of the husband, the probate of the will, or her receipt of notice to elect, and a failure to elect within the statutory time will generally be equivalent to an election to take under the will.<sup>191</sup> Apart from statute there is, it seems, no limit to the time within which the right of election may be exercised, though in certain cases the widow may be debarred by her delay from exercising the right as against intervening equities.<sup>192</sup> In some cases, however, it is said that the right must be exercised within a reasonable time.<sup>193</sup>

<sup>188</sup> *Dabney v. Bailey*, 42 Ga. 521; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Simonton v. Houston*, 78 N. C. 408; *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15.

<sup>189</sup> *Light v. Light*, 21 Pa. St. 407. Compare *Spread v. Morgan*, 11 H. L. Cas. 602; *Sopwith v. Maughan*, 30 Beav. 235.

<sup>190</sup> *Boone's Representatives v. Boone*, 3 Har. & McH. (Md.) 95; *Sherman v. Newton*, 6 Gray (Mass.) 307; *Crozier's Appeal*, 90 Pa. St. 384, 35 Am. Rep. 666.

The committee or guardian of an insane widow cannot make an election, without leave of court, unless authorized so to do by statute. *Heavenridge v. Nelson*, 56 Ind. 90; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650. Compare *Young v. Boardman*, 97 Mo. 181; *Brown v. Hodgdon*, 31 Me. 65.

<sup>191</sup> 1 *Stimson's Am. St. Law*, §§ 3265, 3266; 2 *Scribner, Dower* (2d Ed.) 505; 1 *Pomeroy, Eq. Jur.* § 513, note 4. As to whether a delay to elect beyond the statutory period will be excused by the widow's insanity or ignorance of her rights, see article in 5 *Law Notes*, 145.

<sup>192</sup> 1 *Pomeroy, Eq. Jur.* § 513; 11 *Am. & Eng. Enc. Law* (2d Ed.) 106.

<sup>193</sup> *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *Noel v. Garnett*, 4 Call (Va.) 92.

— Mode of election.

The election may, of course, be express, but it may also be implied from the acts of the widow. No general rule as to what acts on her part constitute an election can be stated, but generally her actual receipt of or entry upon the property given her by the will, with full knowledge of the facts, and retention and enjoyment thereof for a considerable time, will be construed as an acceptance of the testamentary provision.<sup>194</sup> In some states, the statute contains special provisions as to the mode of making the election, a quite ordinary requirement being that it shall be in writing.<sup>195</sup>

— Effect of acceptance of provision.

As a general rule, the acceptance of the testamentary provision will exclude dower, not only in land of which the husband died seised, but likewise in land conveyed by him during coverture, without the joinder of the wife.<sup>196</sup> The widow thus taking a testamentary provision in lieu of dower is regarded as a purchaser for value, and, while the property so taken by devise is generally regarded as ultimately liable for the testator's debts,<sup>197</sup> according to the weight of author-

<sup>194</sup> *Thompson's Lessee v. Hoop*, 6 Ohio St. 480; *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314; *Upshaw v. Upshaw*, 2 Hen. & M. (Va.) 381, 3 Am. Dec. 632; *Bradford v. Kenta*, 43 Pa. St. 474; *Goodrum v. Goodrum*, 56 Ark. 532.

<sup>195</sup> 1 *Stimson's Am. St. Law*, § 3267. See 11 *Am. & Eng. Enc. Law* (2d Ed.) p. 104.

<sup>196</sup> *Chapin v. Hill*, 1 R. I. 446; *Allen v. Pray*, 12 Me. 138; *Steele v. Fisher*, 1 Edw. Ch. (N. Y.) 435; *Stokes v. Norwood*, 44 S. C. 424; *Haynie v. Dickens*, 68 Ill. 267; *Buffinton v. Fall River Nat. Bank*, 113 Mass. 246; *Hornsey v. Casey*, 21 Mo. 545; *Fairchild v. Marshall*, 42 Minn. 14. Contra, under special statute, *Westbrook v. Vanderburgh*, 36 Mich. 30.

<sup>197</sup> *Bray v. Neill's Ex'x*, 21 N. J. Eq. 343; *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Isenthart v. Brown*, 1 Edw. Ch. (N. Y.) 411; *Gaw v. Huffman*, 12 Grat. (Va.) 628. And see *Clayton v. Akin*, 33 Ga. 320, 95 Am. Dec. 393. In Michigan, the widow stands (458)

ity it is not so liable till the property otherwise given by the will is exhausted.<sup>198</sup> Nor does a legacy so given usually abate with other general legacies, or, according to some authorities, with other specific legacies.<sup>199</sup> By statute in a number of states, if the provision for the widow fail, after its acceptance by her, through the enforcement of claims by creditors, or otherwise, she is entitled to her dower as if no such provision had been made, and in some cases such right has been enforced apart from statute.<sup>200</sup>

### § 193. Jointure or antenuptial agreement.

As stated in a previous chapter,<sup>201</sup> after the doctrine of uses was developed by the courts of equity, it became the very general practice to convey lands to uses. The courts, however, refused to recognize any right of dower in land conveyed to the use of the husband, since he had no seisin thereof, and consequently other provision had to be made for the wife in case of the husband's death. It then became usual for the parents of the bride to require the intended husband to have land conveyed to him and his wife, for life or in tail, in joint tenancy or "jointure," the wife thereby becoming entitled to an estate for life, at least, if she survived him. Upon the passage of the Statute of Uses, since

on the same footing as a creditor of the estate, and shares *pro rata* with the creditors. *Tracy v. Murray*, 44 Mich. 109.

<sup>198</sup> *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Lord v. Lord*, 23 Conn. 327; *Taylor's Estate*, 175 Pa. St. 60, *Law v. Huffman*, 12 Grat. (Va.) 628; *Isenthart v. Brown*, 1 Edw. Ch. (N. Y.) 411.

<sup>199</sup> *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Security Co. v. Bryant*, 52 Conn. 311, 52 Am. Rep. 599; *In re Gotzian's Estate*, 34 Minn. 159, 57 Am. Rep. 43; *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507; *Moore v. Alden*, 80 Me. 301, 6 Am. St. Rep. 203; *Roper v. Roper*, 3 Ch. Div. 714.

<sup>200</sup> 2 Scribner, *Dower* (2d Ed.) 525; 1 *Stimson's Am. St. Law*, § 3248.

<sup>201</sup> See ante, § 83

this transferred the legal estate to the owner of the use, a married woman would have become dowable of lands which had been previously conveyed to the use of her husband, although she had already been provided for by jointure, had the statute not provided that no woman who had jointure should also have dower. In the construction of this statute it was held that the jointure, in order to defeat dower, must satisfy the following requirements: (1) It must commence immediately on the death of the husband; (2) it must be an estate for the wife's life, at least, and not a smaller estate; (3) it must be made to herself, and not in trust for her; (4) it must be made, and expressed to be, in satisfaction of her whole dower, and not of a part; (5) it must be made before marriage.<sup>202</sup> Since a jointure fulfilling these requirements, called a "legal jointure," was sufficient to bar dower, irrespective of the wife's consent, by force of the statute alone, the fact that the wife was an infant was immaterial.<sup>203</sup>

Provisions for the wife which did not comply with all the requirements named above as essential to a jointure under the Statute of Uses were, however, recognized in equity as sufficient to bar dower, if assented to by the intending wife before marriage. Such a provision was called an "equitable jointure," and differed primarily from a legal jointure, in that it rested on a contract by the wife to relinquish dower, in consideration of such provision, which equity would enforce.<sup>204</sup> In the case of an infant, though she cannot bind

<sup>202</sup> Co. Litt. 36b; 2 Bl. Comm. 137; 1 Cruise, Dig. tit. 7, c. 1, §§ 22, 33; Williams, Real Prop. p. 236, note; 4 Kent, Comm. 54; Vernon's Case, 4 Coke, 1, 6 Gray's Cas. 772.

<sup>203</sup> Earl of Buckinghamshire v. Drury, 3 Brown, Parl. Cas. 492, 2 Eden, 60, Willmot's Notes, 6 Gray's Cas. 781; Drury v. Drury, 2 Eden, 29; McCartee v. Teller, 2 Paige (N. Y.) 511, 3 Wend. (N. Y.) 267.

<sup>204</sup> 2 Scribner, Dower, 408 et seq.; Williams, Real Prop. 235; Caruthers v. Caruthers, 4 Brown, Ch. 500, 6 Gray's Cas. 791; Drury v. (460)

herself by contract, it was held that an equitable jointure was sufficient to bar dower, if the provision was competent and certain, and was assented to by her parent and guardian.<sup>205</sup>

— In the United States.

In this country, while in some cases the existence of the requirements of a legal jointure, as recited above, have been recognized,<sup>206</sup> the essentials of a jointure are usually determined by the statute of the particular state, and this statute, besides imposing other restrictions, generally requires the wife's assent to the provision given her in lieu of dower, or, in the absence of such assent, gives her the right, after the husband's death, to elect between such provision and her dower.<sup>207</sup> So, in a number of states, the statute provides that any pecuniary provision for the intended wife in lieu of dower will, if assented to by her, exclude her right thereto.<sup>208</sup> Frequently, in the decisions, the term "jointure" is not used, it being merely said that the intending wife may release her dower right by a contract on a valuable and adequate consideration;<sup>209</sup> but such a contract seems to dif-

Drury, 2 Eden, 39, 6 Gray's Cas. 781. See *Andrews v. Andrews*, 8 Conn. 79; *O'Brien v. Elliot*, 15 Me. 125, 32 Am. Dec. 137; *Logan v. Phillippo*, 18 Mo. 22; *Stille v. Folger*, 14 Ohio, 610.

<sup>205</sup> *Caruthers v. Caruthers*, 4 Brown, Ch. 500, 6 Gray's Cas. 791; 1 Washburn, Real Prop. 267; 4 Kent, Comm. 55. See *McCartee v. Teller*, 2 Paige (N. Y.) 511, 8 Wend. (N. Y.) 267; *Levering v. Heighe*, 3 Md. Ch. 365. Contra, *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368.

<sup>206</sup> *Grider v. Eubanks*, 12 Bush (Ky.) 510; *Vance v. Vance*, 21 Me. 364; *Graham v. Graham*, 67 Hun (N. Y.) 329; *Grogan v. Garrison*, 27 Ohio St. 50.

<sup>207</sup> See 1 *Stimson's Am. St. Law*, § 3241; 1 *Sharswood & B. Lead. Cas. Real Prop.* 356; 2 *Scribner, Dower* (2d Ed.) 407.

<sup>208</sup> 1 *Scribner, Dower* (2d Ed.) 409; 1 *Stimson's Am. St. Law*, § 3242.

<sup>209</sup> *Culberson v. Culberson*, 37 Ga. 296; *Forwood v. Forwood*, 86

fer from an "equitable jointure," if it differs at all, merely in the fact that, by reason of the statute, it may be enforced at law as well as in equity.

As before stated, the relations of husband and wife are such that she is not allowed to release her dower right to her husband, and consequently an agreement made by her after marriage, even in consideration of a provision then made for her (postnuptial settlement), is not binding upon her, and she may, after the husband's death, elect whether to take it or her dower,<sup>210</sup> and it is so provided by statute in many states.<sup>211</sup>

— Failure of provision for wife.

In case the provision by way of jointure proves ineffectual, as when the widow is evicted by paramount title, she is then entitled to her dower *pro tanto*,<sup>212</sup> and the state statutes frequently contain provisions to this effect.<sup>213</sup>

Ky. 114; Naill v. Maurer, 25 Md. 532; Jenkins v. Holt, 109 Mass. 261; Worrell v. Forsyth, 141 Ill. 22; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Findley's Ex'rs v. Findley, 11 Grat. (Va.) 434; Hinkle v. Hinkle, 34 W. Va. 142; Stilley v. Folger, 14 Ohio, 610, 650; Graham v. Graham, 67 Hun (N. Y.) 329.

An agreement by the husband relinquishing his rights in his wife's property after her death is, it seems, a sufficient consideration for her contract releasing dower, if she has property. Andrews v. Andrews, 8 Conn. 79; Naill v. Maurer, 25 Md. 532; Cauley v. Lawson, 58 N. C. 132. And see Stilley v. Folger, 14 Ohio, 610.

<sup>210</sup> Co. Litt. 36b; 2 Bl. Comm. 138; 1 Cruise, Dig. tit. 7, c. 1, § 22; 4 Kent, Comm. 56; Vernon's Case, 4 Coke, 1, 6 Gray's Cas. 772; McCartee v. Teller, 2 Paige (N. Y.) 556; Roberts v. Walker, 32 Mo. 200; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 489, 9 Am. Dec. 318; Butts v. Trice, 69 Ga. 74; Newby v. Cox, 31 Ky. 58; Temperance House v. Fowle, 20 Or. 163; Shane v. McNeill, 76 Iowa, 459. But see, to the contrary, Garbut v. Bowling, 31 Mo. 214; Hiltner's Appeal, 54 Pa. St. 110; Lively v. Paschal, 35 Ga. 218, 39 Am. Dec. 282; and under a particular statute, Rhoades v. Davis, 51 Mich. 306.

<sup>211</sup> 1 Stimson's Am. St. Law, § 3243.

<sup>212</sup> 1 Washburn, Real Prop. 265, 268; 2 Scribner, Dower (2d Ed.)



It has generally been held in England that the inadequacy of an equitable jointure settled on an adult woman as a substitute for dower does not affect its sufficiency as a bar, she being bound by her contract in this as in any other case.<sup>214</sup> It has, however, in this country, quite frequently been decided that the compensation given to the wife must be fair and adequate, in order that the contract may be upheld.<sup>215</sup> Any stipulation on the part of the husband as a consideration for the wife's contract must, it has been held, be actually performed by him in order to exclude dower.<sup>216</sup>

In some states, the wife forfeits the provision made for her by any misconduct on her part such as would bar dower.<sup>217</sup>

#### § 194. Effect of divorce.

Since, in order to entitle one to dower, she must have been the wife of the owner of the land at the time of his decease,

432 et seq.; *Drury v. Drury*, 2 Eden, 39, 6 Gray's Cas. 781; *Garrard v. Garrard*, 7 Bush (Ky.) 436. It was so expressly provided in the Statute of Uses (27 Hen. VIII. c. 10, § 7).

<sup>214</sup> See 1 Stimson's Am. St. Law, § 3247; 1 Sharswood & B. Lead. Cas. Real Prop. 358.

<sup>215</sup> *Roper, Husband & Wife*, 487 et seq.; 1 Cruise, Dig. tit. 7, c. 1, § 27; *Caruthers v. Caruthers*, 4 Brown, Ch. 500; *Dyke v. Rendall*, 2 De Gex, M. & G. 209, 6 Gray's Cas. 794. See, also, *Andrews v. Andrews*, 8 Conn. 79, *Naill v. Maurer*, 25 Md. 532, and *Forwood v. Forwood*, 86 Ky. 114, where it is held that the marriage is a sufficient consideration to support an antenuptial contract relinquishing dower.

<sup>216</sup> *Gould v. Womack*, 2 Ala. 83; *Farrow v. Farrow*, 1 Del. Ch. 457; *Grogan v. Garrison*, 27 Ohio St. 50; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Taylor v. Taylor*, 144 Ill. 436; *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206, 64 Pa. St. 122. See 4 Kent, Comm. 56, note.

<sup>217</sup> *Johnson v. Johnson's Adm'r*, 23 Mo. 561, 30 Mo. 72, 77 Am. Dec. 598; *Sargent v. Roberts*, 34 Me. 135; *Brenner v. Gauch*, 85 Ill. 368; *Sheldon v. Bliss*, 8 N. Y. 31. But see *Vincent v. Spooner*, 2 Cush. (Mass.) 467; *Freeland v. Freeland*, 128 Mass. 509.

<sup>218</sup> 1 Stimson's Am. St. Law, § 3247.

an absolute divorce, even though for the husband's fault, has been always regarded as divesting dower, in the absence of any statute to the contrary.<sup>218</sup> Occasionally, it is provided by statute that a divorce for the fault of the husband shall not bar dower,<sup>219</sup> and such a statute sometimes requires dower to be assigned immediately upon divorce, without awaiting the husband's death.<sup>220</sup> Quite frequently, the statute provides that there shall be no dower in case of divorce for the wife's fault,<sup>221</sup> and such statutes have been construed as allowing her dower in case of divorce for her husband's fault.<sup>222</sup>

### § 195. Elopement and adultery of wife.

By an early English statute, it was provided that, if a

<sup>218</sup> Co. Litt. 32a; 2 Bl. Comm. 130; 4 Kent, Comm. 54; Barrett v. Failing, 111 U. S. 523; Wood v. Wood, 59 Ark. 441, 43 Am. St. Rep. 42; Hinson v. Bush, 84 Ala. 368; Fletcher v. Monroe, 145 Ind. 56; Hood v. Hood, 110 Mass. 463; Miltimore v. Miltimore, 40 Pa. St. 151; Price v. Price, 124 N. Y. 589. For statutes to this effect, see 1 Stimson's Am. St. Law, § 3246(c).

A divorce a mensa et thoro, being a mere decree of separation, does not bar dower. Co. Litt. 32a; 2 Bl. Comm. 130; Day v. West, 2 Edw. Ch. (N. Y.) 592; Rich v. Rich, 7 Bush (Ky.) 53; Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460.

<sup>219</sup> 1 Stimson's Am. St. Law, § 3246(c); 1 Sharswood & B. Lead. Cas. Real Prop. 387.

<sup>220</sup> See 1 Sharswood & B. Lead. Cas. Real Prop. 387; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Davol v. Howland, 14 Mass. 219; Percival v. Percival, 56 Mich. 297; Tatro v. Tatro, 18 Neb. 395, 53 Am. Rep. 321. But, in the absence of such a statutory provision, the divorced wife is not entitled to dower till the death of the husband. Hunt v. Thompson, 61 Mo. 148.

<sup>221</sup> 1 Stimson's Am. St. Law, § 3246(c).

<sup>222</sup> Wait v. Wait, 4 N. Y. 95; Meacham v. Bunting, 156 Ill. 536, 47 Am. St. Rep. 239. Contra, Wood v. Wood, 59 Ark. 441, 43 Am. St. Rep. 42.

A statute allowing the wife dower on a divorce does not give her dower in lands acquired by the husband after the divorce. Maynard v. Hill, 125 U. S. 190, 216. In re Ensign's Estate, 37 Hun. (N. Y.) 152.

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woman elope from her husband, and live with an adulterer, she shall lose her dower unless her husband is voluntarily reconciled with her.<sup>223</sup> This statute has, in some states in this country, been regarded as in force,<sup>224</sup> while in others statutes of a similar character have been enacted.<sup>225</sup> In other states, however, it has been decided that adultery is in no case cause for barring dower, for the reason, it is sometimes stated, that, since adultery is cause for a divorce, which would bar dower, there is no reason for introducing the rule prevailing in England, where adultery by the wife was not, until recently, cause for absolute divorce.<sup>226</sup>

<sup>223</sup> St. Westminster II. (13 Edw. I. c. 34 [1285]); 2 Bl. Comm. 130; Co. Litt. 32a.

Under this statute, an elopement, in addition to the commission of adultery, has been held to be necessary to bar dower. *Cogswell v. Tibbetts*, 3 N. H. 41; *Jarnigan v. Jarnigan*, 12 Lea (Tenn.) 252. See 4 Kent, Comm. 52. But see, to the contrary, *Hetherington v. Graham*, 6 Bing. 135; *Reynolds v. Reynolds*, 24 Wend. (N. Y.) 193; *Finch's Cas.* 695.

The consent of the husband to the adultery will not prevent the bar of dower. 2 Co. Inst. 435; *Coot v. Berty*, 12 Mod. 232; *Reynolds v. Reynolds*, 24 Wend. (N. Y.) 193, *Finch's Cas.* 695.

Marrying and living with a man under the mistaken belief that her previous husband was dead does not bar dower. *Greene v. Harvey*, 1 Rolle. Abr. 680; *Payne v. Dotson*, 81 Mo. 145, 51 Am. Rep. 225. Nor is it barred if the wife is deserted by the husband, and afterwards commits adultery. *Graham v. Law*, 6 Up. Can. C. P. 310; *Rawlins v. Buttel*, 1 Houst. (Del.) 224; *Reel v. Elder*, 62 Pa. St. 308; *Shaffer v. Richardson's Adm'r*, 27 Ind. 122. Or if she is driven away by him. *Walters v. Jordan*, 35 N. C. 170.

<sup>224</sup> See *Bell v. Nealy*, 1 Bailey. Law (S. C.) 312, 19 Am. Dec. 686; and see cases cited ante, note 223.

<sup>225</sup> 1 Stimson's Am. St. Law, § 3246; 1 Sharswood & B. Lead. Cas. Real Prop. 384; 2 Scribner, Dower (2d Ed.) 535. See *Stegall v. Stegall*, 2 Brock. 256, Fed. Cas. No. 13,351; *Shaffer v. Richardson's Adm'r*, 27 Ind. 122; *Walters v. Jordan*, 35 N. C. 361; *Payne v. Dotson*, 81 Mo. 145, 51 Am. Rep. 225.

<sup>226</sup> *Lakin v. Lakin*, 2 Allen (Mass.) 45; *Smith v. Woodworth*, 4 Dil. 584, Fed. Cas. No. 13,130; *Bryan v. Batcheller*, 6 R. I. 543, 78 Am. Dec. 454; *Reynolds v. Reynolds*, 24 Wend. (N. Y.) 193, *Finch's Cas.* 695.

## § 196. Estoppel to claim dower.

The widow, it has been held, may be estopped to claim dower by having made statements to intending purchasers of the land that she will make no such claim;<sup>227</sup> but she is not, it seems, estopped by mere failure to assert her claim at the time of the sale of her husband's land, even though the sale is conducted by her as administrator.<sup>228</sup> She has even been held to be estopped by knowledge that her husband was living with another woman as his wife, and failure to assert her rights during his life.<sup>229</sup> She may also, by some decisions, be estopped to claim dower by covenants of title in deeds of the property executed by her.<sup>230</sup>

## § 197. Dower inchoate.

Until the death of the husband, the wife has merely a contingent right or interest, known as "dower inchoate," and not

<sup>227</sup> *Smiley v. Wright*, 2 Ohio, 506; *Sweaney v. Mallory*, 62 Mo. 485; *Dougrey v. Topping*, 4 Paige (N. Y.) 94. And see *Connolly v. Branstler*, 3 Bush (Ky.) 702, 96 Am. Dec. 278; *Ewart, Estoppel*, 27. *Contra, Kelso's Appeal*, 103 Pa. St. 7.

<sup>228</sup> *Sip v. Lawback*, 17 N. J. Law, 442; *Owen v. Slatter*, 26 Ala. 547; *Lawrence v. Brown*, 5 N. Y. 394. But see *Jefferies v. Allen*, 34 S. C. 189.

<sup>229</sup> *De France v. Johnson*, 26 Fed. 891; *Gilbert v. Reynolds*, 51 Ill. 513. *Contra, Reel v. Elder*, 62 Pa. St. 308; *Martin's Heirs v. Martin*, 22 Ala. 86. And see *Cruiza v. Billmire*, 69 Iowa, 397.

<sup>230</sup> 2 *Scribner, Dower* (2d Ed.) 261; *Magee v. Mellon*, 23 Miss. 535; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Usher v. Richardson*, 29 Me. 415. But see *Marvin v. Smith*, 46 N. Y. 571; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167.

The wife has been held to be estopped by the fact that her ancestor made such covenants, and that she was liable thereon; as when land was purchased by the ancestor of the former owner's wife, and then sold by him with covenants of warranty, it being considered that such wife, being liable on the covenants as having received property from her ancestor, could not claim dower, as she would have to respond for the amount thereof. *Torrey v. Minor*, 1 Smedes & M. Ch. (Miss.) 439. See, also, *Russ v. Perry*, 49 N. H. 547.

an estate in the land.<sup>231</sup> This is not even regarded as a vested right, and it may accordingly be abrogated or diminished by the legislature at pleasure.<sup>232</sup> Furthermore, it has been held that the wife is not entitled to compensation for this inchoate right when the land is taken under the power of eminent domain, or dedicated for public use.<sup>233</sup>

On a sale of the land under a mortgage which takes precedence of her right of dower, according to some decisions, the inchoate right is destroyed, so as to exclude her from any share in the proceeds of sale,<sup>234</sup> though by others she is given a share therein.<sup>235</sup> Likewise, in the case of a sale on parti-

<sup>231</sup> *Reiff v. Horst*, 55 Md. 42; *Boyd v. Harrison*, 36 Ala. 533; *Smith v. Howell*, 53 Ark. 279; *Goodkind v. Bartlett*, 136 Ill. 18; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Bonfoey v. Bonfoey*, 100 Mich. 84; *Moore v. City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Elmendorf v. Lockwood*, 57 N. Y. 322; *McArthur v. Franklin*, 16 Ohio St. 193. In *Bullard v. Briggs*, 7 Pick. (Mass.) 533, Parker, C. J., says that "it is more than a possibility, and may well be denominated a contingent interest." In *Mason v. Mason*, 140 Mass. 63, it is called a "vested right of value, dependent on the contingency of survivorship." Compare *In re Alexander*, 53 N. J. Eq. 96.

<sup>232</sup> *Randall v. Kreiger*, 23 Wall. (U. S.) 148; *McNeer v. McNeer*, 142 Ill. 388; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Mellizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573. Contra, *In re Alexander*, 53 N. J. Eq. 96.

<sup>233</sup> *Duncan v. City of Terre Haute*, 85 Ind. 104; *French v. Lord*, 69 Me. 537; *Moore v. City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Venable v. Wabash Western Ry. Co.*, 112 Mo. 103; *Gwynne v. City of Cincinnati*, 3 Ohio, 24, 17 Am. Dec. 576. Contra, *Wheeler v. Kirtland*, 27 N. J. Eq. 534, *Finch's Cas.* 698. And see *In re Central Park Extension*, 16 Abb. Pr. (N. Y.) 69; *Nye v. Taunton Branch R. Co.*, 113 Mass. 277; *Royston v. Royston*, 21 Ga. 161.

<sup>234</sup> *Newhall v. Lynn Five Cents Sav. Bank*, 101 Mass. 428, 3 Am. Rep. 387; *Dean v. Phillips*, 17 Ind. 409; *Kauffman v. Peacock*, 115 Ill. 212; *Cook v. Dillon*, 9 Iowa, 412.

<sup>235</sup> *Mandel v. McClave*, 46 Ohio St. 407, 15 Am. St. Rep. 627; *Unger v. Leiter*, 32 Ohio St. 210; *Vreeland v. Jacobus*, 19 N. J. Eq. 311; *De Wolf v. Murphy*, 11 R. I. 630; *Vartie v. Underwood*, 18 Barb. (N. Y.) 564; *Zinn v. Scott*, 17 Ky. Law Rep. 1083.

tion during the husband's life, it has been held that the wife of a cotenant has no right to share in the proceeds of sale.<sup>226</sup>

The inchoate right of dower is not transferable by the wife, by conveyance or assignment, even though her husband join therein, but she may release it to the tenant of a freehold estate in the land.<sup>227</sup>

Inchoate dower is, however, for some purposes, regarded as a valuable right, which the law will recognize and protect, at the instance of the wife, as when the husband fraudulently alienates his land in order to deprive her of her dower, or, by the fraudulent conduct of others, she is induced to release her right.<sup>228</sup> But though her right to dower, while thus inchoate, will be protected, she is not at this stage entitled to

<sup>226</sup> *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262. But see *Jackson v. Edwards*, 7 Paige (N. Y.) 386; *Greiner v. Klein*, 28 Mich. 12; *Warren v. Twilley*, 10 Md. 39; *Jordan v. Van Epps*, 85 N. Y. 427; 1 *Scribner, Dower* (2d Ed.) 342 et seq.

<sup>227</sup> *Anonymous*, Cro. Jac. 151; *Moore v. City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Johnston v. Smith's Adm'r*, 70 Ala. 108; *Penfold v. Warner*, 96 Mich. 181; *Reiff v. Horst*, 55 Md. 47; *Mason v. Mason*, 140 Mass. 63; *Harriman v. Gray*, 49 Me. 537; *Pixley v. Bennett*, 11 Mass. 298. It may, it has been held, be released to one who has conveyed away the property with covenant of warranty, since he is in privity with the title. *Robbins v. Kinzie*, 45 Ill. 354; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289.

Inchoate dower could not be released at common law, since the wife had no power to dispose of her interests in land except by suffering a fine or recovery jointly with her husband. See *Park Dower*, 193. And see ante, note 162.

<sup>228</sup> *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Busick v. Busick*, 44 Iowa, 259, 24 Am. Rep. 740; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Clifford v. Kampfe*, 147 N. Y. 383; *Bonfoey v. Bonfoey*, 100 Mich. 82; *Petty v. Petty*, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211.

In *Davis v. Wetherell*, 13 Allen (Mass.) 60, 6 Gray's Cas. 306, 90 Am. Dec. 177, it was decided that the wife, having an inchoate dower right in the land, had such an interest that she could bring a bill to redeem from a mortgage thereon.

bring suit to protect her enjoyment of such right, as to prevent waste by the husband or other persons, or to obtain possession from a person wrongfully in possession.<sup>239</sup>

The relinquishment of her dower right, while still inchoate, is a valuable consideration, which will support a transfer to or contract with the wife,<sup>240</sup> and the right is an incumbrance within a covenant against incumbrances.<sup>241</sup>

### § 198. Dower consummate.

Upon the husband's death, the dower right of the wife loses its contingent character, and becomes "consummate," as it is called. It is not, however, yet an estate, but is merely a right in action until the land in which the widow is to hold her dower is set off to her, this being termed the "assignment of dower."<sup>242</sup> Consequently, she has no right of entry until assignment.<sup>243</sup> Nevertheless, she is entitled, it seems, at this

<sup>239</sup> *Miller v. Pence*, 132 Ill. 149; *Paulus v. Latta*, 93 Ind. 34; *Hart v. McCollum*, 28 Ga. 478; *Taylor v. Lawrence*, 148 Ill. 388; *Durham v. Angier*, 20 Me. 242; *Boling v. Clark*, 83 Iowa, 481; *Williams v. Williams*, 89 Ky. 381; *Moore v. Frost*, 3 N. H. 126.

<sup>240</sup> *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; *Nims v. Bigelow*, 45 N. H. 343; *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *Singree v. Welch*, 32 Ohio St. 320; *Motley v. Sawyer*, 38 Me. 68.

<sup>241</sup> *Harrington v. Murphy*, 109 Mass. 299; *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30; *Russ v. Perry*, 49 N. H. 547; *Jones v. Gardner*, 10 Johns. (N. Y.) 266; *Johnson v. Nyce's Ex'rs*, 17 Ohio, 66, 49 Am. Dec. 444; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 260.

<sup>242</sup> 2 Scribner, *Dower* (2d Ed.) 27 et seq.; *Rayner v. Lee*, 20 Mich. 384; *Weaver v. Sturtevant*, 12 R. I. 537; *Wade v. Miller*, 32 N. J. Law, 296; *Van Name v. Van Name*, 23 How. Pr. (N. Y.) 247; *Best v. Jenks*, 123 Ill. 447.

<sup>243</sup> *Hildreth v. Thompson*, 16 Mass. 191; *Johnson v. Shields*, 32 Me. 424; *Hilleary v. Hilleary's Lessee*, 26 Md. 274; *Heisen v. Heisen*, 145 Ill. 658; *Evans' Lessee v. Webb*, 1 Yeates (Pa.) 424, 1 Am. Dec. 308. Contra, under particular statutes, *Stedman v. Fortune*, 5 Conn. 462; *Grant v. Parham*, 15 Vt. 649.

The situation of the widow before assignment of dower is "prob-

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stage, to sue to protect the land of her husband from injury by the heir or other persons.<sup>244</sup>

At law, in the absence of statutory provisions changing the rule, the widow cannot alien her right of dower consummate, so as to vest a right of action in her grantee.<sup>245</sup> But in some cases her assignee has been allowed to sue at law in the name of the widow to recover dower,<sup>246</sup> and, by virtue of statutes extending rights of assignment, the widow may be able to transfer her right.<sup>247</sup> In equity, a transfer by her of her right to dower is generally recognized and protected.<sup>248</sup> The widow may at any time release her right to dower to the tenant of a freehold estate in the land.<sup>249</sup>

Before assignment, the widow's dower is generally not liable to execution.<sup>250</sup> In equity, however, it is generally re-

ably the only existing case in which a title, though complete, and unopposed by any adverse right of possession, does not confer on the person in whom it is vested the right of reducing it into possession by entry." Park, Dower, 334.

<sup>244</sup> *Shepard v. Manhattan Ry. Co.*, 117 N. Y. 442; *Harker v. Christy*, 5 N. J. Law, 717; *Rogers v. Potter*, 32 N. J. Law, 78. Compare *Carey v. Buntain*, 4 Bibb (Ky.) 217.

<sup>245</sup> 2 *Scribner, Dower* (2d Ed.) 42; *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Blain v. Harrison*, 11 Ill. 384; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Johnson v. Shields*, 32 Me. 424; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Saltmarsh v. Smith*, 32 Ala. 404; *Hart v. Burch*, 130 Ill. 426.

<sup>246</sup> *Robie v. Flanders*, 33 N. H. 524; *McMahon v. Gray*, 150 Mass. 291; *Lamar v. Scott*, 4 Rich. Law (S. C.) 516.

<sup>247</sup> *Carey v. West*, 139 Mo. 146; *Dobberstein v. Murphy*, 64 Minn. 129; *Terry v. Curry*, 26 Neb. 353; *Payne v. Becker*, 87 N. Y. 153, *Finch's Cas.* 650; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

<sup>248</sup> 2 *Scribner, Dower*, 45; *Davison v. Whittlesey*, 1 MacArthur (D. C.) 163; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Potter v. Everitt*, 42 N. C. 152; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

<sup>249</sup> 2 *Scribner, Dower*, 314; *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Saunders v. Blythe*, 112 Mo. 1; *Summers v. Babb*, 13 Ill. 483; *Elmendorf v. Lockwood*, 57 N. Y. 322; *Sloniger v. Sloniger*, 161 Ill. 270.

<sup>250</sup> 2 *Scribner, Dower*, 39; *Gooch v. Atkins*, 14 Mass. 378; *Rausch* (470)



garded as such an interest as may be reached by her creditors.<sup>251</sup>

§ 199. The widow's quarantine.

It was by *Magna Charta* provided that the widow should have the right to remain in her husband's principal mansion house for forty days after his death, within which period her dower should be assigned.<sup>252</sup> In this country, the widow is, by statute, generally given a similar or analogous right; in some states it being extended to a longer period than forty days,—quite frequently a year,—and in some states it continues till dower is actually assigned. The statute has also occasionally extended the right to buildings and lands appurtenant to the manor house.<sup>253</sup> The statutes, and the construction put thereon, usually allow the widow to occupy the premises by a tenant during the statutory period.<sup>254</sup>

In England, the right of quarantine was lost by the remar-

v. Moore, 48 Iowa, 611, 30 Am. Rep. 412; *Shields' Heirs v. Batts*, 5 J. Marsh. (Ky.) 12; *Alkman v. Harsell*, 98 N. Y. 186; *Petefish v. Buck*, 56 Ill. App. 149.

<sup>251</sup> *McMahon v. Gray*, 150 Mass. 291; *Payne v. Becker*, 87 N. Y. 153, *Finch's Cas.* 650; *Boltz v. Stolz*, 41 Ohio St. 540; *Davison v. Whittlesey*, 1 MacArthur (D. C.) 163; *Petefish v. Buck*, 56 Ill. App. 149. Contra, *Harper v. Clayton*, 84 Md. 346.

<sup>252</sup> 2 Bl. Comm. 139; 4 Kent, Comm. 61; Co. Litt. 34b. The word "quarantine" means forty days. Id.

<sup>253</sup> 1 Sharswood & B. Lead. Cas. Real Prop. 403; 2 Scribner, Dower (2d Ed.) 55; 1 Stimson's Am. St. Law, § 3278.

There is no right of quarantine in a house belonging to the husband in which he did not reside. *Clary v. Sanders*, 43 Ala. 287; *Ogbourne v. Ogbourne's Adm'r*, 60 Ala. 616.

The right exists only as to property of which the widow is dowerable. *Voelckner v. Hudson*, 1 Sandf. (N. Y.) 215; *Harrison v. Boyd*, 36 Ala. 203. Hence it does not apply in the case of leaseholds. *Pizzala v. Campbell*, 46 Ala. 35.

<sup>254</sup> *White v. Clarke*, 7 T. B. Mon. (Ky.) 641; *Craig v. Morris*, 25 N. J. Eq. 468; *Doe d. Caillaret v. Bernard*, 7 Smedes & M. (Miss.) 319; *Oakley v. Oakley*, 30 Ala. 131.

riage of the widow within the forty days,<sup>255</sup> but a different view has been taken in one state in this country.<sup>256</sup> The right of quarantine, being a mere personal right, is not subject to execution,<sup>257</sup> nor is the widow under any obligation to pay taxes and make repairs on the residence in which the right exists.<sup>258</sup>

§ 200. The assignment of dower.

Unless it is otherwise agreed, or it is impracticable or inequitable, dower must be assigned by metes and bounds.<sup>259</sup> And in order that such assignment be valid, it must, in the absence of agreement otherwise, be of an estate for life, free from any condition or exception.<sup>260</sup> In some cases, assignment by metes and bounds is impracticable, or is so inequitable that it will not be sanctioned by a court, and in these cases another method must be adopted. Accordingly, if the property is such that it cannot be divided by metes and bounds, then the widow may be granted a proportional part of the rents and profits, or, in some cases, a right of alternate occupation and enjoyment.<sup>261</sup> And the statute frequently contains a provision to this effect.<sup>262</sup>

<sup>255</sup> Co. Litt. 34b.

<sup>256</sup> Doe d. Shelton v. Carrol, 16 Ala. 148.

<sup>257</sup> Doe d. Cook v. Webb, 18 Ala. 814; Carnall v. Wilson, 21 Ark. 62.

<sup>258</sup> Graves v. Cochran, 68 Mo. 74; Spinning v. Spinning, 41 N. J. Eq. 427. And see Harrison v. Peck, 56 Barb. (N. Y.) 251.

<sup>259</sup> Litt. § 36; 2 Scribner, Dower (2d Ed.) 80; Sanders v. McMillan, 98 Ala. 146, 39 Am. St. Rep. 19; Pierce v. Williams, 3 N. J. Law, 521; Stevens' Heirs v. Stevens, 3 Dana (Ky.) 371; Benner v. Evans, 3 Pen. & W. (Pa.) 454; Smith v. Smith, 6 Lans. (N. Y.) 313; Schnebly v. Schnebly, 26 Ill. 116. The statute occasionally so provides. 1 Stimson's Am. St. Law, § 3276.

<sup>260</sup> Co. Litt. 34b; Bullock v. Finch, 1 Rolle, Abr. 682; Wentworth v. Wentworth, Cro. Eliz. 451; Austin v. Austin, 50 Me. 77. 79 Am. Dec. 597.

<sup>261</sup> Co. Litt. 32a; Park, Dower, 252; Stoughton v. Leigh, 1 Taunt. 402, 6 Gray's Cas. 729; Stevens' Heirs v. Stevens, 3 Dana (Ky.) 371; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Sanders v. Mc (472)

This principle is applied in the case of mines, dower in which should, if practicable, be assigned by metes and bounds, but which may be otherwise assigned in the form of a share of the rents or profits, or a right of alternate occupation, and it is even sufficient to set out its equivalent in value in other realty of which the widow is dowable.<sup>263</sup> It is also impracticable to assign dower by metes and bounds in lands held by the husband or his alienee jointly with others at the time of the former's death, and in such case the widow will hold her share in common with the other tenants, as well as the heir, devisee, or alienee of her husband.<sup>264</sup> And the assignment cannot be by metes and bounds if the right of the husband's alienee to the benefit of improvements made by him, free from any claim of dower, would be thereby prejudiced.<sup>265</sup>

— Separate tracts.

If the widow is entitled to dower in separate tracts of land, the common-law rule is that she should be given one-third of each tract, rather than a single tract equivalent in value to the aggregate of her dower rights in all the tracts.<sup>266</sup> And

Millian, 98 Ala. 146, 39 Am. St. Rep. 19; Rockwell v. Morgan, 18 N. J. Eq. 389; Clift v. Clift, 87 Tenn. 17.

<sup>263</sup> 1 Stimson's Am. St. Law, § 3276; 1 Sharswood & B. Lead. Cas. Real Prop. 396.

<sup>264</sup> Stoughton v. Leigh, 1 Taunt. 402, 6 Gray's Cas. 729; Coates v. Cheever, 1 Cow. (N. Y.) 460; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263.

<sup>265</sup> Litt. § 44; Co. Litt. 32b; Walker v. Walker, 6 Cold. (Tenn.) 571; Parrish v. Parrish, 88 Va. 529; French v. Lord, 69 Me. 537; Hart v. Burch, 130 Ill. 426; Osborn v. Rogers, 19 N. J. Eq. 429; Blossom v. Blossom, 9 Allen (Mass.) 254; Gregory v. Gregory, 69 N. C. 522.

<sup>266</sup> Beavers v. Smith, 11 Ala. 20; Francis v. Garrard, 18 Ala. 794; Willet v. Beatty, 12 B. Mon. (Ky.) 172; Lewis v. James, 8 Humph. (Tenn.) 537.

<sup>267</sup> 2 Scribner, Dower (2d Ed.) 587; Compton v. Pruit, 88 Ind. 171; Schnebly v. Schnebly, 26 Ill. 116; Jones v. Brewer, 1 Pick.

in the case of several tracts aliened by her husband, the justice of the rule that dower should be assigned in the land of each alienee, and not in the land of one alone, is apparent.<sup>267</sup> In the case of lands belonging to the husband at the time of his death, however, the statute quite frequently provides for the assignment of her whole dower out of one tract, rather than in part out of each of the tracts,<sup>268</sup> and this is always permissible if the widow and the heir agree thereto.<sup>269</sup> It has likewise been decided that dower should be assigned entirely out of a tract of land belonging to the husband's estate, rather than partly in land aliened by him, with a warranty of title, since, in any case, the husband's estate would be liable under the warranty for the amount of the dower.<sup>270</sup>

— Assignment in money.

In cases where the widow is entitled to dower in the proceeds of the sale of land subject to dower, as when a mortgage thereon is foreclosed, or a partition sale is made, she is generally given the annual interest on a third part of such proceeds for the period of her life.<sup>271</sup> The parties may agree

(Mass.) 314; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50; *Scott v. Scott*, 1 Bay (S. C.) 504, 1 Am. Dec. 625; *Slip v. Lawback*, 17 N. J. Law, 442; *Skolfield v. Skolfield*, 88 Me. 258.

In some states it is provided by statute that, if possible, the husband's usual place of residence shall be included in the assignment. 1 Stimson's Am. St. Law, § 3277(B).

<sup>267</sup> See *Doe d. Riddell v. Gwinnell*, 1 Q. B. 682; *Coulter v. Holland*, 2 Har. (Del.) 330; *Fosdick v. Gooding*, 1 Me. 30, 10 Am. Dec. 25; *Thomas v. Hesse*, 34 Mo. 13, 34 Am. Dec. 66; *Cook v. Flak*, Walk. (Miss.) 423.

<sup>268</sup> 1 Stimson's Am. St. Law, § 3277; 1 Sharswood & B. Lead. Cas. Real Prop. 397.

<sup>269</sup> See post, note, 284.

<sup>270</sup> *Lawson v. Morton*, 6 Dana (Ky.) 471; *Wood v. Keyes*, 6 Paige (N. Y.) 478. And see *Raynor v. Raynor*, 21 Hun (N. Y.) 36.

<sup>271</sup> *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 323; *Hinchman v. Stiles*, 9 N. J. Eq. 361; *Beavers v. Smith*, 11 Ala. 20; *Alexander's Ex'x v. Bradley*, 3 Bush (Ky.) 667; *Higbie v. Westlake*, 14 N. Y. 231; *Harrison's Ex'rs v. Payne*, 32 Grat. (Va.) 337. See 1 Stimson's Am. St. Law, §§ 3216, 3276(2).

upon a gross sum to be paid the widow as representing her dower interest.<sup>272</sup> But, in the absence of agreement, unless expressly authorized by statute, by the weight of authority, a gross sum cannot be given her by the court in lieu of dower.<sup>273</sup> When an assignment of a gross sum is made by the court, in accordance with an agreement of the parties, or by force of a statute, or in any other case, the present value of the dower interest is usually computed, as in the case of other life estates, by reference to mortality tables indicating the expectation of life at different ages.<sup>274</sup>

Sometimes the statute authorizes the judicial sale of land in which it is impracticable to fairly assign dower, in order that the widow may take dower in the proceeds.<sup>275</sup>

— Valuation for the purpose of assignment.

The amount of property to be assigned to the widow is determined by its productive value, she being entitled to such.

<sup>272</sup> *Herbert v. Wren*, 7 Cranch (U. S.) 370; *Harrison's Ex'rs v. Payne*, 32 Grat. (Va.) 387; *Robinson v. Govers*, 138 N. Y. 425.

<sup>273</sup> *Herbert v. Wren*, 7 Cranch (U. S.) 370; *Beavers v. Smith*, 11 Ala. 20; *Atkin v. Merrell*, 39 Ill. 62; *Summers v. Donnell*, 7 Heisk. (Tenn.) 565; *Harrison's Ex'rs v. Payne*, 32 Grat. (Va.) 387. For statutes authorizing a gross sum to be given, see 1 Stimson's Am. St. Law, § 3276(5)-(7); 2 Scribner, *Dower* (2d Ed.) 654.

<sup>274</sup> 2 Scribner, *Dower* (2d Ed.) 653 et seq.; 2 Dembitz, *Land Titles*, 834, and note. See *Alexander's Ex'x v. Bradley*, 3 Bush (Ky.) 667; *Simonton v. Gray*, 34 Me. 50; *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Eastabrook v. Hapgood*, 10 Mass. 313; *Nye v. Patterson*, 35 Mich. 413; *Johnson v. Moon*, 32 Ga. 247.

The Maryland statute fixes the amount to be paid as not less than one-tenth nor more than one-seventh of the proceeds of sale. *Stein v. Stein*, 80 Md. 306. The South Carolina rule is to give one-sixth in all but exceptional cases. *Wright v. Jennings*, 1 Bailey, Law (S. C.) 277.

<sup>275</sup> See 1 Stimson's Am. St. Law, § 3276(3).

property as will produce one-third of the rents and profits which all the husband's freehold property would produce.<sup>276</sup>

As against the heir or devisee, the valuation of the husband's property, for the purpose of determining the amount of that to be assigned as dower, is to be made as of the time of the assignment, without regard to whether the property has increased or decreased in value since the husband's death, either from natural causes, from changes in the general values of lands in the neighborhood, from improvements made by the heir or devisee, or even from his neglect or waste of the property; the widow thus sharing in the benefit of any increase in value, or in the loss from any decrease in value, which may occur between the husband's death and the assignment.<sup>277</sup> As against the alienee of the husband, also, the valuation of the land is to be as of the time of the assignment of dower, so far as concerns changes arising from natural or extraneous causes.<sup>278</sup> Accordingly, the widow is en-

<sup>276</sup> *Leonard v. Leonard*, 4 Mass. 533; *McDaniel v. McDaniel's Heirs*, 25 N. C. 61; *Smith's Heirs v. Smith*, 5 Dana (Ky.) 179; *Fuller v. Conrad's Adm'r*, 94 Va. 233; *Relly v. Bates*, 40 Mo. 468.

<sup>277</sup> *Co. Litt.* 32a; 2 *Scribner, Dower*, 595; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, *Fed. Cas. No. 11,356*; *Husted's Appeal from Probate*, 34 Conn. 488; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *McGehee v. McGehee*, 42 Miss. 747; *Price v. Hobbs*, 47 Md. 386; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; *McClanahan v. Porter*, 10 Mo. 746.

In case of waste by the heir, however, the widow is, it seems, entitled to maintain an action for damages. 1 *Washburn, Real Prop.* 238; 1 *Roper, Husb. & Wife*, 349. See *Sanders v. McMillian*, 98 Ala. 149, 39 Am. St. Rep. 19.

<sup>278</sup> *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 353; *McClanahan v. Porter*, 10 Mo. 750; *Westcott v. Campbell*, 11 R. L. 378; *Smith v. Addleman*, 5 Blackf. (Ind.) 406; *Sanders v. McMillian*, 98 Ala. 144, 39 Am. St. Rep. 19, 18 L. R. A. 425; *Scammon v. Campbell*, 75 Ill. 223; *Boyd v. Carlton*, 69 Me. 200, 31 Am. Rep. 268; *Dunseth v. Bank of United States*, 6 Ohio, 77. *Contra*, *Tod v. Baylor*, 4 Leigh (Va.) 498; *Guerin v. Moore*, 25 Minn. 462; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480.

titled to the benefit of a general rise in the value of property in that neighborhood.<sup>279</sup> But in this country the widow is not entitled to the benefit of improvements made by the husband's alienee, and these are not to be considered in awarding dower.<sup>280</sup>

— Who may assign.

The tenant of the freehold, who must make the assignment, is generally the heir, devisee, or alienee of the husband; but this is not necessarily so, and one who is not the actual owner of the freehold, but is merely in possession claiming title, may assign by metes and bounds.<sup>281</sup> It may be made by an infant heir, since otherwise the widow would be delayed in obtaining her dower,<sup>282</sup> or the guardian of the infant may make it.<sup>283</sup>

<sup>279</sup> *Johnston v. Vandyke*, 6 McLean, 422, Fed. Cas. No. 7,426; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, Fed. Cas. No. 11,356; *Summers v. Babb*, 13 Ill. 483.

<sup>280</sup> 2 *Scribner, Dower* (2d Ed.) 612; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, Fed. Cas. No. 11,356; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Fritz v. Tudor*, 1 Bush (Ky.) 28; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Hobbs v. Harvey*, 16 Me. 80; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480; *Summers v. Babb*, 13 Ill. 483; *Quick v. Brenner*, 101 Ind. 230; *Price v. Hobbs*, 47 Md. 359. The rule in England is different, and the widow has the benefit of such improvements. *Doe d. Riddell v. Gwinnell*, 1 Q. B. 682. In some states, the time of valuation and the right to include improvements have been regulated by statute. 1 *Sharswood & B. Lead. Cas. Real Prop.* 401, 1 *Stimson's Am. St. Law*, § 3279.

<sup>281</sup> *Co. Litt.* 35a, 357b; 1 *Cruise, Dig. tit. 6, c. 3, § 3*; 2 *Scribner, Dower* (2d Ed.) 75 et seq. The statute sometimes provides for assignment by the heir, devisee, or other person entitled to the land. 1 *Stimson's Am. St. Law*, § 3271.

<sup>282</sup> 2 *Bl. Comm.* 136; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *M McCormick v. Taylor*, 2 Ind. 336; *Young v. Tarbell*, 37 Me. 509. *Contra*, *Bonner v. Peterson*, 44 Ill. 253.

<sup>283</sup> *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Young v. Tarbell*, 37 Me. 509; *Boyers v. New-*

— By agreement of parties.

By agreement of the widow and the owner of the land, dower may be assigned otherwise than by metes and bounds.<sup>284</sup> Accordingly, dower may, by agreement, be assigned by giving the widow one single tract, instead of parts of several tracts;<sup>285</sup> or a certain proportion of the rents and profits of the land;<sup>286</sup> or a fee-simple estate in a part of the land.<sup>287</sup>

§ 201. Proceedings to compel assignment.

At common law, the proceeding to obtain an assignment of dower was a writ of dower *unde nihil habet*, or writ of right of dower.<sup>288</sup> In some states in this country, this common-law proceeding is substantially retained, while in others there are statutes providing for actions to recover dower.<sup>289</sup> In states where the code system of procedure prevails, with the consequent merger of law and equity, the action for dower does not differ from other actions.<sup>290</sup> In some states, the statute authorizes the recovery of dower by action of ejectment, though

banks, 2 Ind. 388. Contra, *Bonner v. Peterson*, 44 Ill. 253. At common law, a guardian in socage could not assign dower. Co. Litt. 35a.

<sup>284</sup> Park, Dower, 262; 2 Scribner, Dower (2d Ed.) 83; *Booth v. Lambert*, Style, 276. But an assignment by metes and bounds, when practicable, cannot, it seems, be waived by the widow if the assignment is made by the sheriff, and not by the tenant, since the assent of the tenant is necessary. 1 Cruise, Dig. tit. 6, c. 3; Co. Litt. 32b. Hargrave's note; Park, Dower, 262.

<sup>285</sup> Park, Dower, 262; *Schnebly v. Schnebly*, 26 Ill. 116; *Compton v. Pruitt*, 88 Ind. 171; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Fuller v. Rust*, 153 Mass. 46; *French v. Pratt*, 27 Me. 381.

<sup>286</sup> *Marshall v. McPherson*, 8 Gill & J. (Md.) 323.

<sup>287</sup> *Prichitt v. Kirkman*, 2 Tenn. Ch. 390.

<sup>288</sup> 2 Scribner, Dower, 91.

<sup>289</sup> 2 Scribner, Dower, 114 et seq.; 1 Stimson's Am. St. Law, § 2274; 1 Washburn, Real Prop. 226.

<sup>290</sup> See 7 Enc. Pl. & Pr. 171.



at common law such action could not be brought by the widow till after assignment.<sup>291</sup>

The proceeding in equity for the recovery of dower is as effective as an action at law, and in some ways much more so, as the assignment of dower in equitable estates and interests can thereby be enforced, an account of mesne profits can be obtained, and all parties interested can be brought before the court.<sup>292</sup>

In most of the states there is a statute providing for the assignment of dower by summary proceedings, the jurisdiction being generally vested in the court having probate jurisdiction. Under some of the statutes, the court has full power in such a proceeding to determine the widow's right to dower, while in others it has no such power, either losing jurisdiction if her rights are contested, or, in some states, merely assigning dower to her, without thereby establishing her right thereto. The jurisdiction in this class of proceeding is generally restricted to cases in which the husband dies seised, and where dower is assignable by metes and bounds.<sup>293</sup>

— Demand previous to suit.

In the absence of statutory requirement, a demand before bringing suit for dower is unnecessary.<sup>294</sup> But in a number of states such a statutory requirement exists;<sup>295</sup> and even in the absence of a statutory requirement, a demand is quite

<sup>291</sup> 2 Scribner, Dower, 34, 119.

<sup>292</sup> 2 Scribner, Dower, 145 et seq.

<sup>293</sup> 1 Stimson's Am. St. Law, § 3272; 2 Scribner, Dower (2d Ed.) 174 et seq.; 7 Enc. Pl. & Pr. 186 et seq. The assignment by the probate court may in some states also be upon application of persons other than the widow, in which case it is not an adversary proceeding. See 1 Stimson's Am. St. Law, § 3273.

<sup>294</sup> 2 Scribner, Dower, 109.

<sup>295</sup> See *Ford v. Erskine*, 45 Me. 484; *Burbank v. Day*, 12 Metc. (Mass.) 557; *Hasselman v. Allen*, 42 Ind. 257; *Davis v. Walker*, 42 N. H. 482.

generally necessary in order that the widow may recover damages for the detention of dower against an alienee of the husband.<sup>296</sup>

When a demand is necessary, it must be a personal one upon the tenant of the freehold, if he is accessible.<sup>297</sup> It need not be in writing,<sup>298</sup> nor need the agent or attorney making it be authorized in writing.<sup>299</sup> The demand must identify the property with reasonable certainty, and show the nature of the claim.<sup>300</sup>

— Damages for detention of dower.

Though, at common law, the widow could not recover damages for detention of her dower, this right was given by an early English statute, as against the heir or a person wrongfully entering, and their assigns, as to lands of which the

<sup>296</sup> Co. Litt. 32b; 2 Scribner, *Dower* (3d Ed.) 707; *Roan v. Holmes*, 32 Fla. 302; *McClanahan v. Porter*, 10 Mo. 746; *Price v. Hobbs*, 47 Md. 359.

The statute sometimes requires a demand in order to authorize the recovery of damages. 1 Stimson's Am. St. Law, § 3278; *Strawn v. Strawn's Heirs*, 50 Ill. 256; *Whitaker v. Greer*, 129 Mass. 417; *Cowan v. Lindsay*, 30 Wis. 586. And under the Statute of Merton (post, note 301) damages could be recovered against the heir only from the time of demand, if he chose to plead that he had always been ready to assign dower. Co. Litt. 32b.

<sup>297</sup> *Luce v. Stubbs*, 35 Me. 92; *Pond v. Johnson*, 9 Gray (Mass.) 193. A demand on the tenant of the freehold is sufficient, though he convey it before suit is begun. *Barker v. Blake*, 36 Me. 433; *Watson v. Watson*, 10 C. B. 3; *Parker v. Murphy*, 12 Mass. 485.

<sup>298</sup> Co. Litt. 32b; *Baker v. Baker*, 4 Me. 67; *Page v. Page*, 6 Cush. (Mass.) 196.

<sup>299</sup> *Watson v. Watson*, 10 C. B. 3; *Luce v. Stubbs*, 35 Me. 92; *Lothrop v. Foster*, 51 Me. 367. But it has been held that a power of attorney is insufficient for the purpose unless the premises are sufficiently identified therein. *Sloan v. Whitman*, 5 Cush. (Mass.) 532.

<sup>300</sup> *Haynes v. Powers*, 22 N. H. 590; *Atwood v. Atwood*, 23 Pick. (Mass.) 283; *Bear v. Snyder*, 11 Wend. (N. Y.) 592; *Davis v. Walker*, 42 N. H. 482.

husband died seised.<sup>301</sup> In most of the states there is a similar statutory provision authorizing the recovery of damages by the widow for the withholding of dower in lands of which the husband died seised;<sup>302</sup> and the statute occasionally authorizes a recovery against the husband's alienee.<sup>303</sup>

Except as otherwise provided by statute, the damages recoverable as against the heir or devisee are to be estimated from the time of the husband's death.<sup>304</sup> Statutes allowing damages against the husband's alienee generally provide that they shall be estimated from the time of demand for dower.<sup>305</sup>

Without reference to the right to recover damages at law, the widow is ordinarily regarded as entitled in equity to an account of her share of the rents and profits of the property against the husband's heir or devisee,<sup>306</sup> and sometimes against the husband's alienee.<sup>307</sup>

<sup>301</sup> Statute of Merton, 20 Hen. III. c. 1 (A. D. 1235). See Co. Litt. 32b; Park, Dower, 301.

<sup>302</sup> 1 Stimson's Am. St. Law, § 3278; 2 Scribner, Dower, 700.

<sup>303</sup> 2 Scribner, Dower, 704.

<sup>304</sup> *Beavers v. Smith*, 11 Ala. 20; *Wells v. Beall*, 2 Gill & J. (Md.) 468; *Jackson v. O'Donaghy*, 7 Johns. (N. Y.) 247; *Layton v. Butler*, 4 Har. (Del.) 510.

As against the alienee of the heir, likewise, damages are to be estimated from the time of the husband's death, unless the statute provides otherwise. 1 Roper, *Husb. & Wife*, 440; *Seaton v. Jamison*, 7 Watts (Pa.) 533; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229. Contra, *Newbold v. Ridgeway*, 1 Har. (Del.) 55.

<sup>305</sup> See 1 Stimson's Am. St. Law, § 3278; *Martin v. Martin*, 14 N. J. Law, 129; *Rannels v. Washington University*, 96 Mo. 226; *Price v. Price*, 54 Hun (N. Y.) 349; *Munger v. Perkins*, 62 Wis. 499. And see ante, notes 294-300, as to necessity of demand.

<sup>306</sup> 4 Kent, Comm. 70; *Johnson v. Thomas*, 2 Paige (N. Y.) 377; *Slatter v. Meek*, 35 Ala. 528; *Austell v. Swann*, 74 Ga. 278; *Shields v. Hunt*, 39 N. J. Eq. 485; *Campbell v. Murphy*, 55 N. C. 357; *Clift v. Clift*, 87 Tenn. 17; *Keith v. Trapier*, 1 Bailey, Eq. (S. C.) 63; *Henderson v. Chaires*, 35 Fla. 423; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Turner v. Morris*, 27 Miss. 733.

<sup>307</sup> *Beavers v. Smith*, 11 Ala. 32; *Sellman v. Bowen*, 3 Gill & J.

— Limitations and laches.

In some states, the statute requires<sup>1</sup> a suit to establish dower rights to be brought within a certain number of years after the husband's death.<sup>200</sup> Whether, in the absence of such a statute expressly applicable to dower, the general statute of limitations will apply, the cases are not in unison.<sup>200</sup> But though there be no statute of limitations applicable, the widow may, in failing to assert her claim, be guilty of such delay that a court of equity will refuse to give her relief.<sup>210</sup>

— Abatement of right of action.

Since dower is an estate only for the life of the widow, a suit therefor, so far as concerns the assignment of dower, necessarily abates on her death.<sup>211</sup> And as there can be no recovery of damages at law unless the judgment likewise awards seisin of dower lands, the widow's death defeats such

(Md.) 50, 29 Am. Dec. 524; *Chiswell v. Morris*, 14 N. J. Eq. 105. Contra, *Kendall v. Honey*, 5 T. B. Mon. (Ky.) 282; *Johnson v. Thomas*, 2 Paige (N. Y.) 377.

<sup>200</sup> 1 Stimson's Am. St. Law, § 3271. See *O'Gara v. Neylon*, 161 Mass. 140.

<sup>200</sup> That the general statutes are applicable, see *Steele v. Gellatly*, 41 Ill. 39; *Kinsolving v. Pierce*, 18 B. Mon. (Ky.) 782; *Livingston v. Cochran*, 33 Ark. 294; *Durham v. Angler*, 20 Me. 242; *Lide v. Reynolds*, 1 Brev. (S. C.) 76; *Long v. Kansas City Stock-Yards Co.*, 107 Mo. 298, 28 Am. St. Rep. 413; *Conover v. Wright*, 6 N. J. Eq. 612, 47 Am. Dec. 213; *Care v. Keller*, 77 Pa. St. 487. Contra, *Barksdale v. Garrett*, 64 Ala. 280, 38 Am. Rep. 6; *Burt v. C. W. Cook Sheep Co.*, 10 Mont. 571; *Barnard v. Edwards*, 4 N. H. 107, 17 Am. Dec. 403; *Simonton v. Houston*, 78 N. C. 408; *Jones v. Powell*, 6 Johns. Ch. (N. Y.) 194; *Miller v. Pence*, 132 Ill. 151.

<sup>210</sup> *Barnard v. Edwards*, 4 N. H. 107, 17 Am. Dec. 403; *Barksdale v. Garrett*, 64 Ala. 280, 38 Am. Rep. 6; *Ralls v. Hughes*, 1 Dana (Ky.) 407; *Gilbert v. Reynolds*, 51 Ill. 513.

<sup>211</sup> *Atkins v. Yeomans*, 6 Metc. (Mass.) 438; *Tuck v. Fitta*, 18 N. H. 171; *Rowe v. Johnson*, 19 Me. 146; *Miller's Adm'r v. Woodman*, 14 Ohio, 518; *Parks v. McClellan*, 44 N. J. Law, 552. Compare *Robinson v. Govera*, 138 N. Y. 425.

recovery, in the absence of a statutory provision to the contrary;<sup>312</sup> but it does not prevent recovery of the rents and profits in equity, provided suit for dower was brought during her life.<sup>313</sup>

— Judgment or decree.

A judgment for the person demanding dower is either for dower alone, or for dower with damages.<sup>314</sup> Upon a judgment for the widow, a writ or order is issued directing the sheriff or commissioners to set out her dower, and without this the widow cannot, except by the intervention of a statute, enter on the land.<sup>315</sup>

Assignment of dower in accordance with the judgment or decree is generally by the sheriff or commissioners, the practice in this regard varying in the different states, but the action of such officials being usually subject to the approval of the court.<sup>316</sup> Such assignment must be by metes and bounds, unless this is impracticable.<sup>317</sup>

<sup>312</sup> *Atkins v. Yeomans*, 6 Metc. (Mass.) 438; *Rowe v. Johnson*, 19 Ma. 146; *Turney v. Smith*, 14 Ill. 242; *Tuck v. Fitts*, 18 N. H. 171; *Roan v. Holmes*, 32 Fla. 295, 21 L. R. A. 180. But her death does not have this effect if after judgment, though the case is appealed. *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465.

<sup>313</sup> *Pollitt v. Kerr*, 49 N. J. Eq. 66; *Johnson v. Thomas*, 3 Paige (N. Y.) 377; *Steiger's Adm'r v. Hillen*, 5 Gill & J. (Md.) 121. In *Paul's Ex'rs v. Paul*, 36 Pa. St. 270, it was in effect held that her representatives could recover rents and profits, though she did not actually sue for dower during her life, provided she demanded it.

<sup>314</sup> 1 Washburn, Real Prop. 281; *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586; *Shirtz v. Shirts*, 5 Watts (Pa.) 255.

<sup>315</sup> Co. Litt. 34b; 2 Scribner, Dower (2d Ed.) 105, 176; *Hildreth v. Thompson*, 16 Mass. 191.

<sup>316</sup> See 1 Stimson's Am. St. Law, § 3275; 2 Scribner, Dower, 141, 170; 7 Enc. Pl. & Pr. 170, 185, 206.

<sup>317</sup> 2 Scribner, Dower, §2 582; 1 Washburn, Real Prop. 235. See ante, note 284.

## § 202. Dower after assignment.

The estate of dower after assignment is considered to be a continuation of the husband's estate, the widow's title or seisin relating back to the time of his death, and consequently the heir is not regarded as having ever been seised of that part of the land whereof the widow was endowed.<sup>318</sup> The widow has an estate for life in the property assigned, with all the rights, and subject to the liabilities, of any other life tenant.<sup>319</sup> She may accordingly convey or incumber her estate.<sup>320</sup> She is bound to pay taxes,<sup>321</sup> and to keep down the interest on incumbrances.<sup>322</sup> She is likewise liable for the commission of waste.<sup>323</sup> The widow is entitled to the crops

<sup>318</sup> Litt. § 387; Co. Litt. 239a; Park, Dower, 340; 1 Cruise, Dig. tit. 6, c. 3, § 21; 4 Kent, Comm. 62, 69; Powell v. Monson & Brimfield Mfg. Co., 3 Mass. 347, Fed. Cas. No. 11,356; Norwood v. Marrow, 20 N. C. 447; Lawrence v. Miller, 2 N. Y. 245, Finch's Cas. 653; Conant v. Little, 1 Pick. (Mass.) 189.

The effect of this principle in depriving the heir's widow of dower in land assigned to the ancestor's widow has been previously referred to. See § 186. It also had important effects at common law upon the descent of the land assigned to the widow. Park, Dower, 343. But though the widow was considered to be in by her husband of the lands assigned to her, she was regarded as holding in tenure of the heir. See Park, Dower, 340, 344.

<sup>319</sup> 2 Scribner, Dower (2d Ed.) 731 et seq.; Whyte v. Nashville, 2 Swan (Tenn.) 364; McMahon v. Gray, 150 Mass. 289; Kunselman v. Stine, 183 Pa. St. 1; Peyton v. Jeffries, 50 Ill. 143.

<sup>320</sup> Summers v. Babb, 13 Ill. 483; Kunselman v. Stine, 183 Pa. St. 1. See Lawrence v. Brown, 5 N. Y. 394; Serry v. Curry, 26 Neb. 353.

<sup>321</sup> Stetson v. Day, 51 Me. 434; Durkee v. Felton, 44 Wis. 467; Austell v. Swann, 74 Ga. 278; Linden v. Graham, 34 Barb. (N. Y.) 316; Jones v. Hunt, 40 N. J. Eq. 660.

<sup>322</sup> 1 Washburn, Real Prop. 258; Hodges v. Phinney, 106 Mich. 537.

<sup>323</sup> Calvert v. Rice, 31 Ky. 533, 34 Am. St. Rep. 240; Cook v. Cook, 11 Gray (Mass.) 123; Johnson v. Perley, 2 N. H. 56, 9 Am. Dec. 35; Owen v. Hyde, 6 Yerg. (Tenn.) 324, 27 Am. Dec. 467; Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528. For statutes to this effect, see 1 Stimson's Am. St. Law, § 3231.

In some states, the commission of waste by her is by statute made (484)

growing on the land assigned to her at the time of the assignment,<sup>324</sup> and her personal representatives are, by force of the Statute of Merton,<sup>325</sup> or similar state statutes,<sup>326</sup> entitled to those growing at the time of her death.

On the termination of her dower estate by her death, the person who has the reversion after the dower estate, whether he be the husband's heir or devisee, or a grantee of the land, is entitled to immediate possession.<sup>327</sup>

§ 203. Statutes altering or abolishing dower.

In a number of states, dower is abolished, and the widow is given certain rights in her husband's property in lieu thereof. Generally, she is given an absolute share in the husband's property, or in his real property, which she takes as heir, such share being sometimes made the same as that to be taken by each of the children.<sup>328</sup> Sometimes the widow has, by statute, the right to elect between her common-law dower and the share given her by statute,<sup>329</sup> and in some states she must elect between dower and her statutory homestead

ground for forfeiture of her dower estate, and in others for the recovery of damages only. See Sharswood & B. Lead. Cas. Real Prop. 407; 1 Stimson's Am. St. Law, § 3231(B),(C).

<sup>324</sup> 2 Scribner, Dower (2d Ed.) 778; *Ralston v. Ralston*, 3 G. Greene (Iowa) 533; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Kain v. Fisher*, 6 N. Y. 597; *Vaughn v. Vaughn*, 88 Tenn. 742.

<sup>325</sup> 20 Hen. III. c. 2 (A. D. 1237); Park, Dower, 355.

<sup>326</sup> See 1 Stimson's Am. St. Law, § 3233; 2 Scribner, Dower, 780. But she has no right to the crops sown by her when her estate is terminated by her consent to a sale of the land free of dower. *Talbot v. Hill*, 68 Ill. 106.

<sup>327</sup> 2 Scribner, Dower, 785.

<sup>328</sup> See 1 Sharswood & B. Lead. Cas. Real Prop. 299; 1 Stimson's Am. St. Law, §§ 3105(A), 3109, 3202(B); *Dembitz*, Land Titles, 231, 325. See post, § 427.

<sup>329</sup> See 1 Stimson's Am. St. Law, § 3264(B),(C). For cases construing such provisions, see *Sturgis v. Ewing*, 18 Ill. 176; *Brown v. Cantrell*, 62 Ga. 257; *Brawford v. Wolfe*, 103 Mo. 391; *Mathews v. Mathews*, 141 Mass. 511; *Glover v. Glover*, 45 S. C. 51; *Hunkins v. Hunkins*, 65 N. H. 95.

right.<sup>230</sup> In those states in which the community system prevails, dower is not recognized.<sup>231</sup>

#### CURTESY.

The estate by curtesy is that to which a surviving husband is entitled, for the period of his life, in all the lands and tenements of which the wife was seised during coverture in fee simple or fee tail, provided there was issue of the marriage born alive capable of inheritance.<sup>232</sup>

Curtesy resembles dower as regards the things in which it exists, and the quantum and nature of the estate or interest in the consort necessary to support it. It differs from dower primarily in that it is in favor of the husband, and not of the wife, that it is not restricted to one-third of the wife's real property, that it is contingent on the birth of issue, that, after birth of issue, it exists as an estate, and that it is perfected by the wife's death without assignment.

Curtesy is usually defeated by a conveyance by the wife before, but not after, marriage, unless she is, by the conveyance to her, given power to dispose of the property; by a contract by the husband releasing curtesy; by his joinder in a conveyance by her; or by a divorce; but not by the husband's adultery.

The husband has, even during coverture, after birth of issue, an estate by "curtesy initiate." Upon the death of the wife, the estate of curtesy becomes "consummate."

In some states, curtesy has been abolished by statute, and in others it has been modified.

<sup>230</sup> See post, § 215.

<sup>231</sup> See ante, § 166.

<sup>232</sup> It is stated by Mr. Digby that the name probably took its origin in the word "curia," meaning court, perhaps referring to the necessity that the husband do homage at the lord's court. See Digby, *Hist. Real Prop.* 173. But a different view is taken in Pollock & Maitland's *History of the English Law* (volume 2, p. 412 et seq.), where it is said that the name arises from the liberality (or curtesy) of the English law in giving such an estate, as distinguished from the law of Normandy.



## § 204. Necessity of marriage.

As in the case of dower, the marriage must be a legal one,<sup>333</sup> and, if it is absolutely null and void, as when one of the parties is an idiot, the estate does not arise.<sup>334</sup> If, however, the marriage is voidable merely, and it is not avoided during the life of the wife, the husband is entitled to the estate.<sup>335</sup>

## § 205. Seisin of the wife.

At common law, as in the case of dower, seisin in the husband was necessary, so, in the case of curtesy, seisin in the wife was necessary, and this seisin was required to be seisin in deed, seisin in law not being sufficient, as in the case of dower.<sup>336</sup> The requirement of actual seisin never applied in the case of things of an incorporeal character, which were incapable of seisin, and lay "in grant, and not in livery,"<sup>337</sup> nor did it apply when the circumstances were such that it was impossible for the husband to obtain seisin,<sup>338</sup> or when it

<sup>333</sup> 2 Bl. Comm. 127.

<sup>334</sup> *Turner v. Meyers*, 1 Hagg. Consist. 414.

<sup>335</sup> 1 Washburn, Real Prop. 130, citing 2 Burn, Ecc. Law, 501; *in re Murray Canal*, 6 Ont. 685.

<sup>336</sup> Co. Litt. 29a; 2 Bl. Comm. 127; 4 Kent, Comm. 29, 37; *Stoddard v. Gibbs*, 1 Sumn. 263, 6 Gray's Cas. 694, Fed. Cas. No. 13,463.

It has been held that the seisin of the wife's guardian will support curtesy (*Powell v. Gossom*, 18 B. Mon. [Ky.] 179), and that seisin in the husband's vendee will be effective for this purpose, though the husband was not seised (*Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. [Ky.] 401). The possession of a coparcener or tenant in common of the wife has also been held to be sufficiently on her behalf to give her husband curtesy. 1 Washburn, Real Prop. 161; *Wass v. Bucknam*, 38 Me. 360, *Finch's Cas.* 640; *Carr v. Givena*, 9 Bush (Ky.) 679; *Rhodes v. Robie*, 9 App. D. C. 305.

<sup>337</sup> Co. Litt. 29a; *Shelley's Case*, 1 Coke, 97; *Davis v. Mason*, 1 Pet. (U. S.) 503; *Borland's Lessee v. Marshall*, 2 Ohio St. 303, 6 Gray's Cas. 710.

<sup>338</sup> Co. Litt. 29a; *Eager v. Furnwall*, 17 Ch. Div. 115; *De Grey v. Richardson*, 3 Atk. 469, 6 Gray's Cas. 687; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

was prevented by force.<sup>339</sup> How far this requirement of seisin still controls is a question of some difficulty, as it is in connection with the subject of dower. The same considerations as apply in the case of dower<sup>340</sup> are applicable to curtesy, and tend to show that seisin, as distinct from title to land not adversely held, is no longer necessary, and the American decisions directly upon the question of curtesy are, as we shall find, to the same effect.

The requirement of actual seisin seems to have resulted from another requirement, discussed in the next section, that, in order that curtesy may exist, the property must be inheritable by the issue of the marriage, which quality of inheritability could, at common law, exist only when the ancestor (in this case, the wife) was actually seised of the property.<sup>341</sup> This latter requirement of seisin in the ancestor in order to give title by descent having, as will appear elsewhere, been generally discarded in this country,<sup>342</sup> it would consequently seem reasonable that the rule derived therefrom, requiring seisin to support curtesy, should likewise be superseded, and it has been so decided in a number of cases.<sup>343</sup>

As before stated, a conveyance under the Statute of Uses will confer the seisin in deed of the grantor upon the grantee, and consequently no actual possession is, in such case, necessary to support curtesy.<sup>344</sup> So, in New York, the require-

<sup>339</sup> Litt. § 419; *Mercer v. Selden*, 1 How. (U. S.) 87; *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1,037.

<sup>340</sup> See ante, § 180.

<sup>341</sup> 2 Bl. Comm. 128; *Borland's Lessee v. Marshall*, 2 Ohio St. 308, 6 Gray's Cas. 710, Finch's Cas. 629; *Davis v. Mason*, 1 Pet. (U. S.) 507.

<sup>342</sup> See post, § 425.

<sup>343</sup> See *Borland's Lessee v. Marshall*, 2 Ohio St. 308, 6 Gray's Cas. 710, Finch's Cas. 629; *Davis v. Mason*, 1 Pet. (U. S.) 503; *Mettler v. Miller*, 129 Ill. 630; *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. (Ky.) 401; *Reaume v. Chambers*, 22 Mo. 36; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

<sup>344</sup> *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1,037; *Jackson* (406)

ment of actual seisin has been regarded as applicable only when the wife claims as heir or devisee, on the ground that, in such case, her title is not complete without entry, and not when she takes by a conveyance which passes the legal title;<sup>345</sup> but elsewhere it has been held that, in case of the descent of land from one actually seised to the wife, entry by her is not necessary for the purpose of seisin.<sup>346</sup>

The requirement of actual seisin has also, in this country, been regarded as inapplicable to wild or waste land.<sup>347</sup>

In some cases, the view is taken that the husband is entitled to curtesy, even though the wife was disseised,<sup>348</sup> but other courts deny the right to curtesy in case of such adverse possession;<sup>349</sup> and the latter class of decisions is in accord

v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Adair v. Lott, 3 Hill (N. Y.) 182, 6 Gray's Cas. 704; Carpenter v. Garrett, 75 Va. 129.

<sup>345</sup> Adair v. Lott, 3 Hill (N. Y.) 182, 6 Gray's Cas. 704; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Carr v. Anderson, 6 App. Div. (N. Y.) 6.

<sup>346</sup> Doe d. Childers v. Bumgarner, 53 N. C. 297; Stephens v. Hume, 25 Mo. 349.

<sup>347</sup> Jackson v. Sellick, 8 Johns. (N. Y.) 202, 6 Gray's Cas. 691; Wells v. Thompson, 13 Ala. 793, 48 Am. Dec. 76; Davis v. Mason, 1 Pet. (U. S.) 503; Barr v. Galloway, 1 McLean, 476, Fed. Cas. No. 1,037; McDaniel v. Grace, 15 Ark. 463; Guion v. Anderson, 8 Humph. (Tenn.) 298.

In Kentucky, on the contrary, it was held that there was no curtesy in wild lands, though in the possession of nobody. Neely v. Butler, 10 B. Mon. (Ky.) 48; Conner v. Downer, 4 Bush (Ky.) 631. These decisions were to some extent based upon the uncertain character of the title to public lands in that state, rendering it the duty of the owner to promptly take possession.

<sup>348</sup> Borland's Lessee v. Marshall, 2 Ohio St. 308, Finch's Cas. 629, 6 Gray's Cas. 710; Bush v. Bradley, 4 Day (Conn.) 298; Merritt's Lessee v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298. See Mettler v. Miller, 129 Ill. 630; Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160; Stoolfoos v. Jenkins, 8 Serg. & R. (Pa.) 175.

<sup>349</sup> Mercer's Lessee v. Selden, 1 How. (U. S.) 37; Carpenter v. Garrett, 75 Va. 129; Den d. Hopper v. Demarest, 21 N. J. Law, 525. And see Wells v. Thompson, 13 Ala. 793, 48 Am. Dec. 76; McDaniel v. Grace, 15 Ark. 463.

with those holding that title in the wife without entry is sufficient, provided there be no adverse possession.<sup>350</sup> Summing up the result of the decisions as to curtesy, it appears that in no case in this country, outside of the state of Kentucky, has the husband been debarred of curtesy for want of seisin in the wife, if the estate of the wife was such as is necessary for the purpose, except when the land was in the adverse possession of another.

There is a sufficient equivalent of legal seisin in the case of an equitable estate, if the wife is in receipt of the rents and profits, or her trustee is in actual possession.<sup>351</sup>

### § 206. Birth of issue.

In the absence of a statutory provision to the contrary, there must be issue of the marriage born alive,<sup>352</sup> and such issue must be capable of inheriting the property in which curtesy is claimed.<sup>353</sup> The length of the child's life is immaterial, provided it be born alive, and the right to curtesy is not affected by its death before that of its mother.<sup>354</sup> Nor need the birth of issue and ownership of the wife be contem-

<sup>350</sup> *Davis v. Mason*, 1 Pet. (U. S.) 503; *Redus v. Hayden*, 43 Miss. 614; *Jackson v. Sellick*, 8 Johns. (N. Y.) 202, 6 Gray's Cas. 691.

<sup>351</sup> 4 Kent, Comm. 31; *Morgan v. Morgan*, 5 Madd. 408; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Cushing v. Blake*, 30 N. J. Eq. 639; *Withers v. Jenkins*, 14 S. C. 597; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

<sup>352</sup> Co. Litt. 29b; 2 Bl. Comm. 127; *Heath v. White*, 5 Conn. 228, 236; *Day v. Cochran*, 24 Miss. 261. It is stated that the child must be born during the mother's life, and that consequently the delivery of the child by the Caesarian operation after the mother's death would not support the estate. Co. Litt. 29b; 2 Bl. Comm. 127.

<sup>353</sup> Litt. § 52; Co. Litt. 29b; 2 Bl. Comm. 128. So, if the wife has an estate in tail male, the birth of a female child does not entitle the husband to curtesy. *Id.*

<sup>354</sup> 2 Bl. Comm. 127; *Hunter v. Whitworth*, 9 Ala. 965, *Finch's Cas.* 637; *Goff v. Anderson*, 91 Ky. 303; *Tallaferro v. Burwell*, 4 Call (Va.) 321.

poraneous, and, consequently, if a child is born at any time during coverture, the husband is entitled to curtesy in property which the wife may previously have acquired, and which she has conveyed, or of which she has otherwise been divested,<sup>355</sup> or in property which she acquires after the child's death.<sup>356</sup>

In some states, the requirement of the birth of issue has been removed by statute.<sup>357</sup>

### § 207. Things in which curtesy exists.

Curtesy, like dower, exists in lands and tenements.<sup>358</sup> Accordingly, it exists in incorporeal real things, such as rents.<sup>359</sup>

### § 208. Character of the wife's estate or interest.

An estate by curtesy may exist in an estate of inheritance, and in no other estate.<sup>360</sup> Accordingly, it exists in the case of an estate tail, and, on the same principle which applies in the case of dower, it is immaterial that the estate tail for other purposes comes to an end at the wife's death, owing to the failure of issue.<sup>361</sup>

<sup>355</sup> Co. Litt. 30a; *Comer v. Chamberlain*, 8 Allen (Mass.) 166; *Hunter v. Whitworth*, 9 Ala. 965.

<sup>356</sup> 1 Co. Litt. 30a; *Phillips v. Ditto*, 2 Duv. (Ky.) 549; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Templeton v. Twitty*, 33 Tenn. 595.

<sup>357</sup> 1 Sharswood & B. Lead. Cas. Real Prop. 261. See *Dubs v. Dubs*, 31 Pa. St. 149; *Bruner v. Briggs*, 39 Ohio St. 473; *Forbes v. Sweesy*, 8 Neb. 520.

<sup>358</sup> Litt. § 52; 2 Bl. Comm. 126.

<sup>359</sup> Co. Litt. 29; *Shelley's Case*, 1 Coke, 97; *Davis v. Mason*, 1 Pet. (U. S.) 503; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

<sup>360</sup> *Sumner v. Partridge*, 2 Atk. 47; *Churchill v. Reamer*, 8 Bush (Ky.) 256; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Muse v. Friedenwald*, 77 Va. 57; *Graves v. Trueblood*, 96 N. C. 495; *Waller v. Martin*, 106 Tenn. 341.

<sup>361</sup> 4 Kent, Comm. 32; *Paine's Case*, 8 Coke, 36a; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453; *Holden v. Wells*, 18 R. I. 802.

— Estates subject to executory limitation.

In regard to the right to curtesy in an estate in fee in the wife which is defeated by an executory limitation in favor of another person, the same principles control as in the case of dower, and it has accordingly been decided that the taking effect of such limitation does not defeat the right of dower.<sup>322</sup>

— Equitable estates and interests.

Equitable estates of inheritance have always been regarded as subject to curtesy, provided the wife has what is regarded in equity as answering to the requirement of seisin at law, the English courts adopting, in this respect, a rule different from that which was applied in the case of dower;<sup>323</sup> and the fact that the property is limited to the sole and separate use of the wife does not exclude curtesy.<sup>324</sup>

In Vermont, curtesy is restricted to estates in fee simple. *Haynes v. Bourn*, 42 Vt. 686.

<sup>322</sup> 1 Washburn, Real Prop. 123 et seq.; 4 Kent, Comm. 22; *Buckworth v. Thirkell*, 3 Bos. & P. 652, note, 6 Gray's Cas. 690; *Hatfield v. Sneden*, 54 N. Y. 280, Finch's Cas. 641; *Thornton's Ex'rs v. Krepps*, 37 Pa. St. 391; *McMasters v. Negley*, 153 Pa. St. 303; *Crumley v. Deake*, 8 Bart. (Tenn.) 361; *Withers v. Jenkins*, 14 S. O. 597; *Webb v. Trustees of First Baptist Church*, 90 Ky. 117. But in *Webster v. Ellsworth*, 147 Mass. 602, the contrary is apparently assumed, without discussion, though not necessary to the decision.

<sup>323</sup> 1 Roper, Husb. & Wife, 18; *Watts v. Ball*, 1 P. Wms. 109, 1 Ames' Cas. Trusts, 379, and note; *Robinson v. Codman*, 1 Sumn. 123, Fed. Cas. No. 11,970; *Morgan v. Morgan*, 5 Madd. 408; *Hearle v. Greenbank*, 3 Atk. 717, 6 Gray's Cas. 553; *Davis v. Mason*, 1 Pet. (U. S.) 503; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Baker v. Heiskell*, 1 Cold. (Tenn.) 641; *Dubs v. Dubs*, 31 Pa. St. 149; *Rawlings v. Adams*, 7 Md. 26; *Taylor v. Smith*, 54 Miss. 50; *Baker v. Nall*, 59 Mo. 268; *Alexander v. Warrance*, 17 Mo. 228; *Gilmore v. Burch*, 7 Or. 374, 33 Am. Rep. 710.

<sup>324</sup> 4 Kent, Comm. 22; *Appleton v. Rowley*, L. R. 8 Eq. 139, 1 Ames Cas. Trusts, 381, and note; *Cooper v. Macdonald*, 7 Ch. Div. 283; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Cushing v. Blake*, 29 N. J. Eq. 399, 30 N. J. Eq. 689; *Ege v. Medlar*, 82 Pa. St. 86; *Tillinghast v. Coggeshall*, 7 R. I. 323; *Dugan v. Gittings*, 3 Gill (492)

The mortgagor's interest in property subject to a mortgage—an "equity of redemption," as it is usually called—is likewise subject to curtesy.<sup>365</sup>

There may be curtesy in money directed to be invested in land,<sup>366</sup> and likewise in the proceeds of the sale of land under paramount authority.<sup>367</sup>

—— Bare legal estates.

If the wife has a bare legal estate, the beneficial interest in which is in another, the husband is not entitled to dower.<sup>368</sup> The husband of a mortgagee has likewise no estate by curtesy.<sup>369</sup>

—— Future estates.

There is no curtesy in a future estate expectant upon the termination of a present freehold estate, the same considerations applying as in the case of dower.<sup>370</sup> This rule

(Md.) 138, 48 Am. Dec. 306; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660; *Luntz v. Greve*, 102 Ind. 173; *Payne v. Payne*, 11 B. Mon. (Ky.) 138; *Dubs v. Dubs*, 31 Pa. St. 149; *Richardson v. Stoddard*, 100 Mass. 528; *McTigue v. McTigue*, 116 Mo. 138. Compare *Rigler v. Cloud*, 14 Pa. St. 361; *Dugger's Children v. Dugger*, 84 Va. 130.

<sup>365</sup> *Casborne v. Scarfe*, 1 Atk. 603; *Hart v. Chase*, 46 Conn. 207; *De Camp v. Crane*, 19 N. J. Eq. 166; *Gatewood v. Gatewood*, 75 Va. 407.

<sup>366</sup> 2 *Roper, Husb. & Wife*, 20; *Sweetapple v. Bindon*, 2 Vern. 536; *Ames' Cas. Trusts*, 379; *Dodson v. Hay*, 3 Brown Ch. 404.

<sup>367</sup> *Dunscumb v. Dunscumb's Ex'rs*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; *Houghton v. Hapgood*, 13 Pick. (Mass.) 154; *Clepper v. Livergood*, 5 Watts (Pa.) 113; *In re Camp*, 126 N. Y. 377.

<sup>368</sup> *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160; *McKee v. Jones*, 6 Pa. St. 425; *Norton v. McDevit*, 122 N. C. 755. See *Bennet v. Davis*, 3 P. Wms. 318, and 1 *Ames' Cas.* 374, note.

<sup>369</sup> 4 *Kent, Comm.* 32.

<sup>370</sup> *Co. Litt.* 29a; 4 *Kent, Comm.* 29; *Stoddard v. Gibbs*, 1 Sumn. 263, Fed. Cas. No. 13,463, 6 *Gray's Cas.* 694; *Planters' Bank of Tennessee v. Davis*, 31 Ala. 626; *Ferguson v. Tweedy*, 43 N. Y. 543, *Finch's Cas.* 623; *Taylor v. Gould*, 10 Barb. (N. Y.) 400; *Redus v.*

applies even in those states where a mere right of entry is sufficient to support curtesy, as the equivalent of the common-law seisin, since this condition is not satisfied by a right to possession merely at some future time.<sup>371</sup> An outstanding dower estate in a third person will accordingly defeat the estate by curtesy in favor of the husband of the owner of the fee, as regards the lands assigned for dower.<sup>372</sup> But a reversionary interest, subject to a tenancy for years, is sufficient to support curtesy, since the possession of the tenant is regarded as the possession of the reversioner.<sup>373</sup>

— Joint interest.

If the wife holds property in common or coparcenary with others, the husband is entitled to curtesy;<sup>374</sup> but it is otherwise in the case of a joint tenancy with the right of survivorship.<sup>375</sup>

Hayden, 43 Miss. 614; Mackey v. Proctor, 12 B. Mon. (Ky.) 433; Cox v. Boyce, 152 Mo. 576; Shores v. Carley, 8 Allen (Mass.) 425; Oxford v. Benton, 36 N. H. 395; Reed v. Reed, 3 Head (Tenn.) 491, 75 Am. Dec. 777.

<sup>371</sup> Watkins v. Thornton, 11 Ohio St. 367, 6 Gray's Cas. 718; Todd v. Oviatt, 58 Conn. 174; Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160; Malone v. McLaurin, 40 Miss. 161, 90 Am. Dec. 320.

<sup>372</sup> In re Cregler, 1 Barb. Ch. (N. Y.) 601, 45 Am. Dec. 416; Reed v. Reed, 3 Head (Tenn.) 491, 75 Am. Dec. 777; Hitner v. Ege, 23 Pa. St. 305. But the dower must have been assigned. Mettler v. Miller, 129 Ill. 630.

<sup>373</sup> 4 Kent, Comm. 29; De Grey v. Richardson, 3 Atk. 469, 6 Gray's Cas. 687; Malone v. McLaurin, 40 Miss. 161, 90 Am. Dec. 320; Powell v. Gossom, 18 B. Mon. (Ky.) 179; Tayloe v. Gould, 10 Barb. (N. Y.) 388; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Carter v. Williams, 48 N. C. 177; Lowry's Lessee v. Steele, 4 Ohio, 170.

<sup>374</sup> 2 Cruise, Dig. tit. 19, § 10; Id. tit. 20, § 21; Sterling v. Pennington, 14 Vin. Abr. 512; Wass v. Bucknam, 38 Me. 356; Carr v. Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747.

<sup>375</sup> Co. Litt. 183a; 2 Cruise, Dig. tit. 18, c. 1, § 51; Carr v. Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747.



**§ 209. Modes of excluding curtesy—Conveyance by wife.**

A conveyance by the wife before marriage will defeat the estate of curtesy, since one of the essentials—seisin or title during coverture—is then wanting; but this is not so if the conveyance is fraudulently made for the purpose of depriving the husband of curtesy, and in such a case he is entitled to curtesy as if the conveyance had not been made.<sup>376</sup> Unless authorized by a statute, or power is expressly given her for the purpose, the wife cannot, by her sole conveyance during coverture, affect the right to curtesy.<sup>377</sup> But in some states the statute gives the husband curtesy only in property of which the wife dies seised, and there a conveyance by the wife alone, during coverture, if by statute she has power to make a sole conveyance, will defeat curtesy.<sup>378</sup> The result is the same if the instrument vesting an equitable estate in the wife for her separate use authorizes her to convey it free from any claim of curtesy, and she conveys it accordingly.<sup>379</sup>

**—Devise by wife.**

Under some statutes, she may, by a devise of her statutory separate estate, defeat curtesy;<sup>380</sup> but, generally, the fact

<sup>376</sup> *Strathmore v. Bowes*, 1 Ves. Jr. 22; *England v. Downs*, 2 Beav. 522; *Robinson v. Buck*, 71 Pa. St. 386; *Freeman v. Hartman*, 45 Ill. 57, 92 Am. Dec. 193; *Logan v. Simmons*, 38 N. C. 487; *Tucker v. Andrews*, 13 Me. 125.

<sup>377</sup> *Huston v. Seeley*, 27 Iowa, 183; *Johnson v. Fritz*, 44 Pa. St. 449; *Den d. Camp v. Quinby*, 3 N. J. Law, 540; *Clay v. Mayr*, 144 Mo. 376.

<sup>378</sup> *Bertles v. Nunan*, 93 N. Y. 152, 44 Am. Rep. 361; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

<sup>379</sup> *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Pool v. Blakie*, 53 Ill. 495; *Chapman v. Price*, 83 Va. 392; *Cooper v. Macdonald*, 7 Ch. Div. 300.

<sup>380</sup> *Stewart v. Ross*, 50 Miss. 776; *Garner v. Willis*, 13 Ky. Law Rep. 726; *Chapman v. Price*, 83 Va. 392; *Silsby v. Bullock*, 10 Allen (Mass.) 94; *Tiddy v. Graves*, 126 N. C. 620.

that she is authorized to dispose of her property by will does not enable her to thereby defeat curtesy.<sup>381</sup> And apart from statute, she cannot devise her land, even with her husband's consent, free from curtesy, since this would in effect be a devise of his property.<sup>382</sup>

— Contract by husband.

The husband may exclude himself from curtesy by a contract made before marriage, or by one made after marriage, provided the law of that jurisdiction allows contracts between husband and wife.<sup>383</sup>

— Provision excluding curtesy.

At law, the right of the husband to curtesy is regarded, like dower, as a necessary incident to an estate of inheritance, and consequently not subject to be defeated by any provision excluding curtesy, inserted in the gift or conveyance of the land to the wife.<sup>384</sup> The same rule should, on principle, apparently, apply in courts of equity, "as there appears no reason why a person should be able to exempt equitable, any more than legal, estates from the ordinary incidents of property."<sup>385</sup> It has, however, in a number of cases, been considered that curtesy may be excluded by express provisions to that effect in the instrument creating a sole and

<sup>381</sup> *Clarke's Appeal*, 79 Pa. St. 376; *Alderson's Adm'r v. Alderson*, 46 W. Va. 242; *Casler v. Gray*, 159 Mo. 588.

<sup>382</sup> *Middleton v. Steward*, 47 N. J. Eq. 292.

<sup>383</sup> *Charles v. Charles*, 8 Grat. (Va.) 486, 56 Am. Dec. 155; *Ball v. Ball*, 168 Ill. 361; *Rochon v. Lecatt*, 2 Stew. (Ala.) 429; *McBreen v. McBreen*, 154 Mo. 323. See, also, *Hooks v. Lee*, 42 N. C. 83.

<sup>384</sup> *Sir Anthony Mildmay's Case*, 6 Coke, 41; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Chapman v. Price*, 33 Va. 392.

<sup>385</sup> *Lewin*, Trusts, 829, quoted with approval in 1 Ames, Caa. Trusts, 383. This view is well presented in *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238.

separate use in favor of the wife;<sup>386</sup> but even in the case of that class of property curtesy would be excluded in no case when an intent to that effect is not clearly expressed.<sup>387</sup>

— Joint conveyance.

By joining with his wife in a conveyance or mortgage of the land, the husband thereby releases his curtesy, at least as against the grantee,<sup>388</sup> and his joinder in her will may by statute have the same effect.<sup>389</sup> In the case of his joinder in a conveyance by her which is invalid as against the wife, it will be effective as against the husband.<sup>390</sup>

— Divorce.

A divorce *a vinculo* will deprive the husband of curtesy,<sup>391</sup>

<sup>386</sup> *Mason v. Deese*, 30 Ga. 308; *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95; *Rigler v. Cloud*, 14 Pa. St. 361; *McCulloch v. Valentine*, 24 Neb. 215; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464; *McBreen v. McBreen*, 154 Mo. 323; *Haight v. Hall*, 74 Wis. 152; *Pool v. Blakie*, 53 Ill. 495; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239 (dictum); *Grimball v. Patton*, 70 Ala. 620, 635; *Monroe v. Van Meter*, 100 Ill. 347; *Chapman v. Price*, 83 Va. 392; *Morgan v. Morgan*, 5 Madd. 408 (dictum).

<sup>387</sup> *Ege v. Medlar*, 82 Pa. St. 100; *McBreen v. McBreen*, 154 Mo. 323; *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Cushing v. Blake*, 30 N. J. Eq. 689; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660.

<sup>388</sup> *Haines v. Ellis*, 24 Pa. St. 253; *Jackson v. Hodges*, 2 Tenn. Ch. 276; *Campbell v. McBee*, 92 Va. 68; *Hayden v. Peirce*, 165 Mass. 359; See *Baker v. Baker*, 167 Mass. 575.

<sup>389</sup> *McBride's Estate*, 81 Pa. St. 305; *Silsby v. Bullock*, 10 Allen (Mass.) 94. Compare *O'Harra v. Stone*, 48 Ind. 417; *Middleton v. Steward*, 47 N. J. Eq. 293, as to the construction of particular statutes.

<sup>390</sup> *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Mettler v. Miller*, 129 Ill. 630; *Den d. Fagan v. Walker*, 27 N. C. 634; *Mellus v. Snowman*, 21 Me. 201; *Meramon's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 32; *Melvin v. Proprietors of Locks & Canals on Merri-mack River*, 16 Pick. (Mass.) 137.

<sup>391</sup> *Wheeler v. Hotchkiss*, 10 Conn. 225, *Finch's Cas.* 646. *Barrett* (497);

unless a statute intervene, as when it is required that the divorce be for the fault of the husband, in order to have that effect.<sup>392</sup> A purchaser of the land from the husband before a divorce for a cause arising after marriage will not, it has been held, be affected by the divorce.<sup>393</sup> A divorce *a mensa et thoro* will not affect the husband's rights.<sup>394</sup>

#### — Adultery.

Adultery by the husband will not deprive him of curtesy, in the absence of a statutory provision to that effect.<sup>395</sup>

#### — Adverse possession.

The husband, having a right to sue for the land, may be barred of his right of curtesy by his failure to do so for the statutory period of limitations, if the property is in the adverse possession of a third person.<sup>396</sup>

#### § 210. Curtesy initiate.

Upon the birth of issue capable of inheriting, the husband is said to be tenant by the curtesy initiate, and he becomes tenant by the curtesy consummate only after the death of the wife.<sup>397</sup> A tenant by the curtesy initiate has a freehold

*v. Falling*, 111 U. S. 523; *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Burgess v. Muldoon*, 18 R. I. 607; *Cralle v. Cralle*, 79 Va. 182.

<sup>392</sup> *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Wait v. Wait*, 4 N. Y. 95.

<sup>393</sup> *Gillespie v. Worford*, 2 Cold. (Tenn.) 632.

<sup>394</sup> *Rochon v. Lecatt*, 2 Stew. (Ala.) 429; *Clark v. Clark*, 6 Watts & S. (Pa.) 85.

<sup>395</sup> 4 Kent, Comm. 34; *Sidney v. Sidney*, 3 P. Wms. 276; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76.

<sup>396</sup> *Shortall v. Hinckley*, 31 Ill. 219; *Doe d. Childers v. Bumgarner*, 53 N. C. 297; *Guion v. Anderson*, 8 Humph. (Tenn.) 298; *Crow v. Kightlinger*, 25 Pa. St. 343. See post, note 404.

<sup>397</sup> Co. Litt. 30a; 2 Bl. Comm. 128; 4 Kent, Comm. 29; *Jones v. Davies*, 7 Hurl. & N. 507; *Stewart v. Ross*, 50 Miss. 776; *Foster v. Marshall*, 22 N. H. 491, *Finch's Cas.* 622, 6 *Gray's Cas.* 707; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398.

estate in the land,<sup>398</sup> which he has full power to convey,<sup>399</sup> and it is bound by a judgment against him, and liable to sale on execution.<sup>400</sup> In some states, however, owing to legislation, the husband has, until the wife's death, no estate which he can convey,<sup>401</sup> or which is subject to sale on execution.<sup>402</sup>

Curtesy initiate is a vested right, of which the husband cannot be deprived by the legislature.<sup>403</sup> The tenant by the curtesy initiate has full power to sue to obtain possession from third persons.<sup>404</sup>

There has been some difference of opinion as to the character of the wife's rights during the period of curtesy initiate, especially in connection with questions of adverse possession in a third person for the statutory period as against her and her heirs. In Massachusetts, and perhaps elsewhere, it is considered that, during that period, the wife

<sup>398</sup> Co. Litt. 30a; *Stewart v. Ross*, 50 Miss. 776; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 137, 6 Gray's Cas. 697; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

<sup>399</sup> Co. Litt. 30a; *Shortall v. Hinckley*, 31 Ill. 219; *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427; *Stewart v. Ross*, 50 Miss. 776.

<sup>400</sup> *Canby's Lessee v. Porter*, 12 Ohio, 79; *Van Duser v. Van Duser*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; *Lang v. Hitchcock*, 99 Ill. 550; *Roberts v. Whiting*, 16 Mass. 186; *Mattocks v. Stearns*, 9 Vt. 326; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398; *Day v. Cochran*, 24 Miss. 261, 275.

<sup>401</sup> *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 85; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Walker v. Long*, 109 N. C. 510; *Porch v. Fries*, 18 N. J. Eq. 204.

<sup>402</sup> *Staples v. Brown*, 13 Allen (Mass.) 64; *Curry v. Bott*, 53 Pa. St. 400.

<sup>403</sup> *Zeust v. Staffan*, 16 App. D. C. 141; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427. See *Hitz v. National Metropolitan Bank*, 111 U. S. 722.

<sup>404</sup> *Shortall v. Hinckley*, 31 Ill. 219; *Wilson v. Arentz*, 70 N. C. 670; *Cestello v. Grand Trunk Ry. Co.* (N. H.) 47 Atl. 265.

and the husband are jointly seised, so that a disseisin by other persons will operate against the wife, as well as against the husband.<sup>405</sup> But, more usually, it is considered that, during the curtesy initiate, the wife has no seisin, but she has merely a reversion expectant on the termination of the life estate by curtesy in the husband.<sup>406</sup>

<sup>405</sup> *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 161, 6 Gray's Cas. 697; *Kittredge v. Proprietors of Locks & Canals on Merrimack River*, 17 Pick. (Mass.) 246; *Guion v. Anderson*, 8 Humph. (Tenn.) 298, 325 (semble).

<sup>406</sup> *Foster v. Marshall*, 22 N. H. 491, Finch's Cas. 622, 6 Gray's Cas. 707; *Shortall v. Hinckley*, 31 Ill. 219; *Dawson v. Edwards*, 189 Ill. 60; *Dyer v. Wittler*, 89 Mo. 81, 58 Am. Rep. 85; *Stewart v. Rosa*, 50 Miss. 776. And see *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 443; *Den d. Fagan v. Walker*, 27 N. C. 634. The opinion in *Foster v. Marshall*, supra, appears to the present writer to be unanswerable. As there shown, the common-law writers speak of the estate by curtesy initiate vesting in the husband, on the birth of issue, "in his own right," as distinguished from his estate in the wife's freehold property of inheritance before the birth of issue, which give the husband and wife seisin jointly "in right of the wife." See Co. Litt. 30a, 67a, 124b, 351a. See, also, authorities cited ante, note 397. This distinction seems not to be observed in *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 161, and *Guion v. Anderson*, 8 Humph. (Tenn.) 298, 325, which discuss the character of the husband's estate, without reference to the effect of the birth of issue, though it appears from the statements of facts that there were issue born. In *Kittredge v. Proprietors of Locks & Canals on Merrimack River*, 17 Pick. (Mass.) 246, it is merely stated that it had been decided in *Melvin v. Proprietors of Locks & Canals on Merrimack River*, that, where there is tenancy by the curtesy initiate, a disseisin affects the right of the wife as well as that of the husband. The word "curtesy" does not, however, appear in the opinion or arguments in the earlier case. Mr. Washburn (1 Washburn, Real Prop. 141) cites a number of cases as supporting the Massachusetts view (*Weisinger v. Murphy*, 2 Head [Tenn.] 674; *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175; *Junction R. Co. v. Harris*, 9 Ind. 184; *Butterfield v. Beall*, 3 Ind. 203), but these are apparently decisions merely as to the nature of the rights before birth of issue.

§ 211. *Curtesy consummate.*

Upon the death of the wife, the husband is entitled to immediate possession, without the necessity of any assignment, such as is necessary in the case of dower, owing to the fact that the latter estate exists in one-third only of the decedent's property.<sup>407</sup> He takes it by operation of law, as by descent, rather than by purchase, and for this reason he cannot, by a written disclaimer or otherwise, refuse to take it, and cause it to remain in others.<sup>408</sup>

The husband thereafter holds the property with the same rights and liabilities as any life tenant.<sup>409</sup> He may convey or incumber it;<sup>410</sup> and it may be subjected to execution for his debts.<sup>411</sup> He cannot commit waste,<sup>412</sup> but is entitled to emblements.<sup>413</sup>

§ 212. *Statutes altering or abolishing curtesy.*

In a number of states, curtesy has been expressly abolished by statute,<sup>414</sup> and occasionally the husband is given, in place of curtesy, an estate similar to the widow's dower estate.<sup>415</sup>

<sup>407</sup> 2 Minor, Inst. 157; 1 Washburn, Real Prop. 142; 1 Cruise, Dig. tit. 5, c. 2, § 28.

<sup>408</sup> *Watson v. Watson*, 13 Conn. 83, 6 Gray's Cas. 702, Finch's Cas. 626.

<sup>409</sup> *Clancy, Husb. & Wife* (2d Am. Ed.) 189; 1 Washburn, Real Prop. 142; 1 Cruise, Dig. tit. 5, c. 2, § 26.

<sup>410</sup> *Bozarth v. Largent*, 128 Ill. 95; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464. See, also, *Adair v. Lott*, 3 Hill (N. Y.) 182, 6 Gray's Cas. 704.

<sup>411</sup> *Stanley v. Bonham*, 52 Ark. 354; *Bozarth v. Largent*, 128 Ill. 95; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464.

<sup>412</sup> *Walker's Case*, 3 Coke, 23b; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *Ware v. Ware*, 6 N. J. Eq. 117; *McLeod v. Dial*, 63 Ark. 10; *Armstrong v. Wilson*, 60 Ill. 226; *In re Steele*, 19 N. J. Eq. 120.

<sup>413</sup> 1 Roper, Husb. & Wife, 35.

<sup>414</sup> 1 Stimson's Am. St. Law, § 3300(G); 1 Sharswood & B. Lead. Cas. Real Prop. 286.

<sup>415</sup> 1 Stimson's Am. St. Law, §§ 3202(D), 3301(F); 1 Sharswood

The statutes giving married women full control of their property are generally held not to abolish curtesy, though they in effect restrict the estate to such property as the wife has at her death;<sup>416</sup> but they are sometimes regarded as abolishing the curtesy initiate, or as changing its character, without destroying the right to curtesy consummate.<sup>417</sup>

#### IV. HOMESTEAD RIGHTS.

Land occupied by one as a homestead, which, by the statutes of many states, is exempt from forced sale for payment of debts, cannot usually, under those statutes, be aliened or incumbered by the owner unless his wife assents, and, in most states, joins in the instrument of conveyance.

In states where the homestead law prevails, the widow is usually, and the husband occasionally, given homestead rights

& B. Lead. Cas. Real Prop. 286; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427; *Gaffney v. Peeler*, 21 S. C. 55. The term "dower" is sometimes by statute given to the husband's statutory estate. 1 *Stimson's Am. St. Law*, §§ 3202(D), 3301(F); 2 *Dembitz, Land Titles*, 836.

<sup>416</sup> See *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Hatfield v. Sneden*, 54 N. Y. 230; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660; *Comer v. Chamberlain*, 6 Allen (Mass.) 166; *Porch v. Fries*, 18 N. J. Eq. 204; *Alderson's Adm'r v. Alderson*, 46 W. Va. 242; *Cole v. Van Riper*, 44 Ill. 58; *Commissioners of Rouse's Estate v. Directors of Poor of McKean Co.*, 169 Pa. St. 116; *Johnson v. Cummins*, 16 N. J. Eq. 97, 34 Am. Dec. 142; *Kingsley v. Smith*, 14 Wis. 360.

So, curtesy was held to take precedence of the rights of judgment creditors of the wife, if they failed to enforce their rights by execution during the wife's life, though, if they had done so, under the statute, the husband's curtesy would have been excluded. *Hampton v. Cook*, 64 Ark. 353.

In Michigan, a statute giving full control of her property to a married woman was considered to abolish curtesy. *Tong v. Marvin*, 15 Mich. 60.

<sup>417</sup> See *Moore v. Darby*, 6 Del. Ch. 193, 13 L. R. A. 346; *Porch v. Fries*, 18 N. J. Eq. 204; *Walker v. Long*, 109 N. C. 510; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.



in the land of the deceased consort, and the children likewise are frequently given such rights during minority. These rights differ in different states, but quite generally the surviving wife has, in effect, an estate for life in her husband's homestead property, and, occasionally, in property which was not occupied by the husband as a homestead.

§ 213. General character of the rights.

The right given by statute in many states to enjoy land occupied as a residence free from liability for debts, known as the "homestead" exemption, does not arise from marriage, since an unmarried person, if the head of a family, is likewise entitled to the exemption. It consequently does not call for consideration in a portion of this work dealing with estates and interests arising from marriage, and it will be considered in another place.<sup>418</sup> The statutes conferring these exemptions, however, in pursuance of the policy of protecting the family residence, usually give the wife of the owner of the residence or "homestead" property a right to control his disposition of it during their joint lives, and she is almost invariably given, in case she survive her husband, an interest in the land which, though sometimes regarded as a mere right of occupancy, is usually in the nature of an estate in her deceased husband's land, analogous to a dower estate. In some states, the husband surviving his wife is given a like interest in her land, and usually the children of the marriage have similar rights of occupancy during their minority. These rights and interests of the husband and wife above referred to may not inappropriately be here discussed, and those of the minor children will be treated in connection therewith, from considerations of convenience.

The statutes upon the subject of homestead differ greatly in the various states, and have been the subject of an im-

<sup>418</sup> See post, § 499.

mense amount of judicial construction. Here the attempt will be made merely to state the general results, as defined by the decisions, of this legislation, so far as it concerns the rights of the husband or wife of the owner of the land.

**§ 214. The wife's rights during coverture.**

In most of the states in which the homestead right is recognized, the statute provides that the husband shall not convey or incumber the homestead property except with the joinder, or sometimes, the consent, of his wife.<sup>419</sup> The statutory requirements as to the mode of joinder by the wife in the husband's conveyance, or of indication otherwise of her consent, must usually be strictly complied with.<sup>420</sup> Accordingly, a conveyance by the husband, merely signed by the wife, and stating that she releases her dower rights in the property, has been held to be insufficient, under a statute requiring a joint conveyance or their joint consent,<sup>421</sup> as has a separate conveyance by the wife to the grantees of the husband.<sup>422</sup>

The statute frequently provides that the husband and wife shall acknowledge the conveyance, a private examination of the wife being sometimes required. Such a provision, as in

<sup>419</sup> Thompson, *Homesteads*, § 465; Waples, *Homesteads*, c. 12; 15 *Am. & Eng. Enc. Law*, 665 et seq.

<sup>420</sup> *Showers v. Robinson*, 43 Mich. 502; *Watts v. Gordon*, 65 Ala. 546; *Dickinson v. McLane*, 57 N. H. 31; *Myrick v. Bill*, 5 Dak. 167; *Knox v. Brady*, 74 Ill. 476; *Howell v. McCrie*, 36 Kan. 644, 59 *Am. Rep.* 534.

<sup>421</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Herbert v. Kenton Building & Sav. Ass'n*, 11 Bush (Ky.) 296; *Long v. Mostyn*, 65 Ala. 543; *Pipkin v. Williams*, 57 Ark. 242, 38 *Am. St. Rep.* 241; *Sharp v. Bailey*, 14 Iowa, 387, 31 *Am. Dec.* 489; *Connor v. McMurray*, 2 Allen (Mass.) 202.

<sup>422</sup> *Howell v. McCrie*, 36 Kan. 636, 59 *Am. Rep.* 534; *Dickinson v. McLane*, 57 N. H. 31; *Christian v. Clark*, 10 Lea (Tenn.) 630; *Duncan v. Moore*, 67 Miss. 136; *Poole v. Gerrard*, 6 Cal. 71, 65 *Am. Dec.* 431.

the case of the release of dower, is usually regarded as mandatory, and a noncompliance therewith will render the conveyance void, at least so far as the land conveyed does not exceed the value of the statutory homestead right.<sup>423</sup>

In some states it is considered that, though the wife fail to properly join in or assent to her husband's conveyance or incumbrance, the instrument becomes effective if the property thereafter loses its homestead character,<sup>424</sup> while sometimes a contrary view is taken.<sup>425</sup> The conveyance has been generally regarded as effective to the extent to which the property conveyed exceeds in value or extent the statutory limitation upon the right of exemption.<sup>426</sup>

In California, and one or two states which have adopted its statutory provisions, the legislature, in view, apparently, of the fact that the survivor of the marriage is given the homestead property, has provided in terms that homestead property shall be regarded as held by the consorts in joint

<sup>423</sup> *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. Rep. 44; *Vanzant v. Vanzant*, 23 Ill. 536; *American Sav. & Loan Ass'n v. Burghardt*, 19 Mont. 323, 61 Am. St. Rep. 507; *Horbach v. Tyrrell*, 48 Neb. 514.

<sup>424</sup> *Miners' Sav. Bank v. Sandy*, 71 Fed. 340; *McDonald v. Crandall*, 48 Ill. 231, 92 Am. Dec. 112; *Towns v. Mathews*, 91 Ga. 546; *Smith v. Provin*, 4 Allen (Mass.) 516; *Whiteman v. Field*, 53 Vt. 554.

<sup>425</sup> *Bruner v. Bateman*, 66 Iowa, 483; *Belden v. Younger*, 75 Iowa, 567; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681; *Amphlett v. Hibbard*, 29 Mich. 298; *Cummins v. Busby*, 62 Miss. 195; *Stallings v. Hullum*, 89 Tex. 431; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241. See *Myrick v. Bill*, 5 Dak. 167.

<sup>426</sup> *Snedecor v. Freeman*, 71 Ala. 140; *Sargent v. Wilson*, 5 Cal. 504; *McDonald v. Crandall*, 48 Ill. 231, 92 Am. Dec. 112; *Wallace v. Harris*, 32 Mich. 380; *Atkinson v. Atkinson*, 37 N. H. 434; *Whetstone v. Coffey*, 48 Tex. 269. In Massachusetts, a contrary view was at one time adopted (*Richards v. Chace*, 2 Gray [Mass.] 383), but this is now changed by statute (*Smith v. Provin*, 4 Allen [Mass.] 516). See Pub. St. Mass. c. 123, § 7.

tenancy.<sup>427</sup> Apart from such a statutory declaration, the wife cannot properly be said to have any estate in the homestead property of her husband during his life, and the application of the term "estate" to her statutory right to prevent any alienation by him, or to her contingent right to succeed, on his death, to the homestead privilege, is to be avoided.<sup>428</sup>

### § 215. Rights of surviving consort.

As indicated in the preceding section, the homestead privilege generally continues in favor of the widow of the owner of the homestead property,<sup>429</sup> and in some states, if the property belonged to the wife, it continues in favor of the

<sup>427</sup> *Barber v. Babel*, 36 Cal. 11; *Smith v. Shrieves*, 13 Nev. 303. See *Freeman, Cotenancy*, § 49, where it is suggested that it would have been appropriate to call the joint interest, if any, a tenancy by entireties, rather than a joint tenancy, since neither party can affect its character by severance or suit for partition, as may be done in the case of a joint tenancy.

<sup>428</sup> "The right or privilege [of homestead] has no single feature resembling a joint tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to the alienation, or another homestead is provided, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead, not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from her husband's estate for her benefit and that of his children, if there be any." *Field, C. J.*, in *Gee v. Moore*, 14 Cal. 472. See, also, as denying the existence of any estate in the wife in the homestead property during the husband's life, *Pounds v. Clarke*, 70 Miss. 263; *Creath v. Creath*, 86 Tenn. 659; *Godfrey v. Thornton*, 46 Wla. 677; *Burns v. Keas*, 21 Iowa, 267; *Jenness v. Cutler*, 12 Kan. 515.

<sup>429</sup> *Thompson, Homesteads*, c. 11; *Waples, Homesteads*, c. 19; 11 *Am. & Eng. Enc. Law* (2d Ed.) 694. See *Garland v. Bostick*, 111 Ala. 209; *Brokaw v. Ogle*, 170 Ill. 115; *Strong v. Garrett*, 90 Iowa 100; *Freund v. McCall*, 73 Mo. 343; *Glover v. Glover*, 45 S. C. 51; *In re Armstrong's Estate*, 80 Cal. 71; *Glover v. Hill*, 57 Miss. 240.

surviving husband.<sup>420</sup> Moreover, in some states there is a provision that the widow shall be given a homestead out of her husband's property, even though the husband himself had no "homestead," in the technical meaning of the word, this being frequently termed "probate" homestead.<sup>421</sup>

In some states, the homestead right of the widow is merely a right to hold certain land against her husband's creditors in case the husband's estate is insolvent, without a right to any property, as against her husband's heirs,<sup>422</sup> while in others the right may be asserted against heirs as well as against creditors, without reference to the question of debts.<sup>423</sup> In the latter case, the rights of possession and enjoyment of a portion of testator's land are taken from the heirs, and given to the widow for a certain time, and it may therefore be said, as is quite frequently done, that she has, by reason of her homestead right, an "estate" in her

<sup>420</sup> *Ellis v. Davis*, 90 Ky. 183; *Sprague v. Beamer*, 45 Ill. App. 17; *Burns v. Keas*, 21 Iowa, 257; *In re Armstrong's Estate*, 80 Cal. 71; *Roberts v. Greer*, 22 Nev. 318, 58 Am. St. Rep. 755; *Eubank v. Landram*, 59 Tex. 247; *Hanson v. Moore*, 104 Ill. 403.

<sup>421</sup> *Waples, Homesteads*, c. 20; *In re Vance's Estate*, 100 Cal. 425; *Rottenberry v. Pipes*, 53 Ala. 447; *Territory v. Bramble*, 2 Dak. 189; *Coughanour v. Hoffman's Estate*, 2 Idaho, 267; *Fletcher v. State Capital Bank*, 37 N. H. 369; *Hodo v. Johnson*, 40 Ga. 439; *Hatorff v. Wellford*, 27 Grat. (Va.) 356; *Smith v. McDonald*, 95 N. C. 163.

<sup>422</sup> *Kemp v. Kemp*, 42 Ga. 523; *Barker v. Jenkins*, 84 Va. 895; *Robinson v. Baker*, 47 Mich. 619; *Patterson v. Patterson*, 49 Mich. 176; *Rottenberry v. Pipes*, 53 Ala. 447; *Hager v. Nixon*, 69 N. C. 103.

<sup>423</sup> *Smith v. Boutwell*, 101 Ala. 373; *Monk v. Capen*, 5 Allen (Mass.) 146; *Freund v. McCall*, 73 Mo. 343; *Gasaway v. Woods*, 9 Bush (Ky.) 72; *Simpson v. Poe*, 1 Lea (Tenn.) 701; *Spaulding's Appeal*, 52 N. H. 236; *Birmingham v. Birmingham*, 53 Miss. 610; *Keyes v. Hill*, 30 Vt. 760; *Mercier v. Chace*, 11 Allen (Mass.) 194; *Nicholas v. Purczell*, 21 Iowa, 265; *Waples, Homesteads*, 625. See *Fore v. Fore's Estate*, 2 N. D. 260. In *Green v. Crow*, 17 Tex. 180, it was decided that it existed only in case there were debts, but that it could be asserted against heirs.

deceased husband's land.<sup>424</sup> The homestead interest or estate of the widow is usually, by statute, limited to her life,<sup>425</sup> though occasionally she is given an absolute interest, equivalent to a fee simple, in her husband's homestead property.<sup>426</sup>

In some states her interest is inalienable,<sup>427</sup> and in others it may be assigned.<sup>428</sup>

— Loss of rights.

Under some statutes, it is necessary that the widow occupy the homestead premises, and the right is lost by a failure so to do.<sup>429</sup> But even under such statutes, the occupancy

<sup>424</sup> *Nebraska Loan & Trust Co. v. Smassall*, 38 Neb. 516; *Brokaw v. Ogle*, 170 Ill. 115; *Lake v. Page*, 63 N. H. 318; *West v. McMullen*, 112 Mo. 405; *Birmingham v. Birmingham*, 53 Miss. 610; *Holbrook v. Wightman*, 31 Minn. 168; *Strong v. Garrett*, 90 Iowa, 100; *Green v. Crow*, 17 Tex. 180; *Dooly v. Stringham*, 4 Utah, 107; *Day v. Adams*, 42 Vt. 510. See *Monk v. Capen*, 5 Allen (Mass.) 146. To the effect that there is no title or estate in the widow, but merely a right of occupancy, see *Johnson v. Gaylord*, 41 Iowa, 362; *Hosford v. Wynn*, 22 S. C. 309; *Glover v. Glover*, 45 S. C. 51; *Miller v. Marx*, 55 Ala. 322.

<sup>425</sup> *Weber v. Short*, 55 Ala. 311; *Strong v. Garrett*, 90 Iowa, 100; *Miles v. Hall*, 12 Bush (Ky.) 105; *Yoe v. Hanvey*, 25 S. C. 94; *Smith v. Provin*, 4 Allen (Mass.) 516; *Dooly v. Stringham*, 4 Utah, 107; *West v. McMullen*, 112 Mo. 405; *Holbrook v. Wightman*, 31 Minn. 168; *Fauver v. Fleenor*, 13 Lea (Tenn.) 622.

<sup>426</sup> *In re Wixom's Estate*, 35 Cal. 320; *Weatherford v. King*, 119 Mo. 51; *Smith v. Boutwell*, 101 Ala. 373.

<sup>427</sup> *Norton v. Norton*, 94 Ala. 481; *Whittle v. Samuels*, 54 Ga. 549; *Showers v. Robinson*, 43 Mich. 502; *Abbott v. Abbott*, 97 Mass. 137.

<sup>428</sup> *Nebraska Loan & Trust Co. v. Smassall*, 38 Neb. 516; *Lake v. Page*, 63 N. H. 318; *Green v. Crow*, 17 Tex. 180; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321; *Dayton v. Donart*, 22 Kan. 256; *Weatherford v. King*, 119 Mo. 51; *Plummer v. White*, 101 Ill. 474. In Illinois it cannot be aliened by her before it has been set out to her after her husband's death. *Sloniger v. Sloniger*, 161 Ill. 270. *Contra*, *Weatherford v. King*, 119 Mo. 51.

<sup>429</sup> *Norton v. Norton*, 94 Ala. 481; *Barbe v. Hyatt*, 50 Kan. 86; *Abbott v. Abbott*, 97 Mass. 136; *Fore v. Fore's Estate*, 2 N. D. 260; *Hicks v. Pepper*, 1 Baxt. (Tenn.) 42; *Garibaldi v. Jones*, 48 Ark. 230.

need not always be personal, possession by a tenant being sometimes regarded as sufficient.<sup>440</sup> Other statutes contain no requirement of occupancy.<sup>441</sup> Even though a permanent abandonment of the homestead property would defeat the right, a mere temporary absence will not usually have that effect.<sup>442</sup>

The homestead right of the surviving wife is in some, though not all, jurisdictions, lost by her remarriage.<sup>443</sup>

Occasionally it has been decided that the widow's right of homestead cannot be barred by an antenuptial contract.<sup>444</sup> It is, however, lost by her joinder in or consent to her husband's conveyance in the mode provided by statute,<sup>445</sup> and she may release her right after her husband's death.<sup>446</sup>

Her right cannot generally be defeated by her husband's

<sup>440</sup> *Garibaldi v. Jones*, 48 Ark. 230; *Walters v. People*, 21 Ill. 178; *Phipps v. Acton*, 12 Bush (Ky.) 277. See *Shirack v. Shirack*, 44 Kan. 652.

<sup>441</sup> *Brown v. Brown*, 33 Miss. 39; *Holbrook v. Wightman*, 31 Minn. 168; *Durland v. Sellar*, 27 Neb. 32; *Lake v. Page*, 63 N. H. 218; *Hufschmidt v. Gross*, 112 Mo. 656.

<sup>442</sup> *Brokaw v. Ogle*, 170 Ill. 115; *Jones v. Blumenstein*, 77 Iowa, 361; *Zwick v. Johns*, 39 Iowa, 550; *William Deering & Co. v. Beard*, 48 Kan. 16; *Pratt v. Pratt*, 161 Mass. 276; *Carter v. Randolph*, 47 Tex. 376. Compare *Kingman v. Higgins*, 100 Ill. 319; *Carter v. Randolph*, 47 Tex. 376; *Paul v. Paul*, 136 Mass. 286.

<sup>443</sup> That the right is lost by remarriage, see *Dayton v. Donart*, 22 Kan. 256; *Dei v. Habel*, 41 Mich. 88; *In re Boland's Estate*, 43 Cal. 640; *Heard v. Downer*, 47 Ga. 629; *Carpenter v. Brownlee*, 33 Miss. 200; *Anderson v. Coburn*, 27 Wis. 558. Contra, *Nicholas v. Purcell*, 21 Iowa, 265, 39 Am. Dec. 572; *Fore v. Fore's Estate*, 2 N. D. 260; *Brady v. Banta*, 46 Kan. 121; *West v. McMullen*, 112 Mo. 405; *Pressley's Heirs v. Robinson*, 57 Tex. 453; *Yeates v. Briggs*, 95 Ill. 79; *Miles v. Miles*, 46 N. H. 261, 38 Am. Dec. 208.

<sup>444</sup> *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 319; *Mann v. Mann's Estate*, 53 Vt. 48. See *Waples, Homesteads*, 612. Contra, *Hafer v. Hafer*, 36 Kan. 524; *Ditson v. Ditson*, 85 Iowa, 276.

<sup>445</sup> See ante, § 214.

<sup>446</sup> *Small v. Wicks*, 82 Iowa, 744; *Mack v. Heiss*, 90 Mo. 578; *Sloniger v. Sloniger*, 161 Ill. 270; *Showers v. Robinson*, 43 Mich. 502.

devise of the homestead property to another person.<sup>447</sup> In case, however, the husband, by his will, makes a provision for his wife in lieu of her homestead right, she must, as in the case of dower, make an election as to which she will take.<sup>448</sup>

In some jurisdictions, the widow is not entitled both to dower and to her homestead interest, but she must elect as to which she will take,<sup>449</sup> or the amount of her homestead is to be deducted in assigning her dower.<sup>450</sup> In other states, however, she is entitled to both dower and homestead, free from any deductions.<sup>451</sup>

#### — Termination of right.

After the termination of the widow's interest, if there are no minor children to assert the right of exemption,<sup>452</sup> the

<sup>447</sup> *Bell v. Bell*, 84 Ala. 64; *Holbrook v. Wightman*, 31 Minn. 163; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761; *Pratt v. Pratt*, 161 Mass. 276; *Runnels v. Runnels*, 27 Tex. 515; *Rockhey v. Rockhey*, 97 Mo. 76; *Meech v. Meech's Estate*, 37 Vt. 414; *In re Lahiff's Estate*, 86 Cal. 151; *Stewart v. Brand*, 23 Iowa, 477. *Contra*, *Turner v. Scheiber*, 39 Wis. 1; *Osburn v. Sims*, 62 Miss. 429. And see *Hazelett v. Farthing*, 94 Ky. 421, 42 Am. St. Rep. 365.

<sup>448</sup> *Cowdrey v. Hitchcock*, 103 Ill. 262; *Etcheborne v. Auersals*, 45 Cal. 131; *Ellmore v. Ellmore's Adm'r*, 4 Ky. Law Rep. 622; *Dandt v. Musick*, 9 Mo. App. 169; *McCormick v. McNeel*, 52 Tex. 15; *In re Blackmer's Estate*, 66 Vt. 46.

<sup>449</sup> *Whitehead v. Conklin*, 43 Iowa, 478; *Brokaw v. McDougall*, 20 Fla. 212; *Hickson v. Bryan*, 41 Ga. 620; *Walker v. Doane*, 103 Ill. 236; *Burch v. Atchison*, 33 Ky. 585; *Waples, Homesteads*, 612. In Iowa, the surviving widow or husband is required to make an election between her or his distributive share and the homestead interest. *Conn v. Conn*, 58 Iowa, 747; *Holbrook v. Perry*, 66 Iowa, 286.

<sup>450</sup> *Doane v. Doane's Heirs*, 33 Vt. 649; *Seek v. Haynes*, 68 Mo. 13; *Glover v. Hill*, 57 Miss. 240; *Jones v. Gilbert*, 135 Ill. 27.

<sup>451</sup> *Horton v. Hilliard*, 58 Ark. 298; *Chisolm v. Chisolm's Ex'rs*, 41 Ala. 327; *Cowdrey v. Cowdrey*, 131 Mass. 186; *Del v. Habel*, 41 Mich. 38; *Norris v. Morrison*, 45 N. H. 490; *Honford v. Wynn*, 23 S. C. 309.

<sup>452</sup> See post, § 216.



land may be made liable for the husband's debts.<sup>453</sup> Under some decisions, even during the existence of the widow's interest, the land may be sold for the payment of these debts, subject to such interest.<sup>454</sup>

— Probate homestead.

As before stated, in many states the widow is entitled to what is termed a homestead interest in her husband's property, even when he had asserted no claim of homestead during his life, this being conveniently termed a "probate" homestead. Such homestead is allotted by a court, usually, if not always, of either equity or probate jurisdiction, much as in the case of the assignment of dower.<sup>455</sup>

The allotment must be made out of land in which the husband had a beneficial interest not expiring on his death.<sup>456</sup> It has accordingly been allowed out of land which he held as tenant in common of another,<sup>457</sup> out of an equitable interest under an uncompleted contract of purchase,<sup>458</sup> and out of an equity of redemption,<sup>459</sup> and has been denied in

<sup>453</sup> *Garibaldi v. Jones*, 48 Ark. 230; *Barrett v. Durham*, 80 Ga. 336; *Morrill v. Hopkins*, 36 Tex. 686; *Gardner v. Baker*, 25 Iowa, 343; *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177.

<sup>454</sup> *Evans v. Evans' Adm'r*, 13 Bush (Ky.) 587; *McGowan v. Baldwin*, 46 Minn. 477; *Poland v. Vesper*, 67 Mo. 727; *Carrigan v. Rowell*, 96 Tenn. 185. Contra, *Wehrle v. Wehrle*, 39 Ohio St. 365. See *Showers v. Robinson*, 43 Mich. 502.

<sup>455</sup> *Barco v. Fennell*, 24 Fla. 378; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Atkinson v. Atkinson*, 40 N. H. 249; *Mercier v. Chace*, 9 Allen (Mass.) 242; *Norris v. Moulton*, 34 N. H. 392; *Rhea v. Meridith*, 6 Lea (Tenn.) 605; *Lindsey v. Brewer*, 60 Vt. 627; *Christopher v. Christopher*, 92 Tenn. 408; *Keel v. Larkin*, 72 Ala. 493.

<sup>456</sup> *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Weber v. Short*, 55 Ala. 311; *Berry v. Dobson*, 68 Miss. 483.

<sup>457</sup> *Ward v. Mayfield*, 41 Ark. 94; *McClary v. Bixby*, 36 Vt. 254, 84 Am. Dec. 684. See *Capek v. Kropik*, 129 Ill. 509.

<sup>458</sup> *Fauver v. Fleenor*, 13 Lea (Tenn.) 622; *Munro v. Jeter*, 24 S. C. 29.

<sup>459</sup> *Norris v. Morrison*, 45 N. H. 490.

an estate in remainder,<sup>460</sup> and in a bare legal estate in the husband.<sup>461</sup>

Some statutes require that the allotment be out of the residence property of the husband, if any such there be,<sup>462</sup> and sometimes there is no right of homestead except in such property.<sup>463</sup> In some states, the widow has no such rights in land in which the husband did not claim an exemption.<sup>464</sup>

### § 216. Rights of children.

The statute usually provides that the minor children of the marriage shall have a right of homestead in the land, to continue, in the majority of states, only till they arrive at majority.<sup>465</sup> The surviving wife, so long as she lives, and the children, have, usually, joint rights of occupation, and in most of the states the former cannot, by sale, abandonment, or otherwise, prejudice the rights of the latter. The various statutory provisions defining these children's rights of homestead differ so greatly in the various states as to be entirely insusceptible of general treatment, and further consideration of the matter is not possible in a work of the present character.<sup>466</sup>

<sup>460</sup> *Howell v. Jones*, 91 Tenn. 402.

<sup>461</sup> *Osborn v. Strachan*, 32 Kan. 52; *Ogden v. Ogden*, 60 Ark. 79, 46 Am. St. Rep. 151.

<sup>462</sup> *Gregory v. Ellis*, 86 N. C. 579; *Rogers' Adm'r v. Ragland*, 43 Tex. 422.

<sup>463</sup> *Dehoney v. Bell*, 17 Ky. Law Rep. 76. That it may sometimes be given on other property under some statutes, see *Steiner v. McDaniel*, 110 Ala. 409; *In re Sharp's Estate*, 78 Cal. 483.

<sup>464</sup> *King v. McCarthy*, 54 Minn. 190; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110; *Christopher v. Christopher*, 92 Tenn. 408.

<sup>465</sup> *Hunter v. Law*, 68 Ala. 365; *Neal v. Brockhan*, 87 Ga. 130; *Dayton v. Donart*, 22 Kan. 256; *Booth v. Goodwin*, 29 Ark. 633; *Hoppe v. Hoppe*, 104 Cal. 94; *Wolf v. Ogden*, 66 Ill. 224; *Quinn v. Kinyon*, 100 Mo. 551; *Squire v. Mudgett*, 61 N. H. 149; *Hinsdale v. Williams*, 75 N. C. 430.

<sup>466</sup> See 15 Am. & Eng. Enc. Law, 708; *Waples, Homesteads*, c. 21; *Thompson, Homesteads*, §§ 569-579.

## **CHAPTER IX.**

### **RIGHTS OF ENJOYMENT INCIDENT TO OWNERSHIP.**

#### **I. GENERAL RIGHTS ABOVE AND BELOW THE SURFACE.**

- § 217. Rights above the surface.
- 218. Rights below the surface.

#### **II. EARTH AND MINERALS.**

- § 219. Individual rights of ownership.
- 220. Sovereign rights.
- 221. Mineral oils and gases.
- 222. Grants of mineral rights—Mining leases.

#### **III. VEGETABLE PRODUCTS OF THE EARTH.**

- § 223. Fructus industriales and fructus naturales.
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## I. GENERAL RIGHTS ABOVE AND BELOW THE SURFACE.

The owner of land has the absolute control of the space above the surface of the land, and also presumptively owns the land beneath the surface. The surface and strata thereunder may, however, be owned by different persons.

## § 217. Rights above the surface.

The ownership of the surface of land includes the exclusive right to use and control the space above it to an indefinite distance.<sup>1</sup> Consequently, any infringement by another person of the freedom of such space, as by allowing the eaves or wall of a building,<sup>2</sup> or the branches of a tree,<sup>3</sup> to project thereon from adjoining land, is a nuisance. On the same principle, the owner of land has the right to object to the stretching of a telegraph or other wire in the space above his land.<sup>4</sup> But though entitled to remove or enforce the removal of the thing thus constituting a nuisance, he has no right of ownership therein merely because, without being attached to his land, it is suspended over it.<sup>5</sup>

## § 218. Rights below the surface.

The owner of the surface of land is *prima facie* the owner of the soil or mineral deposits to the center of the earth,<sup>6</sup> and any underground encroachment by an adjoining owner

<sup>1</sup> Co. Litt. 4a; 2 Bl. Comm. 18; 3 Kent, Comm. 401.

<sup>2</sup> Baten's Case, 9 Coke, 53b; Meyer v. Metzler, 51 Cal. 142; Copper v. Dolvin, 68 Iowa, 757, 56 Am. Rep. 372; Murphy v. Bolger, 60 Vt. 723.

<sup>3</sup> Hoffman v. Armstrong, 48 N. Y. 201, Finch's Cas. 97; Grandons v. Lovdal, 70 Cal. 161, Finch's Cas. 99. See post, § 229.

<sup>4</sup> Boards of Works for Wandsworth Dist. v. United Telephone Co., 13 Q. B. Div. 904.

<sup>5</sup> Hoffman v. Armstrong, 48 N. Y. 201, Finch's Cas. 97; Skinner v. Wilder, 38 Vt. 115, Finch's Cas. 154; Lyman v. Hale, 11 Conn. 177, 1 Gray's Cas. 546.

<sup>6</sup> Co. Litt. 4a; 2 Bl. Comm. 18; Adam v. Briggs Iron Co., 7 Cush. (Mass.) 361; Hague v. Wheeler, 157 Pa. St. 324.

is a trespass or nuisance.<sup>7</sup> Land may, however, be divided horizontally for purposes of ownership, the surface belonging to one person, and a stratum below the surface to another, this frequently occurring in the case of a conveyance of the minerals separate from the surface.<sup>8</sup>

## II. EARTH AND MINERALS.

The earth and minerals are, while in place, real things, belonging presumptively to the owner of the surface of the land, and become personalty only on severance. Rights as to minerals may be created in a person other than the owner of the surface of the land, either by the conveyance of the minerals as a separate corporeal thing, or by the grant of a right to take minerals from the land. Sometimes a lessee of the land has the right to take minerals as an incident of his limited ownership.

Mineral oils and gases belong to the owner of the surface if he extracts them from the earth before they escape into another's land.

### § 219. Individual rights of ownership.

The ownership of land *prima facie* includes the soil or earth, and also the minerals in or on the ground, and consequently the tenant in fee simple of the land is the owner of all deposits or strata of clay, stone, iron, and other mineral substances,<sup>9</sup> and such substances, while thus in place,

<sup>7</sup> *Pile v. Pedrick*, 167 Pa. St. 296, 46 Am. St. Rep. 677; *Buckingham v. Elliott*, 63 Miss. 296, 52 Am. Rep. 188.

<sup>8</sup> *Stoughton v. Leigh*, 1 Taunt. 402, 6 Gray's Cas. 729; *Wilkinson v. Proud*, 10 Mees. & W. 33; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; *Lee v. Bumgardner*, 86 Va. 315. See post, § 219.

<sup>9</sup> *Egremont Burial Board v. Egremont Iron Ore Co.*, 14 Ch. Div. 158; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476; *Stratton v. Lyons*, 53 Vt. 641. So it has been held that an aerolite constitutes a part of the land, and belongs to the owner thereof. *Goddard v. Winchell*, 86 Iowa, 71, *Finch's Cas.* 109.

are things of a real, and not a personal, character.<sup>10</sup> The minerals or the soil may, however, be removed from their natural position in or on the ground, and, when thus severed from the land by one authorized to make the severance, they become personalty, even though they still remain on or below the surface of the land.<sup>11</sup>

The part of the land consisting of minerals, or of specified minerals, may be made the subject of separate ownership, this being the result either of a grant of the minerals by the owner of the land,<sup>12</sup> or of a grant of the land with an exception of the minerals.<sup>13</sup> Upon such separation of ownership, an estate in fee simple is created in the minerals, as corporeal things real.<sup>14</sup>

To be distinguished from rights of ownership in minerals in place are rights to extract minerals from land belonging to another, the minerals remaining the property of the land-

<sup>10</sup> *People v. Williams*, 35 Cal. 671; *State v. Burt*, 64 N. C. 619. See post, § 222.

<sup>11</sup> *Noble v. Sylvester*, 42 Vt. 146, 1 Gray's Cas. 758, *Finch's Cas.* 114; *Forbes v. Gracey*, 94 U. S. 762; *Brown v. Morris*, 83 N. C. 251; *Lyon v. Gormley*, 53 Pa. St. 261; *McGonigle v. Atchison*, 33 Kan. 726, *Finch's Cas.* 65; *Lyken's Valley Coal Co. v. Dock*, 62 Pa. St. 232. But they remain things of a real nature if removed by natural causes. *State v. Burt*, 64 N. C. 619. As to constructive severance of the soil, see *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476.

<sup>12</sup> *Stoughton v. Leigh*, 1 Taunt. 403, 6 Gray's Cas. 729; *Caldwell v. Fulton*, 31 Pa. St. 475, *Finch's Cas.* 102; *Kincaid v. McGowan*, 88 Ky. 91; *Chester Emery Co. v. Lucas*, 112 Masa. 424; *Wardell v. Watson*, 93 Mo. 107; *Edwards v. McClurg*, 39 Ohio St. 41; *Lee v. Bumgardner*, 86 Va. 315.

<sup>13</sup> *Snoddy v. Bolen*, 122 Mo. 479; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Whitaker v. Brown*, 46 Pa. St. 197; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; *Kincaid v. McGowan*, 88 Ky. 91.

<sup>14</sup> *Manning v. Frazier*, 96 Ill. 279; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568.

owner until actually extracted. Such rights in another's land are considered elsewhere in this work.<sup>15</sup>

§ 220. Sovereign rights.

By the common law, all mines of gold and silver belonged to the king, and also, it seems, all mines in which gold or silver might be found in connection with other metals.<sup>16</sup> It was, however, enacted by statute in England that no copper, tin, iron, or lead mine should be a royal mine merely because gold and silver were taken therefrom.<sup>17</sup> The question whether the common-law rule is in force in this country is of little importance, owing to the fact that the precious metals have been found almost exclusively in the public domain of the United States, and the rights of the finders and workers thereof are secured by express legislation on the subject.<sup>18</sup> In one case, however, it has been decided not to be in force so as to vest the title to a gold or silver mine in the state, on the ground that the rights of the crown at common law were personal to the reigning monarch, and not attributes of sovereignty.<sup>19</sup>

§ 221. Mineral oils and gases.

Oil and natural gas from beneath the surface of the earth are usually regarded as minerals,<sup>20</sup> but, owing to their fluid character, they are subject to rules different from those applicable to other minerals, and are treated somewhat after the analogy of underground water. They are part of the

<sup>15</sup> See post, § 338.

<sup>16</sup> Reg. v. Earl of Northumberland, 1 Plowd. 310, 1 Gray's Cas. 531

<sup>17</sup> 1 Wm. & M. St. 1, c. 30, 5 Wm. & M. c. 6 (A. D. 1688, 1693).

<sup>18</sup> See post, § 371.

<sup>19</sup> Moore v. Smaw, 17 Cal. 199, Finch's Cas. 374. But see Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104.

<sup>20</sup> Brown v. Spilman, 155 U. S. 665; Funk v. Haldeman, 53 Fed. St. 229; People's Gas Co. v. Tyner, 131 Ind. 277.



land until they are removed therefrom.<sup>21</sup> But the owner of the land can claim the gas or oil thereunder only so long as it there remains, and, if it escapes into other land, even as a result of the act of the owner of the latter, the owner of the land under which it had previously accumulated can no longer assert any right thereto.<sup>22</sup>

Occasionally it is said of these substances, as it is of water,<sup>23</sup> that they are not the subject of ownership until reduced to possession;<sup>24</sup> but this statement seems to refer merely to the possibility of their loss by the owner of the land owing to their escape into adjoining land, and they are more usually regarded as belonging to the owner of the land in which they may happen to be.<sup>25</sup>

### § 222. Grants of mineral rights—Mining leases.

Instruments by which a right is granted to take minerals from land, whether it be a conveyance of the minerals in place, or merely a grant of the right to remove them, are indiscriminately termed "mining leases."<sup>26</sup> The same term is sometimes applied to a lease of land for a term of years, or from year to year, containing a provision allowing the

<sup>21</sup> *Hall v. Reed*, 15 B. Mon. (Ky.) 479; *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; *Stoughton's Appeal*, 88 Pa. St. 198.

<sup>22</sup> *People's Gas Co. v. Tyner*, 131 Ind. 277, *Finch's Cas.* 372; *Brown v. Spilman*, 155 U. S. 665; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. St. 235.

<sup>23</sup> See post, §§ 300, 334.

<sup>24</sup> *Shepherd v. McCalmont Oil Co.*, 38 Hun (N. Y.) 37; *Dark v. Johnston*, 55 Pa. St. 164.

<sup>25</sup> *Hall v. Reed*, 15 B. Mon. (Ky.) 479; *Williamson v. Jones*, 39 W. Va. 231, distinguishing *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210; *Hughes v. United Pipe Lines*, 119 N. Y. 423; *Stoughton's Appeal*, 88 Pa. St. 198; *Hague v. Wheeler*, 157 Pa. St. 324; *Brown v. Spilman*, 155 U. S. 665. So in the case of pitch of a semi-fluid nature, *Trinidad Asphalt Co. v. Ambard* [1899] App. Cas. 594.

<sup>26</sup> *Barringer & Adams, Mines*, 35.

leases to take minerals from the ground, in which case he has no separate estate in the minerals, but has merely an ordinary leasehold estate in the land, free, however, from the liability which would otherwise exist as for waste in case of his removal of the minerals.<sup>27</sup>

Generally speaking, an instrument granting minerals or mining rights is subject to the same principles as other conveyances of interests in land. The question whether it conveys the minerals in place, or a mere right to extract them, or is a lease of the land with the right to take minerals, is a question of construction.<sup>28</sup> Upon this question depends the legal nature of the payment to be made by the beneficiary of the grant. If a fee-simple estate in the minerals themselves is conveyed, the payments to be made, though in the form of a royalty on the ore extracted, and even though termed "rent," are properly the purchase price of the minerals.<sup>29</sup> If merely a right to take minerals is granted, the so-called

<sup>27</sup> See *Brown v. Beecher*, 120 Pa. St. 590; *Doe d. Patton v. Axley*, 50 N. C. 440; *Ganter v. Atkinson*, 35 Wis. 48.

<sup>28</sup> According to some cases, an instrument conveying to the grantee all the specified minerals in a certain piece of land is to be regarded as a sale of the minerals in place, although in terms merely a lease of the minerals for a certain number of years. *Montooth v. Gamble*, 123 Pa. St. 240; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. St. 603. And see, to the same effect, *Gowan v. Christie*, L. R. 2 H. L. Sc. 273, 284; *Coltress Iron Co. v. Black*, 6 App. Cas. 315, 335; *Eadon v. Jeffcock*, L. R. 7 Exch. 379, 394. But see, to the contrary, *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105; *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535; *Massot v. Moses*, 3 Rich. (S. C.) 168; *Cowan v. Bradford Iron Co.*, 83 Va. 547; *Genet v. Delaware & H. Canal Co.*, 136 N. Y. 593.

<sup>29</sup> *Manning v. Frazier*, 96 Ill. 279; *Fairchild v. Fairchild* (Pa.) 9 Atl. 255; *Estate of Lazarus*, 145 Pa. St. 1; *Caldwell v. Fulton*, 31 Pa. St. 475, *Finch's Cas.* 102; *Brigstocke v. Brigstocke*, 3 Ch. Div. 363. And see cases cited ante, note 28. In England, however, it has been held that the sums to be paid constitute rent for which a distress may be made. *Daniel v. Gracie*, 6 Q. B. 145; *In re Roundwood Colliery Co.* [1897] 1 Ch. 373.

rent reserved is not rent, since rent cannot issue out of an incorporeal thing.<sup>22</sup> It is merely a contract to pay a certain sum for the privilege granted.

### III. VEGETABLE PRODUCTS OF THE EARTH.

Vegetable products resulting from annual labor are termed "*fructus industriales*," and those not so resulting are termed "*fructus naturales*."

*Fructus industriales*, as against the reversioner or remainderman, belong to the tenant of the land who has planted them, if his estate in the land is uncertain, and terminates without his fault before they are severed from the land. They pass, on the death of the landowner, to his personal representative, and they are separately liable to execution for his debts. They are not regarded as interests in land, within the Statute of Frauds.

*Fructus naturales* are treated as part of the land until they are actually or constructively severed from the land. By some decisions, a sale of them is regarded as a sale of an interest in land, within the Statute of Frauds.

A tree belongs to the owner of the land on which it is planted, and branches or roots extending over or into the land of another, though they may be removed by the latter, belong to the owner of the tree. A tree on the boundary line belongs to both owners in common.

An agreement between the owner of land and another that the latter shall plant and cultivate the land, and that they shall share in the proceeds of the crops, may create, according to the character of the agreement, the relation of landlord and tenant, of tenants in common of the crops, or of master and servant.

#### § 223. *Fructus industriales* and *fructus naturales*.

Those products of the earth which are the result of annual labor and manuring by the person in possession of the land,

<sup>22</sup> See post, § 355.

known sometimes as "*fructus industriales*," or "emblements," are regarded, for many purposes, not as constituting a part of the land, but as chattels. Of such character are grain, garden vegetables, and other annual crops. On the other hand, trees, perennial bushes, and grasses, termed "*fructus naturales*," are regarded as a part of the land for all purposes.<sup>81</sup> Fruits upon trees and bushes have usually been included in this latter class, even though to some extent the result of annual labor and manuring.<sup>82</sup> But occasionally such fruits, when grown by the application of regular labor, have been regarded as *fructus industriales*.<sup>83</sup> Hops, though growing from permanent roots, have usually been regarded as *fructus industriales*, as being the result of the industry of the tenant in possession;<sup>84</sup> and on the same principle, crude turpentine formed on the body of a tree, produced by labor and cultivation, is so classed.<sup>85</sup>

The practical applications of the distinction between *fructus industriales* and *fructus naturales* are stated in the five sections next following. While, as will be seen therein, *fructus*

<sup>81</sup> Co. Litt. 55b; 2 Bl. Comm. 123; 1 Williams, Ex'rs (9th Ed.) 620; Sparrow v. Pond, 49 Minn. 412, Finch's Cas. 171; In re Chamberlain, 140 N. Y. 390, Finch's Cas. 178; Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614; Pattison's Appeal, 61 Pa. St. 294; Reiff v. Reiff, 64 Pa. St. 134; Evans v. Hardy, 76 Ind. 527. Artificial grasses, however, produced by special cultivation, may perhaps be regarded as *fructus industriales*. See 1 Williams, Ex'rs (9th Ed.) 625.

<sup>82</sup> Rodwell v. Phillips, 9 Mees. & W. 501; Sparrow v. Pond, 49 Minn. 412, Finch's Cas. 171; Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614; Rogers v. Elliott, 59 N. H. 201, 47 Am. Rep. 192; State v. Gemmill, 1 Houst. (Del.) 9; Kain v. Fisher, 6 N. Y. 597; Ewell Fixtures, 247, and authorities cited.

<sup>83</sup> Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591, Finch's Cas. 160; Vulicevich v. Skinner, 77 Cal. 239.

<sup>84</sup> Latham v. Atwood, Cro. Car. 515, 1 Gray's Cas. 622; Rodwell v. Phillips, 9 Mees. & W. 501. See Graves v. Weld, 5 Barn. & Adol. 105, 1 Gray's Cas. 625, Finch's Cas. 403.

<sup>85</sup> Lewis v. McNatt, 65 N. C. 63, 1 Gray's Cas. 633.

*industriales* are for most purposes treated as personal property, whether it is proper to regard them as personal property for all purposes is open to considerable question.<sup>36</sup>

§ 224. Rights as between tenants of successive estates.

Reference has been made, in connection with the consideration of the various estates and interests in land, to the right of the tenant, after the termination of his estate or tenancy, to cultivate, and take at maturity, the crops growing upon the land, known as "emblemments."<sup>37</sup> The general rule is that one who has an uncertain interest, or one which is determined by the act of God or of another, is entitled to crops planted by him which must mature within the year, while the rule is otherwise if the termination of the interest is certain, or if he terminates it by his own act.<sup>38</sup>

A tenant is consequently entitled to emblemments if his interest terminate by the death of another, as when his estate is one *pur autre vie*, and the *cestui que vie* dies, or his landlord has a life estate merely, and the latter dies.<sup>39</sup> Likewise, upon the death of the tenant of an estate for his own life, his personal representatives are entitled to emblemments.<sup>40</sup> While a tenant terminating the tenancy by his own act is

<sup>36</sup> See the question well discussed by Simmons, C. J., in *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626.

<sup>37</sup> See ante, §§ 32, 56.

<sup>38</sup> Litt. § 68; Co. Litt. 55a; 2 Bl. Comm. 123, 145; *Graves v. Weld*, 5 Barn. & Adol. 105, 1 Gray's Cas. 625, Finch's Cas. 403; *Bulwer v. Bulwer*, 2 Barn. & Ald. 471; *Hawkins v. Skegg's Adm'r*, 10 Humph. (Tenn.) 31.

The right of a gardener or nurseryman to remove plants from premises leased by him is usually based on the theory of trade fixtures. See post, note 131.

<sup>39</sup> Co. Litt. 55b; *Bradley v. Balley*, 56 Conn. 374, 7 Am. St. Rep. 316, Finch's Cas. 409; *Graves v. Weld*, 5 Barn. & Adol. 105, 1 Gray's Cas. 625; *Reilly v. Ringland*, 39 Iowa, 106; *Beavans v. Briscoe*, 4 Har. & J. (Md.) 139.

<sup>40</sup> Co. Litt. 55b; 2 Bl. Comm. 122; *Thornton v. Burch*, 20 Ga. 791.

not entitled to emblements, an under tenant is in a different position, it seems, and is not, by the original tenant's action, deprived of the right to emblements.<sup>41</sup>

A tenant for years is not, as a rule, entitled to emblements, since the termination of the interest is certain, and he can take measures accordingly.<sup>42</sup> Nor has he such right when the lease is forfeited by his own misconduct.<sup>43</sup> He is, however, entitled thereto, as just indicated, when his estate is terminated by the act of God or of another without his fault. There is, moreover, in some places, a custom allowing the tenant to take crops growing at the termination of his tenancy, even though it be of a fixed duration, this being known as the right of "away-going crops."<sup>44</sup>

A tenant from year to year is entitled to emblements, when the tenancy is terminated by notice from the landlord,<sup>45</sup> since the length of notice is not sufficient to enable him to take measures to protect himself. In the case of a tenancy at will, likewise, the tenant, or his representative, is entitled to emblements when the tenancy is terminated by his own death, or by the act of the landlord.<sup>46</sup> A tenant by suffer-

<sup>41</sup> 2 Bl. Comm. 124; *Oland v. Burdwick*, Cro. Eliz. 460; *Debow v. Colfax*, 10 N. J. Law, 128. Contra, *Oland's Case*, 5 Coke, 116a. So, upon the marriage of one who has an estate during widowhood, though she is not entitled to emblements, one holding under her as tenant is so entitled. See cases *supra*.

<sup>42</sup> Litt. § 68; 2 Bl. Comm. 145; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360, *Finch's Cas.* 406; *Chesley v. Welch*, 37 Me. 106; *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510.

<sup>43</sup> Co. Litt. 55; 2 Bl. Comm. 145.

<sup>44</sup> *Wigglesworth v. Dallison*, 1 Doug. 205; *Van Doren v. Everitt*, 5 N. J. Law, 528, 8 Am. Dec. 615; *Shaw v. Bowman*, 91 Pa. St. 414; *Forsythe v. Price*, 8 Watts (Pa.) 282, 34 Am. Dec. 465; 2 Taylor, Landl. & Ten. § 538. But in *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510, it was held that such a custom is invalid.

<sup>45</sup> *Kingsbury v. Collins*, 4 Bing. 202; 2 Taylor, Landl. & Ten. § 534. See *Clark v. Harvey*, 54 Pa. St. 142, *Finch's Cas.* 406, where such right is based on custom.

<sup>46</sup> Litt. § 68; Co. Litt. 55b, 56a, 63a; *Oland's Case*, 5 Coke, 116a; (594)

ance has no right to emblements,<sup>47</sup> nor does any such right appertain to one who has wrongfully disseised another.<sup>48</sup> If, however, a disseisor harvest crops planted by him, he acquires a good title thereto.<sup>49</sup>

§ 225. Succession on death of owner.

Upon the death of the owner of land without having made a devise thereof, while the land, together with the *fructus naturales*, will pass to the heir, the *fructus industriales* pass to the executor or administrator as personal assets.<sup>50</sup> In a number of states this matter is regulated by statute.<sup>51</sup>

Annual crops, and *a fortiori* permanent growths, pass with

*Ellis v. Paige*, 1 Pick. (Mass.) 43, 3 Gray's Cas. 441; *Reilly v. Ringland*, 39 Iowa, 106; *Harris v. Frink*, 49 N. Y. 24, Finch's Cas. 763; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Simpkins v. Rogers*, 15 Ill. 397; *Davis v. Eyton*, 7 Bing. 154; *Howell v. Schenck*, 24 N. J. Law, 89; *Samson v. Rose*, 65 N. Y. 411.

<sup>47</sup> *Doe d. Bennett v. Turner*, 7 Mees. & W. 226; *Miller v. Cheney*, 88 Ind. 466, 470.

<sup>48</sup> *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88; *Huerstal v. Muir*, 64 Cal. 450; *Craig v. Watson*, 68 Ga. 115; *Freeman v. McLennan*, 26 Kan. 151; *Brothers v. Hurdle*, 32 N. C. 490, 51 Am. Dec. 400; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220.

<sup>49</sup> *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737; *Stockwell v. Phelps*, 84 N. Y. 363, 90 Am. Dec. 710; *Page v. Fowler*, 39 Cal. 412; *Jenkins v. McCoy*, 50 Mo. 348; *Lindsay v. Winona & St. P. R. Co.*, 29 Minn. 411, 43 Am. Rep. 228. Contra, *Co. Litt.* 55b; *Liford's Case*, 11 Coke, 51.

<sup>50</sup> *Co. Litt.* 55b; 1 Williams, Ex'rs (9th Ed.) 622; 2 Woerner, Administration, § 282; *Penhallow v. Dwight*, 7 Mass. 84, 5 Am. Dec. 21; *Sherman v. Willett*, 42 N. Y. 146, Finch's Cas. 209; *Dennett v. Hopkinson*, 63 Me. 350; *McGee v. Walker*, 106 Mich. 521.

<sup>51</sup> 2 Woerner, Administration, § 282. See *Wright v. Watson*, 96 Ala. 536; *Cheney v. Roodhouse*, 32 Ill. App. 49; *Dickey v. Wilkins* (Miss.) 17 So. 374; *Evans v. Hardy*, 76 Ind. 527; *Bradner v. Faulkner*, 34 N. Y. 347; *Waring v. Purcell*, 1 Hill Eq. (S. C.) 193.

the land to a devisee thereof, unless it is otherwise expressed in the will.<sup>53</sup>

### § 226. Sale or conveyance of land.

On the sale of land, or on its conveyance, either absolutely or by way of mortgage, vegetable growths thereon pass with the land to the vendee or grantee, this being true of annual crops, as well as of trees or shrubbery.<sup>53</sup> Trees planted in a nursery garden likewise *prima facie* pass by a conveyance of the land.<sup>54</sup> And even trees and crops which have been cut and are lying upon the land have been held to pass with the land.<sup>55</sup>

The vegetable growths may, however, be excepted or reserved by a written stipulation to that effect, in which case

<sup>53</sup> Co. Litt. 55b, Hargrave's note; Spencer's Case, Winch, 51, 1 Gray's Cas. 621; Cooper v. Woolfit, 2 Hurl. & N. 122, 1 Gray's Cas. 629; Stall v. Wilbur, 77 N. Y. 158, Finch's Cas. 207; In re Chamberlain, 140 N. Y. 390, Finch's Cas. 173; Smith v. Barham, 17 N. C. 420, 25 Am. Dec. 721; Pratte v. Coffman's Ex'r, 27 Mo. 424; Budd v. Hilier, 27 N. J. Law, 43; Dennett v. Hopkinson, 63 Me. 350. Contra, by statute, see Humphrey v. Merritt, 51 Ind. 197; Thomas v. Lines, 83 N. C. 191.

A bequest of "farming stock," or "stock on my farm," has been held to include growing crops, so that, in such a case, they will not pass to the devisee of the land. In re Roose, 17 Ch. Div. 696, 1 Gray's Cas. 631; West v. Moore, 8 East, 343.

<sup>54</sup> Terhune v. Elberson, 3 N. J. Law, 533, 1 Gray's Cas. 634; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284, 1 Gray's Cas. 635, Finch's Cas. 163; Batterman v. Albright, 122 N. Y. 484, Finch's Cas. 164; Tripp v. Hasceig, 20 Mich. 254, Finch's Cas. 188; Kittredge v. Woods, 3 N. H. 503; Heavilon v. Heavilon, 29 Ind. 509; Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438; Backenstoss v. Stahler's Adm'rs, 33 Pa. St. 251, 75 Am. Dec. 592; Treat v. Dorman, 100 Cal. 623; Reed v. Swan, 133 Mo. 100; Smith v. Leighton, 38 Kan. 544, 5 Am. St. Rep. 778.

<sup>55</sup> Maples v. Millon, 31 Conn. 598; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Adams v. Beadle, 47 Iowa, 439, 29 Am. Rep. 487.

<sup>56</sup> 2 Kent, Comm. 346; Brackett v. Goddard, 54 Me. 309, 1 Gray's Cas. 636, Finch's Cas. 170. See Kittredge v. Woods, 3 N. H. 503.



the grantor has a right in the soil sufficient for their nourishment, and the privilege of entering on the land to remove them.<sup>56</sup> By some decisions, even an oral exception or reservation may be effective for this purpose.<sup>57</sup>

If the ownership of any part of the vegetation has previously been vested in a person other than the owner of the land, it will not pass under a conveyance of the land, at least to one who knows of such severance of ownership,<sup>58</sup> and, by some decisions, crops which are ready for cutting are not considered to pass by a conveyance of the land.<sup>59</sup>

### § 227. Liability for debts.

*Fructus naturales* are not subject to levy on execution as personal property,<sup>60</sup> but *fructus industriales* are so subject,

<sup>56</sup> *Clap v. Draper*, 4 Mass. 266, Finch's Cas. 176; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Howard v. Lincoln*, 18 Me. 122; *Alcutt v. Lakin*, 33 N. H. 507, 66 Am. Dec. 739; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306; *Wait v. Baldwin*, 60 Mich. 622.

<sup>57</sup> *Kluse v. Sparks*, 10 Ind. App. 444; *Heavilon v. Heavilon*, 29 Ind. 509; *Baker v. Jordan*, 3 Ohio St. 438, Finch's Cas. 191; *Backenstoss v. Stahler's Adm'rs*, 33 Pa. St. 251, 75 Am. Dec. 592. See *Sherman v. Willett*, 42 N. Y. 146. These decisions seem to involve a plain violation of the so-called "parol evidence" rule. See *Smith v. Price*, 39 Ill. 28, 1 Gray's Cas. 635, Finch's Cas. 163; *Cockrill v. Downey*, 4 Kan. 426, Finch's Cas. 174; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39, Finch's Cas. 31; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438, all holding that such a parol reservation is invalid.

<sup>58</sup> 1 Williams, Ex'rs (9th Ed.) 620; 1 Woerner, Administration, § 281; *Johnson v. Barber*, 10 Ill. 431; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39, Finch's Cas. 31; *Willis v. Moore*, 59 Tex. 628, Finch's Cas. 201; *Myers v. White*, 1 Rawle (Pa.) 355; *Harshey v. Metzgar*, 90 Pa. St. 218; *Wait v. Baldwin*, 60 Mich. 622.

<sup>59</sup> *Hecht v. Dettman*, 56 Iowa, 679, Finch's Cas. 199; *Powell v. Rich*, 41 Ill. 466; *First Nat. Bank of Clay Centre v. Bergle*, 52 Kan. 709, 39 Am. St. Rep. 365. See *Willis v. Moore*, 59 Tex. 628, Finch's Cas. 201. Contra, *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 382, Finch's Cas. 188.

<sup>60</sup> *Sparrow v. Pond*, 49 Minn. 412, 32 Am. St. Rep. 571, Finch's (527)

and the sheriff or purchaser may enter on the land for purposes of their cultivation, preservation, or removal, though having no interest in the land.<sup>61</sup> The crops so levied on are thereafter to be considered as in the custody of the law.<sup>62</sup>

§ 228. Severance from the land—Separate sale.

Any growth of the soil, even though not produced by annual labor, is personalty after its actual severance from the soil by the owner of the land, as in the case of timber cut by him. Furthermore, by the weight of authority, there may be constructive or legal severance of vegetable products while still growing or standing in the soil. Thus, it has been decided that, by a sale by the landowner of growing trees, they become personalty,<sup>63</sup> and the same effect has been

Cas. 171; *Adams v. Smith*, 1 Brees (Ill.) 283, Finch's Cas. 187; *Rogers v. Elliott*, 59 N. H. 201, 47 Am. Rep. 192.

<sup>61</sup> *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442, Finch's Cas. 402; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108, Finch's Cas. 407; *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159, Finch's Cas. 214; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284, Finch's Cas. 204; *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 205, Finch's Cas. 215; *Penhallow v. Dwight*, 7 Mass. 34, Finch's Cas. 216; *Pattison's Appeal*, 61 Pa. St. 294, 100 Am. Dec. 637; *Evans v. Roberts*, 5 Barn. & C. 832.

In Iowa it has been held that an execution cannot be levied on the crops as personalty until their maturity. *Ellithorpe v. Reidesil*, 71 Iowa, 315; and see *Heard v. Fairbanks*, 5 Metc. (Mass.) 111, 38 Am. Dec. 394. In some states there are statutory provisions as to the state of maturity of the crop for this purpose. See 8 Am. & Eng. Enc. Law (2d Ed.) 309.

<sup>62</sup> *Peacock v. Purvis*, 2 Brod. & B. 362, 1 Gray's Cas. 622.

<sup>63</sup> *Bacon*, Abr. Executors (H) 3; 1 Williams, Ex'rs (9th Ed.) 620; *Toller*, Law of Ex'rs, 194; *Wentworth*, Office of Ex'rs (14th Ed.) 148; *Stukeley v. Butler*, Hobart, 300; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Asher Lumber Co. v. Cornett*, 22 Ky. Law Rep. 569, 58 S. W. 438. See *Liford's Case*, 11 Co. Rep. 46b, 50a. So a chattel mortgage of the crop has been held to effect a severance of crops from the land (*First Nat. Bank of Clay Centre v. Beegle*, 52 Kan. 709, 39 Am. St. Rep. 365), especially after breach of con- (528)

given to an exception of the trees on a conveyance of the land.<sup>64</sup> By other decisions, while it is recognized that the ownership of the trees may be vested in a person other than the owner of the soil, they are regarded as still retaining the character of land, so long as they are rooted in the soil.<sup>65</sup>

By grant or exception, an estate of inheritance may be created in trees, either existing or thereafter to exist,<sup>66</sup> and trees may be leased, separately from the land, for a certain period, as is frequently done where the sap is utilized for commercial purposes.<sup>67</sup>

In the case of the sale of standing trees, or of their exception from a conveyance of the land, their owner has an interest in the soil sufficient for their support and nourishment, in the nature of an easement, and also the right to enter on the land in order to remove them.<sup>68</sup>

dition (*Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614; *Bank of Lansingburgh v. Crary*, 1 Barb. [N. Y.] 542, 547).

<sup>64</sup> *Wentworth*, Office of Ex'rs (14th Ed.) 148; 1 *Williams, Ex'rs*, 620, citing *Herlakenden's Case*, 4 Coke, 63b, which does not, however, sustain the statement. *Baker v. Jordan*, 3 Ohio St. 438; *Sterling v. Baldwin*, 42 Vt. 306. See *McClintock's Appeal*, 71 Pa. St. 365.

<sup>65</sup> *Liford's Case*, 11 Coke, 46b; *White v. Foster*, 102 Mass. 375.

In Massachusetts, a parol contract for the sale of growing trees, to be cut by the vendee, passes an interest in the trees only when they are severed from the freehold, and hence cannot of itself effect a severance. *Douglas v. Shumway*, 13 Gray (Mass.) 498; *Claffin v. Carpenter*, 4 Metc. (Mass.) 580. But if there be a conveyance of the trees by an instrument sufficient to convey real property, the ownership of the trees is separated from that of the land, though the trees still retain the character of land. *White v. Foster*, 102 Mass. 375.

<sup>66</sup> *Barrington's Case*, 8 Coke, 136b; *Liford's Case*, 11 Coke, 46b, Cro. Jac. 487; *Stanley v. White*, 14 East, 338; *Clap v. Draper*, 4 Mass. 266, *Finch's Case*, 176; *White v. Foster*, 102 Mass. 375.

<sup>67</sup> *Perkins v. Peterson*, 110 Ga. 24; *Carter v. Williamson*, 106 Ga. 280.

<sup>68</sup> *Liford's Case*, 11 Coke, 46b; *White v. Foster*, 102 Mass. 375; *Walt v. Baldwin*, 60 Mich. 622.

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If there is a limitation as to the time within which the owner of the trees may enter to remove them, his rights to the trees, according to some decisions, cease at the end of the period named, and the ownership vests in the owner of the land.<sup>69</sup>

— Formal requisites of sale.

A sale of growing trees, or of other growths of a *quasi* permanent character, such as grass, or fruit growing on trees (*fructus naturales*), is, by the weight of authority, *prima facie* a sale of an interest in land, and consequently it must be in writing under the fourth section of the Statute of Frauds.<sup>70</sup> And so it has been held that a mortgage or sale of standing timber must comply with the same requirements as if it were of the land itself.<sup>71</sup> If, however, the title is not to pass until the products have been severed from the soil, as when one contracts to sell lumber to be cut, the contract is for the sale of goods.<sup>72</sup>

In some jurisdictions the contract is regarded as a sale of chattels, and not of land, if the products are to be immediately removed,—that is, are not, before severance, to ac-

<sup>69</sup> *Saltonstall v. Little*, 90 Pa. St. 422, Finch's Cas. 177; *McRae v. Stillwell*, 111 Ga. 65. Contra, *Irons v. Webb*, 41 N. J. Law. 203; *Holt v. Stratton Mills*, 54 N. H. 109. See, also, *Davis v. Emery*, 61 Me. 140, apparently overruling *Pease v. Gibson*, 6 Me. 81.

<sup>70</sup> *Burdick, Sales*, § 43; *Mecham, Sales*, §§ 336, 341; *Slocum v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432, Finch's Cas. 151; *Hirth v. Graham*, 50 Ohio St. 57, Finch's Cas. 34; *Green v. Armstrong*, 1 Denio (N. Y.) 550, Finch's Cas. 38; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Buck v. Pickwell*, 27 Vt. 158; *Stuart v. Pennis*, 91 Va. 688; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Bowers v. Bowers*, 95 Pa. St. 477; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204.

<sup>71</sup> *White v. King*, 87 Mich. 107; *Williams v. Hyde*, 98 Mich. 153; *White v. Foster*, 102 Mass. 375.

<sup>72</sup> *Smith v. Surman*, 9 Barn. & C. 561; *Killmore v. Howlett*, 48 N. Y. 569, Finch's Cas. 179; *Dorris v. King* (Tenn.) 54 S. W. 683.

quire further benefits from the soil;<sup>73</sup> and occasionally it is held that, even though the severance is to be made by the purchaser, and, until such severance, the products will receive nourishment from the soil, the sale is to be regarded as one of chattels, if the purchaser obtains title merely to the trees or other growths specifically sold, without any rights in the soil itself.<sup>74</sup>

*Fructus industriales*, being at common law regarded as chattels, for most purposes, are so treated in connection with the Statute of Frauds, and they do not constitute an interest in land, within the fourth section.<sup>75</sup>

#### § 229. Border trees.

While a tree growing upon the division line between the lands of two persons is *prima facie* the property of both as

<sup>73</sup> *Tiffany*, Sales, 46; *Marshall v. Green*, 1 C. P. Div. 35; *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am. Dec. 481, *Finch's Cas.* 180; *Tilford v. Dotson*, 21 Ky. Law Rep. 333, 51 S. W. 583; *Upson v. Holmes*, 51 Conn. 500. See *Sterling v. Baldwin*, 42 Vt. 306; *McClinton's Appeal*, 71 Pa. St. 365.

<sup>74</sup> *Burdick*, Sales, § 44; *Purner v. Piercy*, 40 Md. 212, *Finch's Cas.* 160.

In Massachusetts and Maine, the view is taken that the contract, if not sufficient for the conveyance of an interest in land, is *prima facie* one of a merely executory nature, title not to pass until the products are actually severed, and that consequently it is not within the statute, though a different effect will be given to a contract in proper form to pass an interest in land. *White v. Foster*, 102 Mass. 375, *Finch's Cas.* 184; *Drake v. Wells*, 11 Allen (Mass.) 141, *Finch's Cas.* 182; *Clafin v. Carpenter*, 4 Metc. (Ky.) 583; *Banton v. Shorey*, 77 Me. 48. Consequently, until the timber is actually cut, the purchaser has merely a license to enter in order to cut and remove them, and, if the license is wrongly revoked, he has merely a right of action for breach of contract. *Fletcher v. Livingston*, 153 Mass. 388.

<sup>75</sup> *Benjamin*, Sales, § 126; *Mechem*, Sales, § 342; *Evans v. Roberts*, 5 Barn. & C. 829; *Graff v. Fitch*, 58 Ill. 373; *Backenstoss v. Stahler's Adm'rs*, 33 Pa. St. 251; *Marshall v. Ferguson*, 23 Cal. 66. Whether *fructus industriales* are "goods, wares, and merchandises," within

tenants in common,<sup>76</sup> this presumption is rebutted by proof that it was planted upon the land of one of such owners,<sup>77</sup> and it belongs to him on whose land it was planted, even though the roots extend into the other's land.<sup>78</sup>

Since branches of a tree planted on the ground of one proprietor constitute a nuisance if they extend over the land of another proprietor, they may be removed by the latter;<sup>79</sup> but he is not entitled to appropriate such overhanging branches, or the fruit thereon, since these belong to the owner of the land on which the tree is planted.<sup>80</sup>

If the tree is on the boundary line between two proprietors, neither can remove or destroy the tree as a whole.<sup>81</sup>

the seventeenth section of the Statute of Frauds, is a doubtful question. See citations in *Tiffany, Sales*, 48.

<sup>76</sup> 2 Leake, 29; *Griffin v. Bixby*, 12 N. H. 454, 1 Gray's Cas. 551; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, Finch's Cas. 154; *Dubois v. Beaver*, 25 N. Y. 123, Finch's Cas. 168; *Musch v. Burkhart*, 83 Iowa, 301; *Relyea v. Beaver*, 34 Barb. (N. Y.) 547. But see *Robinson v. Clapp*, 65 Conn. 365.

<sup>77</sup> *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537, 1 Gray's Cas. 553, Finch's Cas. 97; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, Finch's Cas. 154; *Holder v. Coates*, 1 Moody & M. 112, 1 Gray's Cas. 544.

<sup>78</sup> *Masters v. Pollie*, 2 Rolle, 141, 1 Gray's Cas. 543; *Lyman v. Hale*, 11 Conn. 177, 1 Gray's Cas. 546; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, Finch's Cas. 154; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, Finch's Cas. 168. And see *Holder v. Coates*, 1 Moody & M. 112, 1 Gray's Cas. 544. Contra, *Anon.*, 2 Rolle, 255; *Waterman v. Soper*, 1 Ld. Raym. 737, 1 Gray's Cas. 544.

<sup>79</sup> *Hoffman v. Armstrong*, 48 N. Y. 201, Finch's Cas. 97; *Grandona v. Lovdal*, 70 Cal. 161, 78 Cal. 611, Finch's Cas. 99; *Lyman v. Hale*, 11 Conn. 177, 1 Gray's Cas. 546; *Lemmon v. Webb* [1894] 3 Ch. Div. 1.

<sup>80</sup> *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728, 1 Gray's Cas. 546; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, Finch's Cas. 154; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537, 1 Gray's Cas. 553, Finch's Cas. 97.

<sup>81</sup> *Griffin v. Bixby*, 12 N. H. 454, 1 Gray's Cas. 551; *Dubois v. Beaver*, 25 N. Y. 123, Finch's Cas. 168; *Musch v. Burkhart*, 83 Iowa, 301; *Relyea v. Beaver*, 34 Barb. (N. Y.) 547; *Comfort v. Everhardt*, 26 Wkly. Notes Cas. (Pa.) 364. In *Robinson v. Clapp*, 65 Conn. 365, (532)

**§ 230. Agreements for the division of crops.**

It is quite usual, in this country, for the owner of land to make a contract with another person whereby the latter is to plant and cultivate the land, the crops so raised to be divided between the two persons in a fixed proportion. The effect of such a contract is primarily a question of construction in each case, and consequently it is impossible to lay down any general rule in that regard, and the subject is further complicated by the divergent views of the courts upon the principles to be applied.

The contract between the parties, if it is intended to take effect as a present demise, or to give the cultivator exclusive possession of the land, or if the portion of the crops to be received by the tenant is evidently regarded as rent, creates the relationship of landlord and tenant between them. Frequently, in such a case, the landlord's right to a share in the crops being regarded as rent, the crops belong, until such division is actually made, entirely to the cultivator, and the landlord has no rights therein.<sup>82</sup> Other decisions, while regarding the parties as landlord and tenant, consider the landlord's right to a share of the crops as existing by way of an exception or reservation from the grant of his proportion of the crops, thus making him and his lessee tenants in common of the crops as they come into existence.<sup>83</sup> Likewise, it may

it was decided that one proprietor could cut off the overhanging branches of a tree located on the division line, but could not cut any portion of the trunk.

<sup>82</sup> *Fry v. Jones*, 2 Rawle (Pa.) 11; *Mondschein v. State*, 55 Ark. 389; *Alwood v. Ruckman*, 21 Ill. 200; *Symonds v. Hall*, 37 Me. 354; *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278; *Warner v. Abbey*, 112 Mass. 355; *Sargent v. Courrier*, 66 Ill. 245; *Front v. Hardin*, 56 Ind. 165, 26 Am. Rep. 18; *Almand v. Scott*, 80 Ga. 95, 12 Am. St. Rep. 241; *Watson v. Bryan*, 64 N. C. 764; *Burns v. Cooper*, 31 Pa. St. 426; *Townsend v. Isenberger*, 45 Iowa, 670.

<sup>83</sup> *Jones v. Durrer*, 96 Cal. 95; *Moulton v. Robinson*, 27 N. H. 553; *Wentworth v. Portsmouth & D. R. Co.*, 55 N. H. 540; *Lewis*

be expressly agreed, or necessarily implied from the agreement, that the tenant shall not acquire any right, or shall acquire a merely qualified right, to a portion of the crops, as when, though he is to share in the crops, the ownership thereof is to remain in the landlord until the division is actually made.<sup>84</sup>

The agreement for cultivation on shares may, it seems, make the owner of the land and the cultivator tenants in common of the land and also of the crops, neither being entitled to exclusive possession.<sup>85</sup> In this case, the original owner of the land is, it would appear, landlord of the cultivator to the extent of an undivided portion of the land.

The agreement is sometimes construed as making the parties tenants in common of the crops to be grown, without giving the cultivator any interest in the land, either as tenant or otherwise.<sup>86</sup>

The agreement may have the effect of giving the cultivator an interest neither in the land nor in the crops, and in such case the cultivator receives his share of the crops as compensation for his labor, the relation of master and servant being created.<sup>87</sup>

v. Lyman, 22 Pick. (Mass.) 437; Johnson v. Hoffman, 53 Mo. 504; Heald v. Builders' Mut. Fire Ins. Co., 111 Mass. 38; Esdon v. Colburn, 28 Vt. 631; Sims v. Jones, 54 Neb. 769, 69 Am. St. Rep. 749.

<sup>84</sup> Moulton v. Robinson, 27 N. H. 550; Ponder v. Rhea, 32 Ark. 435; Esdon v. Colburn, 28 Vt. 631; Kelley v. Weston, 20 Me. 232; Wentworth v. Miller, 53 Cal. 9; Lewis v. Lyman, 22 Pick. (Mass.) 437. But see Almand v. Scott, 80 Ga. 95, 12 Am. St. Rep. 241.

<sup>85</sup> Warner v. Abbey, 112 Mass. 355.

<sup>86</sup> Hare v. Celey, Cro. Eliz. 143; Bradish v. Schenck, 8 Johns. (N. Y.) 117; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309, and note; Aiken v. Smith, 21 Vt. 172; Brown v. Coats, 56 Ala. 439; Caswell v. District, 15 Wend. (N. Y.) 379; Creel v. Kirkham, 47 Ill. 344; Guest v. Opdyke, 31 N. J. Law, 552; Ponder v. Rhea, 32 Ark. 435; Herskell v. Bushnell, 37 Conn. 36, 9 Am. Rep. 299; Loomis v. O'Neal, 73 Mich. 582; Rawley v. Brown, 71 N. Y. 85; Delaney v. Root, 99 Mass. 546.

<sup>87</sup> Jeter v. Penn, 28 La. Ann. 230, 26 Am. Rep. 98; Hammock v. (584)



The fact that the crop is to be divided in kind between the owner of the land and another does not make them partners, though this relation is created if the agreement be for the sale of the crop on joint account, and division of the profits.<sup>88</sup>

#### IV. FIXTURES AND IMPROVEMENTS.

A fixture is a thing which, though originally a chattel, is, by reason of its annexation to land, regarded as a part of the land, partaking of its character, and belonging to its owner. Whether a chattel annexed to land is, in a particular case, to be so regarded as a part thereof, is determined usually by the mode of its attachment to the land, and the character of the chattel, as indicating the presumed intention of the annexor.

An article which, by reason of its annexation to land, would otherwise be a fixture, may retain its chattel character by agreement.

A fixture may resume its chattel character by a severance, either actual or constructive, from the land.

A fixture passes as part of the land to a vendee or grantee of the land, and becomes subject to a mortgage on the land.

A tenant for life, for years, or at will, may usually remove things annexed by him to the land for trade, domestic or ornamental purposes, and, by some decisions, things annexed for agricultural purposes.

#### § 231. General considerations as to fixtures.

The underlying principle of the law of fixtures is repre-

Creekmore, 48 Ark. 264; Chase v. McDonnell, 24 Ill. 236; Adams v. McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Appling v. Odom, 46 Ga. 583; Hudgins v. Wood, 72 N. C. 256; Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 293; Almand v. Scott, 80 Ga. 195, 12 Am. St. Rep. 241; McCutcheon v. Crenshaw, 40 S. C. 511.

<sup>88</sup> Parsons, Partnership (4th Ed.) § 61, note; Gardenhire v. Smith, 39 Ark. 280; Donnell v. Harshe, 67 Mo. 170; Day v. Stevens, 88 N. C. 83; Brown v. Jaquette, 94 Pa. St. 113; Jeter v. Penn, 28 La. Ann. 230, 26 Am. Rep. 98.

sented by the maxim, *Quidquid plantatur solo, solo cedit*,—that is, that whatever is annexed to the soil becomes part thereof,—this being but one application of the theory of accession, as it existed in the civil law.<sup>89</sup> In order that the principle apply, however, it is not necessary that the thing in question be in actual contact with the soil, and it is sufficient if it be attached to some other article or structure which is itself, by reason of the same principle, a part of the land. So, if a house is a fixture, as being erected on the land in a certain manner, and for certain purposes, articles within the house may be regarded as part of the land, as being annexed to what is itself a part thereof.

In the case of an article annexed by the tenant in fee simple of land, the question whether it is a part of the land may arise as between such tenant and a grantee or mortgagee of the land, or, after his death, between his personal representative and his heir or devisee. In case the annexation is by a life tenant or the tenant of an estate less than freehold, the question arises usually between such tenant of a limited interest and the reversioner or remainderman. The annexation may also be by one who has no interest or estate in the land, and the question of the right of removal then arises between him or his representative and the owner of the land. Questions also frequently arise between persons claiming under a sale or chattel mortgage of the article annexed and grantees or mortgagees of the land.

In order that a chattel become part of the land, the annexation must usually be made by the owner of the chattel, or with his consent, since persons other than the owner have

<sup>89</sup> The subject of fixtures is treated by the present writer at length in an article in 18 Am. & Eng. Enc. Law (2d Ed.) 593, which is frequently cited in the following pages. Here merely leading principles of the subject are stated, and for the decisions as to the effect of annexation to land of specific classes of chattels, he refers to the article named.

usually no right to change the character of property.<sup>90</sup> In some cases, however, it has been decided that the original owner of the chattel cannot, after its wrongful annexation by another, recover the chattel as such, on the ground that it has become part of the land,<sup>91</sup> and the annexation is regarded as thus changing the character of the article annexed, if it thereby entirely loses its identity.<sup>92</sup>

§ 232. The intention of the annexor.

In deciding whether an article or structure annexed to land, or annexed to another article or structure which is itself legally a part of the land,—that is, a fixture,—the courts usually name one or more of the following considerations as determinative of the question: (1) The mode of attachment or annexation; (2) the character of the article; (3) the intention of the person making the annexation. The later cases usually regard the consideration of intention as, in theory, the controlling one, and the others as important merely in order to determine the intention.<sup>93</sup> "Intention," how-

<sup>90</sup> *Gill v. De Armant*, 90 Mich. 425; *Cochran v. Flint*, 57 N. H. 514; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460.

<sup>91</sup> *Reese v. Jared*, 15 Ind. 142, *Finch's Cas.* 239; *Dorr v. Dudderar*, 88 Ill. 107; *Jackson v. Walton*, 28 Vt. 43. *Contra*, *Shoemaker v. Simpson*, 16 Kan. 43; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, *Finch's Cas.* 309; *Huebschmann v. McHenry*, 29 Wis. 655; 13 *Am. & Eng. Enc. Law*, 681.

<sup>92</sup> *Peirce v. Goddard*, 22 Pick. (Mass.) 559, *Finch's Cas.* 307; *Woodruff v. Adams*, 37 Conn. 233; *Cross v. Marston*, 17 Vt. 533, *Finch's Cas.* 239. See *Jackson v. Walton*, 28 Vt. 43; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, *Finch's Cas.* 290; 2 *Kent, Comm.* 362.

<sup>93</sup> *Holland v. Hodgson*, L. R. 7 C. P. 328, 1 *Gray's Cas.* 709; *State Sav. Bank v. Kercheval*, 65 Mo. 683, *Finch's Cas.* 280; *Snedeker v. Warring*, 12 N. Y. 170, *Finch's Cas.* 231; *McRea v. Central Nat. Bank*, 66 N. Y. 489, *Finch's Cas.* 271; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 *Am. Dec.* 634; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 *Am. St. Rep.* 235; *Fisfield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 *Am. St. Rep.* 166; *Potter v. Cromwell*, 40 N. Y. 293, 100 *Am. Dec.* 485; *Manwaring v. Jenison*, 61 Mich. 117; *Ottumwa Woolen Mill Co.*

ever, in this connection, refers to a legal intention merely, as indicated by the mode of attachment, the character of the thing attached, and perhaps other external *indicia*, and the actual intention or state of mind of the person annexing is usually regarded as absolutely immaterial.<sup>94</sup> The intention, therefore, being merely a deduction from other facts, calls for no further consideration, and we will direct our attention to the states of fact from which this theoretical intention to make an article a fixture to the land is to be deduced,—that is, the mode of attachment, and the character of the article.

### § 233. Attachment to the land.

As a general rule, the courts have refused to regard as a fixture a thing which, while placed upon the land, is not physically attached or fastened in some way to the land or to a structure constituting, in a legal sense, a part of the land;<sup>95</sup> but this requirement is sometimes relaxed, and things of a heavy and permanent character have occasionally been

v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Hayes v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286.

<sup>94</sup> Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 15 Am. St. Rep. 235; Catasaqua Nat. Bank v. North, 160 Pa. St. 303; Huebschmann v. McHenry, 29 Wis. 655; State Sav. Bank v. Kercheval, 65 Mo. 682, Finch's Cas. 280; Snedeker v. Warring, 12 N. Y. 174, Finch's Cas. 231; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, Finch's Cas. 245; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

<sup>95</sup> Walker v. Sherman, 20 Wend. (N. Y.) 636, Finch's Cas. 218; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595, Finch's Cas. 248; Brown v. Lillie, 6 Nev. 244; Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 311, 1 Gray's Cas. 768; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Hill v. Wentworth, 23 Vt. 429. In Pennsylvania, such a requirement has not been recognized. Voorhis v. Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490, Finch's Cas. 224.

decided to be part of the land, even though not annexed, but held in place merely by the force of gravity.<sup>96</sup>

On the other hand, while in some cases the courts have considered the mode of physical attachment as decisive that the article attached is a part of the land,<sup>97</sup> the tendency is to consider this as in itself but a slight indication that the article is a fixture, provided it is susceptible of removal without injury to the land, or to the structure constituting a part of the land to which it is attached.<sup>98</sup> But the fact that a chattel is so attached to a structure that its removal would leave an unfinished gap in the structure has been regarded as strong evidence that the chattel is a part of the land.<sup>99</sup>

Things which are essential parts of a thing attached to the land are quite frequently regarded as partaking of the nature of such principal thing to which they belong, even

<sup>96</sup> *Snedeker v. Warring*, 12 N. Y. 170, *Finch's Cas.* 231; *Holland v. Hodgson*, L. R. 7 C. P. 334, 1 *Gray's Cas.* 709; *Monti v. Barnes* [1901] 1 K. B. 205; *Stockwell v. Campbell*, 39 Conn. 364, 12 Am. Rep. 393; *Doscher v. Blackiston*, 7 Or. 143. So, buildings and fences, merely placed upon the surface of the ground, have quite frequently been held in this country to be fixtures. *Landon v. Platt*, 34 Conn. 517; *Glidden v. Bennett*, 43 N. H. 306. See authorities cited in 12 Am. & Eng. Enc. Law, 603.

<sup>97</sup> *Wiltshier v. Cottrell*, 1 El. & Bl. 674; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 35 Am. Dec. 745; *Degraffenreid v. Scruggs*, 4 Humph. (Tenn.) 451, 40 Am. Dec. 658; *Clark v. Hill*, 117 N. C. 11. See *Amos & F. Fixt.* (3d Ed.) § et seq.

<sup>98</sup> *State Sav. Bank v. Kercheval*, 65 Mo. 687, *Finch's Cas.* 280; *McRea v. Central Nat. Bank*, 66 N. Y. 495, *Finch's Cas.* 271; *Farrar v. Stackpole*, 6 Me. 154, *Finch's Cas.* 227; *Voorhis v. Freeman*, 1 Watts & S. (Pa.) 116, *Finch's Cas.* 224; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Manwaring v. Jenison*, 61 Mich. 117; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756. See 12 Am. & Eng. Enc. Law (2d Ed.) 607.

<sup>99</sup> *Ward v. Kilpatrick*, 85 N. Y. 413, *Finch's Cas.* 234; *Teaff v. Hewitt*, 1 Ohio St. 534, 59 Am. Dec. 634; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Horne v. Smith*, 105 N. C. 323, 18 Am. St. Rep. 903.

though, at the time, they are not in use, and consequently are not physically connected with such things.<sup>100</sup> On perhaps an analogous principle, railroad engines and cars have occasionally been held to be fixtures,<sup>101</sup> but the best-considered cases regard them as personal property, they being without the fixity of location which, with few exceptions, is an essential characteristic of a fixture.<sup>102</sup>

§ 234. The character of the thing annexed.

The consideration on which the more modern cases lay the greatest stress, as indicating the intention of the annexor, and as so determining the character of the article as a fixture *vel non*, is its character, as related to the uses to which the land has been appropriated, it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted. This idea of correspondence between the use of the article and that of the land, as showing the annexor's intention, is presented in the cases under vari-

<sup>100</sup> *Fisher v. Dixon*, 12 Clark & F. 312, 1 Gray's Cas. 686; *Dudley v. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310. So it has been held that duplicate rolls belonging to an iron rolling machine were part of the land, because the machine itself was a fixture (*Ex parte Astbury*, 4 Ch. App. 630, 1 Gray's Cas. 701); and beams laid upon looms only when actually in use were held to partake of the character of the looms as fixtures (*Howell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235).

<sup>101</sup> *Palmer v. Forbes*, 23 Ill. 301; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484. See *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, and note.

<sup>102</sup> *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, *Finch's Cas.* 248; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 1 Gray's Cas. 768; *Chicago & N. W. Ry. Co. v. Borough of Ft. Howard*, 21 Wis. 44; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 373. The nature of rolling stock is fixed by statute in a number of states (Stimson's Am. St. Law, § 468.

ous names, as when it is stated that the article annexed must be "adapted" or "appropriate" to the use to which the land is appropriated. The same idea is apparently involved in the frequent statement that the object and purpose of the annexation, as being for the "improvement" or "better enjoyment" of the land, is the important consideration, this referring to the purpose as indicated by the character of the article and the use made of the land.<sup>103</sup>

Buildings, unless of a very light construction, and fences, are usually regarded as placed on the land for its permanent improvement, and so to be considered as a part thereof.<sup>104</sup>

§ 235. Agreement as to the character of thing annexed.

By agreement, articles annexed which would otherwise be regarded as a part of the land may preserve their personal

<sup>103</sup> *Lawton v. Salmon*, 1 H. Bl. 260, note b, 1 Gray's Cas. 664; *Holland v. Hodgson*, L. R. 7 C. P. 328, 1 Gray's Cas. 709; *State Sav. Bank v. Kercheval*, 65 Mo. 686, Finch's Cas. 280; *Green v. Phillips*, 26 Grat. (Va.) 752, 21 Am. Rep. 323; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166; *Atchison, T. & S. F. R. Co. v. Morgan*, 43 Kan. 23, 16 Am. St. Rep. 471; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Rogers v. Prattville Mfg. Co. No. 1*, 81 Ala. 483, 60 Am. Rep. 171; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Stillman v. Flenniken*, 53 Iowa, 450, 43 Am. Rep. 120, 1 Gray's Cas. 785; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489, Finch's Cas. 271; 13 Am. & Eng. Enc. Law, 609.

This idea is well stated in the following quotation from an able series of articles upon the subject of "Fixtures" in 15 Sol. J. 810, 836, copied in 4 Alb. Law J. 255, 273: "It is obvious that, the general

use of a building being ascertained, those things which conduce or are subservient to that use will be more readily assumed to have been affixed with an intention of permanence than those which do not subserve that common end. Thus, if a building be used as a dwelling house, things suitable to a dwelling house will more readily become fixtures; if it be used as a mill or manufactory, the same inference will be drawn with respect to those things which form part of the machinery, or assist in its operations."

<sup>104</sup> See 13 Am. & Eng. Enc. Law, 614.

giving a person the right of removal is valid, by the weight of authority, as against a mortgage made before the annexation of the chattel, so far as the security of the previous mortgage is not thereby rendered less than when it was given, the theory being that the mortgagee of the land is entitled to a lien on the interest of the mortgagee only in the article.<sup>113</sup>

§ 236. Severance—Actual and constructive.

A chattel which has become part of the land by annexation thereto may be caused to resume its chattel character by its "severance" from the land by the owner thereof. The severance may be actual, by detachment or removal of the article affixed,<sup>114</sup> but even an actual severance will not have the effect of giving a chattel character to the article, if the severance is not made with the intention that it shall be permanent.<sup>115</sup> An accidental severance, as when a thing attached to the land is blown away from its proper place, will

<sup>113</sup> *Binkley v. Forkner*, 117 Ind. 176, *Finch's Cas.* 297; *Davenport v. Shants*, 43 Vt. 546, 1 *Gray's Cas.* 762, *Kirchwey's Cas.* 399; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 *Am. St. Rep.* 839; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 43 *Am. St. Rep.* 491; *Hill v. Sewald*, 53 Pa. St. 271, 91 *Am. Dec.* 209; *Fosdick v. Schall*, 99 U. S. 235; *Clary v. Owen*, 15 *Gray (Mass.)* 522, 1 *Gray's Cas.* 746; *Kirchwey's Cas.* 381; *Meagher v. Hayes*, 152 *Mass.* 223, 23 *Am. St. Rep.* 819; *McFadden v. Allen*, 134 N. Y. 489, distinguishing *Tift v. Horton*, 53 N. Y. 377, *Finch's Cas.* 293; *Frankland v. Moulton*, 5 *Wis.* 1. See *Cochran v. Flint*, 57 N. H. 514.

<sup>114</sup> *Harris v. Scovel*, 85 *Mich.* 32, *Finch's Cas.* 254; *Hensley v. Brodie*, 16 *Ark.* 511; *Sampson v. Graham*, 96 *Pa. St.* 405; *Franks v. Craven*, 6 *W. Va.* 185; *Clark v. Burnside*, 15 *Ill.* 62. See *Fulton v. Norton*, 64 *Me.* 410; 13 *Am. & Eng. Enc. Law*, 615.

<sup>115</sup> *Goodrich v. Jones*, 2 *Hill (N. Y.)* 142, *Finch's Cas.* 255; *Bishop v. Bishop*, 11 *N. Y.* 123, 62 *Am. Dec.* 68, *Finch's Cas.* 305; *Voornis v. Freeman*, 2 *Watts & S. (Pa.)* 116, *Finch's Cas.* 224; *Lewis v. Rosier*, 16 *W. Va.* 323; *Wadleigh v. Janvrin*, 41 *N. H.* 503, 77 *Am. Dec.* 780.



not, by the best-considered decisions, make it personalty,<sup>116</sup> nor will a severance by one who has no right to make it be effective as against the owner of the inheritance, unless the latter elects to consider the article as personalty.<sup>117</sup>

Though an article annexed is not actually detached or removed, it may, according to a number of decisions, resume its chattel character by reason of an express or implied agreement on the part of the landowner,—that is, by “constructive” severance,<sup>118</sup> as when it is sold or agreed to be sold by him as a chattel apart from the land,<sup>119</sup> or is mortgaged by him as such,<sup>120</sup> or he conveys the land with a reservation of the article annexed.<sup>121</sup> Such a constructive severance, however, to be valid, must be by a writing which complies with the Statute of Frauds, since it involves a transfer of an interest in land.<sup>122</sup> A constructive severance is not

<sup>116</sup> *Rogers v. Gilling*, 30 Pa. St. 185, *Finch's Cas.* 267, 1 *Gray's Cas.* 733; *Goodrich v. Jones*, 2 Hill (N. Y.) 142, *Finch's Cas.* 255; *Patton v. Moore*, 16 W. Va. 428, 37 *Am. Rep.* 789. *Contra*, *State v. Goodnow*, 80 Mo. 271; *Buckout v. Swift*, 27 Cal. 433, 37 *Am. Dec.* 90; *Meyers v. Schemp*, 67 Ill. 469.

<sup>117</sup> *Herlakenden's Case*, 4 Coke, 62a; *Lewis v. Rosler*, 16 W. Va. 333. Compare *Ogden v. Stock*, 43 Ill. 523, 35 *Am. Dec.* 332; *Westgate v. Wixon*, 128 Mass. 304.

<sup>118</sup> 13 *Am. & Eng. Enc. Law*, 616.

In Massachusetts, the doctrine of constructive severance is not recognized, at least as against persons not parties to the agreement of severance. *Gibbs v. Estey*, 15 Gray (Mass.) 587, 1 *Gray's Cas.* 146; *Madigan v. McCarthy*, 108 Mass. 376. See *Aldrich v. Husband*, 131 Mass. 480.

<sup>119</sup> *Davis v. Emery*, 61 Me. 140, 14 *Am. Rep.* 553; *Myrick v. Bill*, 3 Dak. 284; *Manwaring v. Jenison*, 61 Mich. 117; *Dudley v. Foote*, 63 N. H. 57, 56 *Am. Rep.* 489.

<sup>120</sup> *Tyson v. Post*, 108 N. Y. 217, 2 *Am. St. Rep.* 409, *Finch's Cas.* 260; *Gooding v. Riley*, 50 N. H. 400.

<sup>121</sup> *Leonard v. Clough*, 133 N. Y. 292, *Finch's Cas.* 257; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *Frederick v. Devol*, 15 Ind. 357. But see *Davis' Adm'r v. Eastham*, 81 Ky. 116.

<sup>122</sup> *Leonard v. Clough*, 133 N. Y. 292, *Finch's Cas.* 257; *Meyers v.*

valid as against a *bona fide* purchaser of the land,<sup>122</sup> nor, according to some decisions, against a purchaser with notice.<sup>124</sup>

### § 237. Conveyance or sale of land.

Upon the sale or conveyance of land, fixtures thereon pass to the vendee or grantee, in the absence of an agreement to the contrary.<sup>125</sup>

A vendee in possession under a contract of sale, who annexes articles to the land, cannot remove them, as against the vendor, unless the latter is in default in carrying out the contract.<sup>126</sup>

Schemp, 67 Ill. 469; Rice v. Adams, 4 Har. (Del.) 332, Finch's Cas. 270. Contra, Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749. That the instrument must be under seal, as being a conveyance of an interest in land, see Dudley v. Foote, 68 N. H. 57, 56 Am. Rep. 489.

<sup>122</sup> Brennan v. Whitaker, 15 Ohio St. 446, 1 Gray's Cas. 751; Fenikson v. Rackliff, 50 Me. 362. Accordingly, to be valid as against such purchaser, a mortgage of the article annexed must be recorded among the conveyances of land. Trull v. Fuller, 28 Me. 545, Finch's Cas. 261.

<sup>124</sup> Richardson v. Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424, 1 Gray's Cas. 731, Finch's Cas. 303; Keeler v. Keeler, 31 N. J. Eq. 131.

<sup>125</sup> Gibbs v. Estey, 15 Gray (Mass.) 587, 1 Gray's Cas. 749; Ford v. Cobb, 20 N. Y. 344, 1 Gray's Cas. 740; Rogers v. Gillingier, 30 Pa. St. 185, 1 Gray's Cas. 733; Walker v. Sherman, 20 Wend. (N. Y.) 636, Finch's Cas. 218; Stillman v. Flenniken, 58 Iowa, 450, 1 Gray's Cas. 785; Ritchmyer v. Moras, 3 Keyes (N. Y.) 349, Finch's Cas. 283; Mott v. Palmer, 1 N. Y. 564, Finch's Cas. 286; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 310, 38 Am. Dec. 368; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

<sup>126</sup> Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49, Finch's Cas. 809; McLaughlin v. Nash, 14 Allen (Mass.) 136, 92 Am. Dec. 741, 1 Gray's Cas. 756; Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Hinkley & Egery Iron Co. v. Black, 70 Me. 483, 35 Am. Rep. 246. Compare Waters v. Reuber, 16 Neb. 106.

**§ 238. Mortgage on land.**

Articles annexed to land so as to become part thereof are subject to a mortgage lien on the land subsequently created, the rule being the same in such case as in that of an absolute conveyance.<sup>127</sup>

Articles annexed to land which is already subject to a mortgage become subject thereto as a part of the land, and pass with the land to a purchaser at a foreclosure sale under the mortgage.<sup>128</sup>

**§ 239. Succession on death of landowner.**

Upon the death of the tenant in fee simple of land, fixtures thereon pass with the land to the heir, and not to the personal representative,<sup>129</sup> and they pass by a devise of the land.<sup>130</sup>

**§ 240. Removable fixtures.**

The ancient rule that whatever was attached to land

<sup>127</sup> *Murdock v. Gifford*, 18 N. Y. 28, Finch's Cas. 242; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489, Finch's Cas. 271; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 1 Gray's Cas. 768; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Climie v. Wood*, L. R. 4 Exch. 328, 1 Gray's Cas. 706; 13 Am. & Eng. Enc. Law, 662.

<sup>128</sup> *Climie v. Wood*, L. R. 4 Exch. 328, 1 Gray's Cas. 706; *Walmsley v. Milne*, 7 C. B. (N. S.) 115, 1 Gray's Cas. 695, *Kirchwey's Cas.* 377; *State Sav. Bank v. Karcheval*, 65 Mo. 682, Finch's Cas. 281; *Quinby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. 260; *Wood v. Whelen*, 93 Ill. 153; *Witmer's Appeal*, 45 Pa. St. 455, Finch's Cas. 263; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 522, 15 Am. St. Rep. 235.

<sup>129</sup> *Henry's Case*, Y. B. 20 Hen. VII., 13 pl. 24; 1 Gray's Cas. 657; *Anonymous*, Y. B. 21 Hen. VII., 26 pl. 4, 1 Gray's Cas. 658; *Lawton v. Salmon*, 1 H. Bl. 260, note b, 1 Gray's Cas. 664; *Fisher v. Dixon*, 12 Clark & F. 312, 1 Gray's Cas. 686; *Kinsell v. Billings*, 35 Iowa, 154; *Tuttle v. Robinson*, 33 N. H. 104; *Hays v. Doane*, 11 N. J. Eq. 84.

<sup>130</sup> *Norton v. Dashwood* [1896] 2 Ch. 497.

by the tenant or occupier of land for a limited period, as for life or years, is not removable by him, because a part of the land, has been subjected to a relaxation in favor of the tenant as against the landlord or remainderman, by which the former, or his representative, is allowed to remove certain classes of articles annexed.

That articles which are annexed by the tenant for purposes of trade, known as "trade fixtures," are removable by him as against the landlord, has been recognized from an early period in the development of the law of fixtures, the theory being that it is of public utility that the tenant should be enabled to improve the property for the purpose of carrying on trade, without thereby forfeiting his improvements.<sup>181</sup> The same exception exists in favor of a tenant for life as

<sup>181</sup> Poole's Case, 1 Salk. 368, 1 Gray's Cas. 661; Elwes v. Maw, 3 East, 38, 2 Smith, Lead. Cas. (8th Ed.) 169, 1 Gray's Cas. 666; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 1 Gray's Cas. 717, Finch's Cas. 312; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Moore v. Smith, 24 Ill. 512; Andrews v. Day Button Co., 132 N. Y. 348; Kile v. Glebner, 114 Pa. St. 381; Macdonough v. Starbird, 106 Cal. 15; Smith v. Whitney, 147 Mass. 479; Conrad v. Saginaw Min. Co., 54 Mich. 249, 52 Am. Rep. 317; 13 Am. & Eng. Enc. Law, 642.

\* Thus, attachments for the purpose of conducting a boarding house or hotel, such as additional buildings, shelves, counters, furnaces, and water pipes, have been held to be removable as trade fixtures (Wall v. Hinds, 4 Gray [Mass.] 256, 64 Am. Dec. 64; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467; Ombony v. Jones, 19 N. Y. 234) as has a building erected by a dairyman for the purpose of his trade, though also occupied by his family for residence purposes (Van Ness v. Pacard, 2 Pet. [U. S.] 137, 1 Gray's Cas. 717, Finch's Cas. 312). Engines and machinery are evidently within the rule allowing removal. See cases cited 13 Am. & Eng. Enc. Law, 644.

The tenant, if a gardener or nurseryman, may remove even trees and shrubs if he has planted them with a view to sale. 2 Taylor, Landl. & Ten. § 536; Penton v. Robart, 2 East, 90; Lee v. Risdon, 7 Taunt. 191; Brooks v. Galster, 51 Barb. (N. Y.) 196. And see Miller v. Baker, 1 Metc. (Mass.) 27; Whitmarsh v. Walker, 1 Metc. (Mass.) 315.

against the landlord or remainderman.<sup>132</sup> In this connection, the term "trade" has, by the courts, been given a broad significance, and apparently all annexations for the purpose of pecuniary profit, provided they are not of an exclusively agricultural character, are removable as trade fixtures.

Articles annexed for purely agricultural purposes were decided in England not to be removable by the tenant who erected them.<sup>133</sup> This decision has been criticised in this country, and in some states the same right of removal doubtless exists in the case of agricultural as of trade fixtures.<sup>134</sup>

Articles annexed by a tenant for years or at will for the ornamentation or more convenient use of a dwelling, known as "ornamental" or "domestic" fixtures, are also subject to removal by him,<sup>135</sup> and the executor of a tenant for life has been decided to have the same right of removal.<sup>136</sup>

By some decisions, the right of the tenant of a limited estate to remove fixtures extends to all fixtures which may be regarded as having been annexed by him for purposes of

<sup>132</sup> *Dudley v. Warde*, Ambler, 113; *Estate of Hinds*, 5 Whart. (Pa.) 133, 34 Am. Dec. 542; *Overman v. Sasser*, 107 N. C. 432, Finch's Cas. 310; *Lawton v. Lawton*, 3 Atk. 13, 1 Gray's Cas. 661; *Elwes v. Maw*, 3 East, 38, 1 Gray's Cas. 666; *In re De Falbe* [1901] 1 Ch. 523.

<sup>133</sup> *Elwes v. Maw*, 3 East, 38, 1 Gray's Cas. 666, 2 Smith, Lead. Cas. 191.

<sup>134</sup> *McMath v. Levy*, 74 Miss. 450; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742. See *Van Ness v. Packard*, 2 Pet. (U. S.) 137, Finch's Cas. 312, 1 Gray's Cas. 717; *Wing v. Gray*, 36 Vt. 261.

<sup>135</sup> *Bishop v. Elliott*, 11 Exch. 113; *Gibson v. Hammersmith & City Ry. Co.*, 2 Drew. & S. 603 (ornamental chimney pieces); *Grymes v. Boweren*, 6 Bing. 437, 1 Gray's Cas. 676 (a pump); *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, Finch's Cas. 323 (a fire frame); *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64 (cistern and sink); *Rofey v. Henderson*, 17 Q. B. 575 (stoves, ranges, etc.). See *Elwes v. Maw*, 3 East, 38, 1 Gray's Cas. 666.

<sup>136</sup> *Leigh v. Taylor* [1902] App. Cas. 157, affirming *In re De Falbe* [1901] 1 Ch. 523.

his occupancy only, and not to particular classes of fixtures merely.<sup>137</sup>

— Restrictions on right of removal.

The right of the tenant of a limited interest to remove fixtures cannot be exercised if the premises will be thereby substantially injured, to the disadvantage of the reversioner;<sup>138</sup> nor, according to some authorities, if the article annexed cannot be removed without losing its identity, or being reduced to merely a collection of crude materials.<sup>139</sup>

The rights of a tenant to remove fixtures may be extended or restricted by agreement between him and the landlord, and they may likewise be affected by a local custom.<sup>140</sup>

The exceptional rule in regard to trade fixtures has no application in the case of annexations by the owner of a fee-simple estate in the land, and fixtures of this character pass, as do other fixtures, to the heir, grantee, or mortgagee of the land;<sup>141</sup> nor is there, it seems, any right of removal of ornamental fixtures annexed by the owner of the fee.<sup>142</sup>

<sup>137</sup> *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Bircher v. Parker*, 40 Mo. 118. See 13 Am. & Eng. Enc. Law, 647.

<sup>138</sup> *Gibson v. Hammersmith & City Ry. Co.*, 2 Drew. & S. 603; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Powell v. McAshan*, 28 Mo. 70; *Cubbins v. Ayres*, 4 Lea (Tenn.) 329. See *Wall v. Hinds*, 4 Gray (Mass.) 271, 64 Am. Dec. 64; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 52 Am. Rep. 817.

<sup>139</sup> *Whitehead v. Bennett*, 27 L. J. Ch. 474, 1 Gray's Cas. 691; *Colamore v. Gillis*, 149 Mass. 578. But see *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, 1 Gray's Cas. 717, *Finch's Cas.* 312; *White's Appeal*, 10 Pa. St. 252; 13 Am. & Eng. Enc. Law, 644, note.

<sup>140</sup> 13 Am. & Eng. Enc. Law, 655, 661.

<sup>141</sup> *Fisher v. Dixon*, 12 Clark & F. 312, 1 Gray's Cas. 686; *Walmaley v. Milne*, 7 C. B. (N. S.) 115, 1 Gray's Cas. 695; *Climie v. Wood*, L. R. 4 Exch. 328, 1 Gray's Cas. 706; *Harkness v. Sears*, 26 Ala. 403, 62 Am. Dec. 742; *Foot v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411; *Wight v. Gray*, 73 Me. 297; *Burnside v. Twitchell*, 48 N. H. 390; 13 Am. & Eng. Enc. Law (2d Ed.) 635, 663, 671.

<sup>142</sup> *Amos & F. Fixt.* (3d Ed.) 329; *Hallen v. Runder*, 1 Crompt. M. (550)

## — Time of removal.

Fixtures removable by a tenant for years, within the above rules, must be removed by him during the term,<sup>143</sup> or, according to other authorities, before he surrenders possession at or after the end of the term.<sup>144</sup> If the duration of a tenant's term is indefinite, as in the case of a tenancy for life or at will, or if the tenancy is prematurely terminated without his fault, he has a reasonable time after its termination in which to remove the fixtures.<sup>145</sup>

& R. 266, 1 Gray's Cas. 679; *Lee v. Gaskell*, 1 Q. B. Div. 700, 1 Gray's Cas. 715; *South Baltimore Co. v. Muhlbach*, 69 Md. 395; *Norton v. Dashwood* [1896] 2 Ch. 497; *Bainway v. Cobb*, 99 Mass. 457. Contra, as between executor and heir, *Squier v. Mayer*, *Freem. Ch.* 249, cited in *Re De Falbe* [1901] 1 Ch. 523, 535.

<sup>143</sup> *Poole's Case*, 1 Salk. 368, 1 Gray's Cas. 660; *Lyde v. Russell*, 1 Barn. & Adol. 394; *Lee v. Risdon*, 7 Taunt. 188; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Stokoe v. Upton*, 40 Mich. 581, 29 Am. Rep. 560; *Sullivan v. Carberry*, 67 Me. 531.

<sup>144</sup> *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341, *Finch's Cas.* 328; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290, *Finch's Cas.* 323; *Watriss v. Cambridge First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, 1 Gray's Cas. 780. It is quite frequently stated that the tenant loses his right to remove fixtures by failure to do so before the end of the term or his surrender of possession, for the reason that he is, in such case, presumed to have intended to abandon the fixtures, but, on such a theory, chattels not annexed, but merely left lying on the premises by the tenant, should also be lost to him, which is not the case. The more satisfactory view is that there is no right of removal after the time named because the tenant's exceptional right to remove certain classes of fixtures is so restricted, and, being part of the freehold, he has no right to remove them except as permitted by the rule. See the remarks of *Kindersley, V. C.*, in *Gibson v. Hammersmith & City Ry. Co.*, 2 Drew. & S. 603, 32 L. J. Ch. 337, 1 Gray's Cas. 683, note. Viewing the matter thus, it would seem proper that his right of removal should be restricted to his term, and that it should not be extended by his unauthorized continuance in possession beyond the term.

<sup>145</sup> *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, 1 Gray's Cas. 780; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173,

If the tenant takes a new lease, without any stipulation on the subject, he loses, by perhaps the weight of authority, the right to remove the fixtures.<sup>146</sup>

— Real or personal property.

By some authorities, articles which, though annexed to the land, are removable by the tenant of a limited term, are regarded as personalty,<sup>147</sup> but the better view is that they are fixtures, as previously defined, and constitute part of the land until the tenant actually removes them.<sup>148</sup> But though removable fixtures be regarded as part of the land, a sale of them by the tenant is not within the fourth section of the Statute of Frauds, it being considered that the tenant thereby sells, not the fixtures, but the right to remove the fixtures,

*Finch's Cas.* 325; *Sullivan v. Carberry*, 67 Me. 531; *Shellar v. Shivers*, 171 Pa. St. 569; *Martin v. Roe*, 7 El. & Bl. 237.

<sup>146</sup> *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, 1 Gray's Cas. 780; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, *Finch's Cas.* 325; *Talbot v. Cruger*, 151 N. Y. 117, *Finch's Cas.* 330; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467. See *Thresher v. East London Water Works Co.*, 2 Barn. & C. 608, 1 Gray's Cas. 673. *Contra*, *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, *Finch's Cas.* 332; *Beloit Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501.

<sup>147</sup> *Watts v. Lehman*, 107 Pa. St. 106; *Torrey v. Burnett*, 33 N. J. Law, 457; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29.

<sup>148</sup> *Hallen v. Runder*, 1 Crompt. M. & R. 266, 1 Gray's Cas. 679; *Mackintosh v. Trotter*, 3 Mees. & W. 184, 1 Gray's Cas. 682; *Gibson v. Hammersmith & City Ry. Co.*, 3 Drew. & S. 603, 32 L. J. Ch. 337, 1 Gray's Cas. 683, note; *Meux v. Jacobs*, L. R. 7 H. L. 490; *Freeman v. Dawson*, 110 U. S. 264, 270; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Joliet First Nat. Bank v. Adam*, 138 Ill. 483; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 35 Am. Dec. 745.

It is only, it seems, by considering such annexed articles as part of the realty, and not as personalty, that it is possible to justify the rule that the right to remove them is lost by failure to do so during the term or the tenant's possession, since a tenant does not lose his right to personal chattels on the premises by his failure to remove them. Nor, on the contrary view, could the right to them well be lost by the taking of a new lease.



or, in case the sale is to the landlord, there is considered to be merely an abandonment or waiver of the right of removal.<sup>149</sup>

### § 241. Compensation for improvements.

Since the rule that erections or additions made by one who has no rights to land are fixtures, and therefore not removable by him, even though he made them in the belief that he was the owner of the land, is calculated to cause hardship to an innocent occupant of another's land, by giving the benefit of his labor and expenditures to the landowner,<sup>150</sup> a system of compensation for improvements so made has been established by the courts, and, in most of the states, by express legislation.

A court of equity will, on the principle that he who seeks equity must do equity, refuse its assistance to the rightful owner of land as against an occupant thereof unless he make compensation for permanent and beneficial improvements, made by the latter without notice of the defect in his title.<sup>151</sup>

<sup>149</sup> *Hallen v. Runder*, 1 Crompt. M. & R. 266, 1 Gray's Cas. 679; *Lee v. Gaskell*, 1 Q. B. Div. 700, 1 Gray's Cas. 715; *South Baltimore Co. v. Muhlbach*, 69 Md. 395.

<sup>150</sup> *Ritchmyer v. Morss*, 3 Keyes (N. Y.) 349, Finch's Cas. 283; *Inhabitants of First Parish in Sudbury v. Jones*, 8 Cush. (Mass.) 184; *Jones v. New Orleans & S. R. Co.*, 70 Ala. 227; *Doscher v. Blackiston*, 7 Or. 143; *Beers v. St. John*, 16 Conn. 322; *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320; *Hunt v. Missouri Pac. Ry. Co.*, 76 Mo. 115; *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31.

<sup>151</sup> 3 Pomeroy, Eq. Jur. § 1241; *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Thomas v. Evans*, 105 N. Y. 614, 59 Am. Rep. 519; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486; *Broumel v. White*, 37 Md. 521; *Barrett v. Stradi*, 73 Wis. 385, 9 Am. St. Rep. 795. By a few decisions, the person making the improvement has been allowed to recover the value thereof in equity by bill therefor, and not merely as a defense. *Herring v. Pollard's Ex'rs*, 4 Humph. (Tenn.) 362; *Albea v. Griffin*, 22 N. C. 9. See *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875.

This equitable practice of granting compensation for improvements in favor of an innocent occupant has frequently been adopted by courts of law to the extent of allowing the value of the improvements to be set off against the claim of the owner for mesne profits.<sup>152</sup>

In most of the states, statutes, known as "Occupying Claimants' Acts," or "Betterment Acts," have been passed, allowing one in adverse possession of another's land, under color of title, who has made improvements in good faith, to recover their value, either by the assertion of his claim in an action by the owner to recover the land, or by a direct proceeding for the purpose.<sup>153</sup>

#### § 242. Divided ownership of building.

A building may not only, by force of an agreement to that effect, belong to a person other than the owner of the land,<sup>154</sup> but parts of a building may belong to different persons, as when an upper floor belongs to one, and the lower to another,<sup>155</sup> or separate rooms, or even parts of rooms, belong to different persons.<sup>156</sup>

<sup>152</sup> *Kerr v. Nicholas*, 38 Ala. 346; *Dowd v. Faucett*, 15 N. C. 32; *Tongue v. Nutwell*, 31 Md. 302; *Porter v. Hanley*, 10 Ark. 186; *Learned v. Corley*, 43 Miss. 687; *Ege v. Kille*, 84 Pa. St. 333; *Jackson v. Loomis*, 4 Cow. (N. Y.) 163, 15 Am. Dec. 347, and note.

<sup>153</sup> See the full discussion of these statutes, and the numerous decisions thereunder, by J. W. Magrath, Esq., in 16 Am. & Eng. Enc. Law, 79 et seq. See, also, *Sedgwick & W. Tr. Title Land*, c. 26; 2 Kent, Comm. 335, and notes.

<sup>154</sup> *Howard v. Fessenden*, 14 Allen (Mass.) 124; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Walton v. Wray*, 54 Iowa. 531; *Lowenberg v. Bernd*, 47 Mo. 297; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479, 12 Am. St. Rep. 676. See *supra*, § 235.

<sup>155</sup> *Co. Litt.* 48b; *Corbett v. Hill*, L. R. 9 Eq. 671; *Loring v. Bacon*, 4 Mass. 575, *Finch's Cas.* 100; *Ottumwa Lodge v. Lewis*, 34 Iowa, 67, 11 Am. Rep. 135; *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396; *McConnel v. Kibbe*, 33 Ill. 75; *Mott v. Palmer*, 1 N. Y. 564, *Finch's Cas.* 286.

<sup>156</sup> *Selby v. Greaves*, L. R. 3 C. P. 594; *Com. v. Hersey*, 144 Mass. 298; *White v. White*, 16 N. J. Law, 202, 31 Am. Dec. 232.

## V. MANURE.

Manure made on land presumptively passes on a conveyance of the land, nor can it, as against the landlord, be removed from the land by a tenant.

## § 243. Effect of conveyance of land.

The law relating to manure is sometimes spoken of as subject to the principles which control in the case of fixtures, but it is, for the most part, the result of entirely different considerations, based partly upon public policy, and partly upon the duties which a tenant owes to his landlord to properly cultivate the land.

The courts have always regarded it as a matter of public policy, to prevent the impoverishment of land, that manure made upon land as a result of feeding to stock part of the crops raised on the land should not be removed therefrom, and, in furtherance of this view, manure so made, if still on the land, is held to pass by a conveyance of the land, in the absence of any agreement to the contrary.<sup>157</sup> On the same principle, it has been held that a mortgagor cannot, at least after condition broken, remove manure made on the land.<sup>158</sup> Since the principle on which this rule is based does not apply in the case of manure which is not the product of crops raised on the premises, as when the land is not used for agricultural purposes, or the stock is fed with materials raised

<sup>157</sup> *Goodrich v. Jones*, 2 Hill (N. Y.) 142, Finch's Cas. 255, 1 Gray's Cas. 648; *Needham v. Allison*, 24 N. H. 855, 1 Gray's Cas. 649; *Norton v. Craig*, 68 Me. 275; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Wetherbee v. Ellison*, 19 Vt. 379. Contra, *Ruckman v. Outwater*, 28 N. J. Law, 581, Finch's Cas. 340. The principles thus applicable as between grantor and grantee are not, it seems, affected by the question whether the manure is in heaps, or is scattered about the premises. See post, note 162.

<sup>158</sup> *Chase v. Wingate*, 68 Me. 204, 28 Am. Rep. 36.

elsewhere, in such case the manure does not pass by a conveyance of the land.<sup>159</sup>

### § 244. Rights as between landlord and tenant.

On the principle of public policy before referred to, and likewise by reason of the tenant's obligation to use the land in accordance with the dictates of good husbandry, a tenant for years or at will cannot, in the absence of an agreement or custom to the contrary, remove from the land manure which results from the feeding to his stock of crops raised on the land.<sup>160</sup> But, as in the case of a conveyance of the land, since the reason of the rule does not apply in the case of manure which does not result from crops raised on the premises, the rule does not itself apply in such case, so as to prevent removal by the tenant.<sup>161</sup> The question of the tenant's

<sup>159</sup> *Fay v. Muzzey*, 13 Gray (Mass.) 53, Finch's Cas. 339, 1 Gray's Cas. 654; *Needham v. Allison*, 24 N. H. 355, 1 Gray's Cas. 649; *Preetor v. Gilson*, 49 N. H. 62; *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333. In *Collier v. Jenks*, 19 R. I. 137, it was decided, upon the same principle, that a conveyance of a small portion of a farm did not pass manure made from the whole farm, which happened to be piled on such portion.

<sup>160</sup> *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169, 1 Gray's Cas. 646, Finch's Cas. 344; *Daniels v. Pond*, 21 Pick. (Mass.) 371, 32 Am. Dec. 269; *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray's Cas. 651; *Gallagher v. Shipley*, 24 Md. 418, 37 Am. Dec. 611; *Lewis v. Jones*, 17 Pa. St. 262, 55 Am. Dec. 550; *Wetherbee v. Ellison*, 19 Vt. 379; *Perry v. Carr*, 44 N. H. 118; *Parsons v. Camp*, 11 Conn. 530; *Elting v. Palen*, 60 Hun (N. Y.) 306. A contrary decision has been rendered in North Carolina. *Smithwick v. Ellison*, 24 N. C. 326, 38 Am. Dec. 697. And in Maine it has been decided that the restriction upon the removal of manure by the tenant applies only to such as is made by him during the last year of the tenancy, he himself being the sufferer by the removal of that previously made. *Staples v. Emery*, 7 Me. 201, 1 Gray's Cas. 644.

<sup>161</sup> *Needham v. Allison*, 24 N. H. 355, 1 Gray's Cas. 649; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Corey v. Bishop*, 48 N. H. 146; *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333; *Gallagher*

right to remove the manure is independent of whether it is in heaps or scattered over the premises.<sup>162</sup> It may, however, be controlled by custom or agreement.<sup>163</sup>

§ 245. Manure as real or personal property.

The decisions above referred to in regard to the rights of the grantee of land and of the tenant to manure made on the land cannot be regarded as decisive of the question whether manure is to be considered real or personal property, and the decisions directly bearing on this point are few. In a decision of quite early date it was said that manure in a heap is a chattel, and goes to the executor, while, if it lies scattered on the ground, it is parcel of the freehold, and this statement is repeated by writers of authority without dissent.<sup>164</sup> This seems a reasonable view of the question; manure scattered over the land as it has fallen being thus treated as if it were part of the soil, while, if gathered by the landowner into heaps, so as to be separate from the soil, it becomes a chattel, as is the case with earth or rock under the same circumstances.<sup>165</sup> It has, however, been held in

*v. Shipley*, 24 Md. 478, 87 Am. Dec. 611; *Lewis v. Jones*, 17 Pa. St. 267, 55 Am. Dec. 550.

<sup>162</sup> *Lassell v. Reed*, 6 Me. 222, 1 Gray's Cas. 222; *Goodrich v. Jones*, 2 Hill (N. Y.) 142, 1 Gray's Cas. 648; *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray's Cas. 651; *Strong v. Doyle*, 110 Mass. 92, *Finch's Cas.* 346, 1 Gray's Cas. 767; *Wetherbee v. Ellison*, 19 Vt. 379.

<sup>163</sup> *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169, 1 Gray's Cas. 646, *Finch's Cas.* 344; *Webb v. Plummer*, 2 Barn. & Ald. 746; *Roberts v. Barker*, 1 Crompt. & M. 808; *Fletcher v. Herring*, 112 Mass. 382; *Hill v. De Rochemont*, 48 N. H. 87; *Ewell*, *Filt.* 122. In England the rights of the landlord and tenant are apparently always settled by custom or agreement, and hence arises the lack of English decisions on the subject.

<sup>164</sup> *Yearworth v. Pierce*, *Aleyn*, 31, 1 Gray's Cas. 641; *Toller, Ex'rs*, 150; 1 *Williams, Ex'rs* (9th Ed.) 643. See *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray's Cas. 651.

<sup>165</sup> See *French v. Freeman*, 43 Vt. 93; *Collier v. Jenks*, 19 R. I. 127. In *Haslem v. Lockwood*, 27 Conn. 500, *Finch's Cas.* 349, it was (557)

at least one case in this country that manure made from crops grown on the land goes to the heir as real property, and not to the personal representative as personalty;<sup>166</sup> and it has also been decided that manure made on a farm, and piled thereon in heaps, is not subject to execution as a chattel.<sup>167</sup>

Even if otherwise regarded as part of the land, manure becomes personalty if sold by the landowner separately from the land,<sup>168</sup> or if reserved upon a conveyance of the land.<sup>169</sup>

#### VI. RIGHTS OF USER—WASTE.

A tenant in possession of land cannot, as against one having a future estate or interest, appropriate or injure any part of what is regarded as a permanent part of the land. Such illegal action by the tenant is waste, for which he is generally liable in damages, and which may be restrained by injunction.

Waste usually consists of injury to the mineral deposits, to the timber or other permanent growths, or to structures on the ground.

Equitable waste is such as is taken cognizance of in equity, but not at law.

"Permissive" waste, as distinguished from "voluntary" waste, consists of a mere failure to protect the structures on the land from decay or injury by the elements.

A tenant in common or joint tenant is liable, usually by force of statute, for any unreasonable use of the land or of parts thereof, to the injury of his cotenant.

decided that manure dropped on a highway belonged to the person who first gathered it into heaps, as against a person who thereafter appropriated it.

<sup>166</sup> *Fay v. Muzzey*, 13 Gray (Mass.) 53, Finch's Cas. 339, 1 Gray's Cas. 654. And see *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray's Cas. 651. Manure not made from crops on the land is, however, personalty going to the executor. *Id.*

<sup>167</sup> *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray's Cas. 651.

<sup>168</sup> *French v. Freeman*, 43 Vt. 94. See *Collier v. Jenks*, 19 R. I. 137.

<sup>169</sup> *Strong v. Doyle*, 110 Mass. 92.

**§ 246. Rights as determined by the quantum of estate.**

A tenant in fee simple may make any use whatever of the land, provided he do not violate the rights, either naturally existing or imposed by contract, in favor of his neighbors,<sup>170</sup> even though he destroy buildings, improvements, or timber on the land, or in other ways decrease the value thereof. In case, however, the fee-simple estate is liable to be divested by the taking effect of an executory limitation, a court of equity will interpose, on the application of the owner of the executory interest, to restrain unreasonable destruction or "waste" of the inheritance by the tenant in possession, this being known as "equitable waste," because thus recognized in equity only.<sup>171</sup>

A tenant in fee tail has the same right to use the land, even to its injury, as has a tenant in fee simple; and since he always has, in any case, the power to destroy executory interests by a conveyance in fee simple, a court of equity will not, in favor of the owner of an executory interest, restrain destruction by the tenant in tail.<sup>172</sup> Tenant in special tail after possibility of issue extinct, though he is, in other respects, in the position of a tenant for life merely, may commit ordinary waste, but willful acts of destruction by him will be restrained, as being equitable waste.<sup>173</sup>

A tenant for life or for years has the right to use and enjoy the premises in the condition in which he receives them, and to take therefrom the profits of the land, whether periodical or continuous, but cannot generally do any acts upon the premises which involve a diminution in their value, to

<sup>170</sup> See post, Part IV.

<sup>171</sup> *Turner v. Wright*, 2 De Gex, F. & J. 234, 1 Gray's Cas. 593, Finch's Cas. 391; *Farabow v. Green*, 108 N. C. 339. Contra, *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305.

<sup>172</sup> *Attorney General v. Duke of Marlborough*, 3 Madd. 498.

<sup>173</sup> *Co. Litt.* 27b; *Bowles' Case*, 11 Coke, 79b, 1 Gray's Cas. 564; *Attorney General v. Duke of Marlborough*, 3 Madd. 498.

the injury of the reversioner or remainderman. Such acts of injury to the subsequent interests—to the “inheritance,” as it is expressed—constitute “waste.”

§ 247. General considerations as to waste.

The question of what constitutes waste is, at the present day, determined primarily, at least, by the consideration whether the act results in injury to the inheritance.<sup>174</sup> In former times, some acts were regarded as waste merely because they changed the appearance of the land, and so impaired the evidence of title thereto, but, with the adoption of improved methods of identifying land, this can no longer be regarded as waste.<sup>175</sup> It was, in part at least, on this principle, that any change in the character of the land, as of meadow into arable land, or arable land into wood, was formerly regarded as constituting waste,<sup>176</sup> but at the present day such a change would not be waste, at least in this country, unless it constitute an actual injury to the inheritance.<sup>177</sup>

A merely trifling damage has from early times been regarded as insufficient to support an action as for waste, the judgment being entered for defendant in case the jury finds for the plaintiff in merely nominal damages.<sup>178</sup>

<sup>174</sup> *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207, 1 Gray's Cas. 601, Finch's Cas. 451; *King v. Miller*, 99 N. C. 583; *Proffitt v. Henderson*, 29 Mo. 325; *McGregor v. Brown*, 10 N. Y. 114. But see *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

<sup>175</sup> *Doherty v. Allman*, 3 App. Cas. 709, 725; *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207, 1 Gray's Cas. 601; *Melms v. Pabst Brewing Co.*, 104 Wis. 7.

<sup>176</sup> *Co. Litt.* 53a; *Darcey v. Askwith*, Hob. 234; *Simmons v. Norton*, 7 Bing. 640.

<sup>177</sup> *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207, 1 Gray's Cas. 601, Finch's Cas. 451; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. See *Bewes, Waste*, 18, 135. And compare *Chapel v. Hull*, 60 Mich. 167, where it was held that plowing up all the meadow land on a farm was waste.

<sup>178</sup> *Co. Litt.* 54a; *Harrow School v. Alderton*, 2 Bos. & P. 86, 1 (560)



In determining whether particular acts constitute waste, the condition and usages of the particular locality are to be considered; a thing thus constituting waste in one locality which is not waste in another.<sup>179</sup> The general tendency of the American courts has been to restrict the application of the English law of waste, in order to adapt it to the conditions of a new and growing country, and to stimulate the development of the land by the tenant in possession.<sup>180</sup>

#### § 248. Earth and minerals.

A particular tenant, such as a tenant for life or years, has no right to take clay, gravel, soil, and the like, unless such material was one of the recognized profits of the land before the commencement of his tenancy.<sup>181</sup> Nor can he open new quarries, mines, or oil or gas wells, unless he is expressly given such right.<sup>182</sup> Quarries, mines, or wells, however,

Gray's Cas. 581; Doe d. Grubb v. Burlington, 5 Barn. & Adol. 507; Doherty v. Allman, 3 App. Cas. 733; Sheppard v. Sheppard, 3 N. C. 580.

<sup>179</sup> Pynchon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207, 1 Gray's Cas. 601; Drown v. Smith, 52 Me. 141; King v. Miller, 99 N. C. 583.

<sup>180</sup> 4 Kent, Comm. 76; Gaines v. Green Pond Iron Min. Co., 33 N. J. Eq. 603, 1 Gray's Cas. 611; Pynchon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207, 1 Gray's Cas. 601, Finch's Cas. 451; Clemence v. Steere, 1 R. I. 621, 53 Am. Dec. 621; King v. Miller, 99 N. C. 583; Drown v. Smith, 52 Me. 141; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733; Chase v. Hazleton, 7 N. H. 171; Proffitt v. Henderson, 29 Mo. 325.

<sup>181</sup> Co. Litt. 53b; United States v. Bostwick, 94 U. S. 53; Smith v. City of Roine, 19 Ga. 89, 63 Am. Dec. 298; University v. Tucker, 31 W. Va. 621; Coates v. Cheever, 1 Cow. (N. Y.) 460; Reed's Ex'rs v. Reed, 16 N. J. Eq. 248. The tenant may, however, take clay or gravel for the repair of the house, on the same principle on which he may take wood for that purpose, under the law of estovers. Co. Litt. 53b.

<sup>182</sup> Co. Litt. 53b; Astry v. Ballard, 2 Mod. 193, 1 Gray's Cas. 572; Saunders' Case, 5 Coke, 12a; Stoughton v. Leigh, 1 Taunt. 410,

(561)

which were opened before the commencement of the tenancy in question, may be worked by the tenant, it being considered that the previous owner, by such opening, made the minerals a part of the regular profits of the land.<sup>183</sup> On the same principle, in case the previous owner in fee made a lease of mines, or authorized his executors to do so, a subsequent life tenant is entitled to the rent or royalty therefrom as income.<sup>184</sup> The mine or quarry cannot, however, it seems, be worked by the tenant for general purposes, as for sale, if, previous to his tenancy, it was worked merely for some other and restricted purpose, as for the repair of particular buildings.<sup>185</sup>

If the work in a mine was discontinued before the beginning of the tenancy, and the discontinuance was such as apparently to show an intention on the part of the previous owner to devote the land to other uses, the succeeding tenant cannot work it, though he may do so if the discontinuance was owing to lack of sale for the minerals, to want of cap-

Gray's Cas. 729; Owings v. Emery, 6 Gill (Md.) 260; Harlow v. Lake Superior Iron Co., 36 Mich. 105; Williamson v. Jones, 43 W. Va. 562; Bewes, Waste, 103 et seq. That, however, a tenant in dower may open mines, see *In re Seager's Estate*, 92 Mich. 186, Finch's Cas. 454.

<sup>183</sup> Co. Litt. 54b; Astry v. Ballard, 2 Mod. 193, 1 Gray's Cas. 572; Gaines v. Green Pond Iron Min. Co., 33 N. J. Eq. 603, 1 Gray's Cas. 611; McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 49 Am. Rep. 686; Findlay v. Smith, 3 Munf. (Va.) 134, 8 Am. Dec. 733; Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721; Moore v. Rollins, 45 Me. 493. An open mine may be worked even to exhaustion. *Sayers v. Hoskinson*, 110 Pa. St. 473; *Irwin v. Cavode*, 24 Pa. St. 163; *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 394.

<sup>184</sup> Priddy v. Griffith, 150 Ill. 560; *Hendrix v. McBeth*, 61 Ind. 473; *Eley's Appeal*, 103 Pa. St. 300; *Clift v. Clift*, 87 Tenn. 17; *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 384; *Raynolds v. Henn*, 55 Fed. 783.

<sup>185</sup> *Elias v. Snowdon State Quarries Co.*, 4 App. Cas. 454. See *Ward v. Carp River Iron Co.*, 47 Mich. 65. But see *Neel v. Neel*, 19 Pa. St. 323.

ital, or to a like reason.<sup>186</sup> And the right to work a mine or quarry which is already opened includes the right to sink new shafts on the same vein, or break new ground on the same rock, but not to work new veins.<sup>187</sup>

#### § 249. Trees and timber—In England.

Trees are, for the purpose of the law of waste, divided in England into "timber" trees and trees not timber. Some trees, such as oak, ash, and elm, seem to be invariably regarded as timber, but other trees may be, and frequently are, timber by the custom of the particular neighborhood. Trees are not, however, considered timber until twenty years of age, and, by custom, may require even a greater age in order to be so considered.<sup>188</sup> This distinction between timber trees and trees not timber has, in that country, important results. Timber trees are considered as part of the inheritance, and consequently a tenant (not unimpeachable for waste) has no right to cut them except upon land where it has been the custom to fell seasonable wood at intervals, as part of the regular profits.<sup>189</sup> Trees not timber the tenant for life may cut, generally speaking, provided such cutting does not injure the inheritance. The tenant may according-

<sup>186</sup> *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86, 1 Gray's Cas. 611; *Bagot v. Bagot*, 32 Beav. 509. See *Stoughton v. Leigh*, 1 Taunt. 402, 6 Gray's Cas. 729.

<sup>187</sup> *Clavering v. Clavering*, 2 P. Wms. 338, 1 Gray's Cas. 576; *Elias v. Snowdon State Quarries Co.*, 4 App. Cas. 466; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603, 1 Gray's Cas. 611; *Billings v. Taylor*, 10 Pick. (Mass.) 460; *Moore v. Rollins*, 45 Me. 493; *Irwin v. Covode*, 24 Pa. St. 162; *Findlay v. Smith*, 6 Munt. (Va.) 134, 8 Am. Dec. 738.

<sup>188</sup> *Co. Litt.* 53a; *Bewes, Waste*, 98; *Honywood v. Honnywood*, L. R. 18 Eq. 306, 1 Gray's Cas. 598; *Dashwood v. Magniac* [1891] 3 Ch. 306.

<sup>189</sup> *Bewes, Waste*, 75 et seq.; *Perrot v. Perrot*, 3 Atk. 94, 1 Gray's Cas. 579; *Ferrand v. Wilson*, 4 Hare, 344; *Dashwood v. Magniac* [1891] 3 Ch. 306.

ly cut underwood, provided he does not destroy the stubs from which it grows, such wood being for this purpose like any ordinary crop on the land,<sup>190</sup> and a tenant may cut "do-tards," or dead trees.<sup>191</sup> Trees of the nature of timber trees, but which are as yet too young to be timber, can be cut only for the purpose of thinning the growth for the benefit of other trees.<sup>192</sup> Fruit trees cannot be cut,<sup>193</sup> nor trees other than timber, if beneficial to the inheritance, such as willows protecting the banks of streams, and ornamental trees.<sup>194</sup>

— In the United States.

In this country, what constitutes waste as regards timber is determined generally by considerations both of the purpose of the cutting and its effect upon the value of the inheritance. In view of the quantity of land which is here available for use only by clearing away the timber thereon, it is usually held that a tenant is not guilty of waste if he cuts timber to a reasonable extent in order that he may cultivate the soil,<sup>195</sup> though cutting is waste if it decreases rather than enhances the value of the land,<sup>196</sup> or if the real purpose of the cutting

<sup>190</sup> Co. Litt. 53a; Bewes, Waste, 58; Phillips v. Smith, 14 Meea. & W. 589.

<sup>191</sup> Co. Litt. 53a; Herlakenden's Case, 4 Coke, 62.

<sup>192</sup> Honywood v. Honywood, L. R. 18 Eq. 306, 1 Gray's Cas. 598.

<sup>193</sup> Bewes, Waste, 95; Co. Litt. 53a.

<sup>194</sup> Co. Litt. 53a; Honywood v. Honywood, L. R. 18 Eq. 309, 1 Gray's Cas. 598; Phillips v. Smith, 14 Meea. & W. 589.

<sup>195</sup> 1 Taylor, Landl. & Ten. § 353; Cannon v. Barry, 59 Miss. 239, Finch's Cas. 433; King v. Miller, 99 N. C. 583; Dawson v. Coffman, 28 Ind. 220; Sayers v. Hoskinson, 110 Pa. St. 473; Owen v. Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467; Keeler v. Eastman, 11 Vt. 293; Wilkinson v. Wilkinson, 59 Wis. 557; Disher v. Disher, 45 Neb. 100.

<sup>196</sup> Davis v. Gilliam, 40 N. C. 308; Mooers v. Wait, 3 Wend. (N. Y.) 104, Finch's Cas. 466; Johnson's Adm'r v. Johnson, 2 Hill, Eq. (S. C.) 277, 29 Am. Dec. 72; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Proffitt v. Henderson, 29 Mo. 335; Disher v. Disher, 45 Neb. 100.

is the sale of the timber,<sup>197</sup> or some other purpose not conducive to the benefit of the land.<sup>198</sup> The question is to be determined with reference to what one would do, in the exercise of good husbandry, if he were the owner of the fee,<sup>199</sup> and also with regard to the custom of the neighborhood.<sup>200</sup> The fact that but a small proportion of the property is woodland is a strong consideration against the tenant's right to remove timber.<sup>201</sup> The cutting or destruction of fruit trees is waste,<sup>202</sup> but not of dead trees.<sup>203</sup> In some of the New England states, however, it seems questionable whether the cutting of wood, otherwise than for estovers, by a tenant in possession impeachable for waste, is in any case allowable.<sup>204</sup>

<sup>197</sup> *Johnson v. Johnson*, 18 N. H. 594, *Finch's Cas.* 445; *Davis v. Gilliam*, 40 N. C. 308; *Smith v. Smith*, 105 Ga. 106; *Davis v. Clark*, 40 Mo. App. 515; *Modlin v. Kennedy*, 53 Ind. 267; *Lester v. Young*, 14 R. I. 579; *Morehouse v. Cotheal*, 22 N. J. Law, 521; *Padelford v. Padelford*, 7 Pick. (Mass.) 151; *Chase v. Hazelton*, 7 N. H. 171; *McLeod v. Dial*, 63 Ark. 10. But see *Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467; *Joyner v. Speed*, 68 N. C. 236.

<sup>198</sup> *Armstrong v. Wilson*, 60 Ill. 226; *Johnson v. Johnson*, 18 N. H. 594; *Noyes v. Stone*, 163 Mass. 490; *Webster v. Peet*, 97 Mich. 327.

<sup>199</sup> *Cannon v. Barry*, 59 Miss. 289, *Finch's Cas.* 433; *Davis v. Gilliam*, 40 N. C. 308; *Chase v. Hazelton*, 7 N. H. 171; *Drown v. Smith*, 52 Me. 141; *Keeler v. Eastman*, 11 Vt. 293; *Wilkinson v. Wilkinson*, 59 Wis. 557.

<sup>200</sup> *Morehouse v. Cotheal*, 22 N. J. Law, 521; *McCullough v. Irvine's Ex'rs*, 13 Pa. St. 438; *Proffitt v. Henderson*, 29 Mo. 329; *Drown v. Smith*, 52 Me. 141; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

<sup>201</sup> *Powell v. Chesire*, 70 Ga. 357, 48 Am. Rep. 572; *Duncombe v. Felt*, 81 Mich. 332; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *McLeod v. Dial*, 63 Ark. 10.

<sup>202</sup> *Bellows v. McGinnis*, 17 Ind. 64; *Duncombe v. Felt*, 81 Mich. 332; *Silva v. Garcia*, 65 Cal. 591; *Bewes, Waste*, 95.

<sup>203</sup> *Sayers v. Hoskinson*, 110 Pa. St. 473; *Keeler v. Eastman*, 11 Vt. 293; *King v. Miller*, 99 N. C. 583.

<sup>204</sup> *Ford v. Erskine*, 50 Me. 227; *White v. Cutler*, 17 Pick. (Mass.) 248, *Finch's Cas.* 447; *Clark v. Holden*, 7 Gray (Mass.) 8; *Chase v. Hazelton*, 7 N. H. 171.

As in England the tenant may periodically cut timber of a certain amount, when such periodical cutting is an established custom on the property,<sup>205</sup> so, in this country, a tenant, such as one in dower, may cut wood so far as it has been cut in the past as an ordinary source of profit.<sup>206</sup>

— **Estovers.**

A tenant for life or years, or from year to year, but not a tenant at will, is entitled to cut and appropriate a reasonable quantity of timber for the purpose of repairing buildings, fences, gates, and the like upon the premises, also for repairing implements of husbandry, and he may, moreover, take sufficient wood to burn in the house, or, it seems, in houses occupied by his servants. The timber which he is thus entitled to take is known as "estovers" or "botes."<sup>207</sup> He is, however, guilty of waste if he cuts down growing wood when there is sufficient dead timber for the purpose, or if he takes superior, rather than inferior, trees, and likewise if he takes more than a reasonable amount, or if he sells the timber so cut.<sup>208</sup>

§ 250. **Mode of cultivation.**

The duty of a tenant for years to cultivate the land in a husbandlike manner, so that it will come in good condition

<sup>205</sup> See ante, note 189.

<sup>206</sup> *Clemence v. Steers*, 1 R. I. 272, 53 Am. Dec. 621; *Ballentine v. Poyner*, 3 N. C. 268; *Williard v. Williard*, 56 Pa. St. 119.

<sup>207</sup> Co. Litt. 41b, 53b; *Fawcett, Landl. & Ten.* (2d Ed.) 355; 1 *Taylor, Landl. & Ten.* §§ 351, 352; *Smith v. Jewett*, 40 N. H. 530; *Finch's Cas.* 417; *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Walters v. Hutchins' Adm'x*, 29 Ind. 136; *Calvert v. Rice*, 91 Ky. 533; *Gardiner v. Derring*, 1 Paige (N. Y.) 573.

<sup>208</sup> Co. Litt. 53b; *Bewes, Waste*, 43 et seq.; 1 *Taylor, Landl. & Ten.* § 352; *Simmons v. Norton*, 7 Bing. 640; *Doe d. Foley v. Wilson*, 11 East, 56; *Johnson v. Johnson*, 18 N. H. 594; *Finch's Cas.* 445; *Padelford v. Padelford*, 7 Pick. (Mass.) 152.

to the reversioner, is occasionally based on the theory that cultivation otherwise is waste,<sup>209</sup> but generally it is based on the theory of an implied covenant to so cultivate.<sup>210</sup>

### § 251. Injuries to fixtures.

Structures and annexations upon the land constituting "fixtures" can be removed by the tenant of a particular estate only under the rules heretofore stated.<sup>211</sup> So, the removal or destruction by him of buildings on the land, as a general rule, constitutes waste.<sup>212</sup> The entire alteration of the character of a building or the substitution of another in place thereof, constitutes waste, it seems, even though the value of the land is increased thereby.<sup>213</sup> So, a material alteration

<sup>209</sup> *Barles v. Barles*, 3 Sandf. Ch. (N. Y.) 601, Finch's Cas. 450; *Hubble v. Cole*, 85 Va. 87. So it has been regarded as waste to remove manure made from the products of the land. *Lewis v. Jones*, 17 Pa. St. 262, 55 Am. Dec. 550; *Perry v. Carr*, 44 N. H. 118. See *Wing v. Gray*, 36 Vt. 261.

<sup>210</sup> *Bewes, Waste*, 25; *Westropp v. Elligott*, 9 App. Cas. 815, 823; *Richards v. Torbert*, 3 Houst. (Del.) 172; *Chapel v. Hull*, 60 Mich. 167; *Walker v. Tucker*, 70 Ill. 527.

<sup>211</sup> See ante, § 240.

<sup>212</sup> *Dooly v. Stringham*, 4 Utah, 107; *Chalmers v. Smith*, 152 Mass. 561; *McCullough v. Irvine's Ex'rs*, 13 Pa. St. 438; *Davenport v. Magoon*, 13 Or. 3, 57 Am. Rep. 1; *United States v. Bostwick*, 94 U. S. 53, Finch's Cas. 434; *Bass v. Metropolitan West Side Elevated R. Co.*, 53 U. S. App. 542, 82 Fed. 857, 27 C. C. A. 147. "If glass windows (though glazed by the tenant himself) be broken down or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion or the tenant." Co. Litt. 53a.

<sup>213</sup> *Smyth v. Carter*, 18 Beav. 78, 1 Gray's Cas. 588; *Dooly v. Stringham*, 4 Utah, 107; *Davenport v. Magoon*, 13 Or. 3, 57 Am. Rep. 1. The older cases in which the rule that a beneficial alteration constitutes waste was most strictly applied were generally based on the theory that, by such alteration, the evidence of title was affected (*Cole v. Green*, 1 Lev. 309; *City of London v. Greyme*, Cro. Jac. 181; *Young v. Spencer*, 10 Barn. & C. 145), a reason which

of a building in some particular respect, as by removing an interior partition, or cutting an opening therein, apparently constitutes waste, without reference to the question of actual injury to the inheritance.<sup>214</sup> While the tenant is not liable for any injury to the building caused by his use thereof in a reasonable manner, having regard to the character of the building, and the purposes for which it is leased,<sup>215</sup> he is liable for injuries resulting from its use in an unreasonable or improper way.<sup>216</sup>

§ 252. Equitable waste.

The doctrine of "equitable waste," by which waste of a character which is not recognized at law as illegal, is relieved against in equity by an injunction to prevent it, and, when possible, by compelling the restoration of the thing wasted,

is not recognized at the present day. See ante, § 247. The present rule in England would seem to be that an alteration increasing the value of the property is not waste unless it involves a breach of a contract, express or implied, on the part of the tenant, to preserve the nature of the premises as demised. *Bewes, Waste*, 11, 134 et seq.; *Doherty v. Allman*, 3 App. Cas. 709; *Brooke v. Mer-nagh*, L. R. 23 Ir. 86.

<sup>214</sup> *Klie v. Von Broock*, 56 N. J. Eq. 18; *Agate v. Lowenbein*, 57 N. Y. 604; *Wotton v. Wise*, 47 N. Y. Super. Ct. 515; *Brock v. Dole*, 66 Wis. 143; *Doe d. Dalton v. Jones*, 4 Barn. & Adol. 126. The removal of an undesirable and useless building by a life tenant has been held not to be waste (*Melms v. Pabst Brewing Co.*, 104 Wis. 7), as has the failure to repair such a building (*Sherrill v. Connor*, 107 N. C. 630).

<sup>215</sup> *Saner v. Bilton*, 7 Ch. Div. 815; *Jennings v. Bond*, 14 Ind. App. 282.

<sup>216</sup> *Anderson v. Miller*, 96 Tenn. 35, 54 Am. St. Rep. 812; *Zigler v. McClellan*, 15 Or. 499; *Powell v. Dayton, S. & G. R. Co.*, 16 Or. 33, 8 Am. St. Rep. 251. So, the placing of such an extraordinary weight in a building as to injure it is waste (*Chalmers v. Smith*, 152 Mass. 561; *Brooks v. Clifton*, 22 Ark. 54), though it is otherwise if the weight is such as might be reasonably expected to be placed in that character of building (*Saner v. Bilton*, 7 Ch. Div. 815).



has been very fully developed in England. In this country there are but few decisions in which waste has been considered as of such a character as to be cognizable in equity, and not at law, and the extent to which there is such a thing as equitable waste, as distinct from legal waste, appears doubtful.<sup>217</sup>

One instance of "equitable waste" has previously been referred to, being that of waste committed by a tenant in fee simple whose estate is subject to be defeated by an executory limitation, a court of equity interposing in such a case to prevent acts of willful destruction, or other acts calculated to unduly prejudice the future tenant, although these acts are within his legal powers as tenant in fee simple.<sup>218</sup> Likewise, a tenant in fee tail after possibility of issue extinct will be restrained from committing acts unduly destructive to the reversion.<sup>219</sup> A tenant for life, although expressly "without impeachment of waste," will be restrained in equity from an unconscientious, malicious, or unreasonable exercise of his legal power to commit waste, thus disappointing the presumed intention of the creator of the estate that the property should pass to the next in succession in its integrity, as originally settled or devised.<sup>220</sup>

<sup>217</sup> Relief has occasionally been given in this country in an action at law on account of acts which are in England regarded as equitable and not legal waste. *Stevens v. Rose*, 69 Mich. 259, *Finch's Cas.* 442; *Duncombe v. Felt*, 81 Mich. 332. While the law of legal waste is not applicable, it has been held, to injuries by a tenant for ninety-nine years, renewable forever, the tenant having, in such case, the absolute control of the property, equity will intervene if the destruction of the inheritance is such as to affect the security for the rent. *Crowe v. Wilson*, 65 Md. 479, 57 Am. Rep. 342.

<sup>218</sup> *Turner v. Wright*, 2 De Gex, F. & J. 234, 1 Gray's Cas. 593, *Finch's Cas.* 391.

<sup>219</sup> *Abraham v. Bubb*, 2 Freem. Ch. 53; *Williams v. Day*, 2 Ch. Cas. 32.

<sup>220</sup> *Vane v. Barnard*, 2 Vern. 738, *Finch's Cas.* 442, 1 Gray's Cas.

**§ 253. Tenant without impeachment of waste.**

In England the lease or other instrument creating an estate for life or years quite frequently provides that the tenant shall be "without impeachment of waste," or uses equivalent language, and the effect of such a provision is that the tenant can, at law, commit waste to the same extent as a tenant in fee simple, as by cutting timber or digging minerals for the purpose of sale.<sup>221</sup> A tenant without impeachment of waste will, however, be restrained from unreasonable destruction of the property, to the injury of those entitled to the inheritance; that is, from equitable waste.<sup>222</sup>

**§ 254. Permissive waste.**

What is known as "permissive waste" is injury to the inheritance, not by the voluntary act of the tenant, but by his failure to take measures to prevent such injury from the elements, as when he fails to keep the building wind and water tight,<sup>223</sup> or allows part of the premises to be submerged by

738; *Rolt v. Somerville*, 2 Eq. Cas. Abr. 759, 1 Gray's Cas. 577; *Marker v. Marker*, 9 Hare, 1, 17; *Downshire v. Sandys*, 6 Ves. 110; *Stevens v. Rose*, 69 Mich. 259, Finch's Cas. 442; *Clement v. Wheeler*, 25 N. H. 361; 1 Bewes, Waste, 167.

<sup>221</sup> *Bewes, Waste*, 145; *Bowles' Case*, 11 Coke, 79, 1 Gray's Cas. 564.

<sup>222</sup> *Vane v. Barnard*, 2 Vern. 738, 1 Gray's Cas. 572. See ante, note 220.

<sup>223</sup> *Co. Litt.* 53a; *Anworth v. Johnson*, 5 Car. & P. 239; *Suydam v. Jackson*, 54 N. Y. 450; *Moore v. Townshend*, 33 N. J. Law, 381, 1 Gray's Cas. 605, Finch's Cas. 427. See *Sherrill v. Connor*, 107 N. C. 630. A breach of the obligation to keep fences in repair, which in some cases (*Whitfield v. Weedon*, 3 Chit. 685; *Cheetham v. Hampson*, 4 Term R. 319; *Fenton v. Montgomery*, 19 Mo. App. 156; *Blood v. Spaulding*, 57 Vt. 422; *Andrews v. Jones*, 36 Tex. 149) is regarded as impliedly assumed by the tenant, might perhaps be regarded as permissive waste. But see *Richards v. Torbert*, 3 Howt (Del.) 172.

water, to their injury,<sup>224</sup> or even when, by negligence in keeping or guarding a fire on the premises, the building is destroyed.<sup>225</sup> It is not, however, permissive waste to leave the building without a roof, if that was its condition at the beginning of the tenancy,<sup>226</sup> nor is the tenant bound to make extraordinary repairs, involving the substitution of new structures, or parts thereof, for old.<sup>227</sup>

The liability of a particular tenant on account of permissive waste is in England a matter of some doubt, but it appears probable that a tenant for years or from year to year is so liable at law,<sup>228</sup> though otherwise as to a tenant for life, especially if he holds under a lease.<sup>229</sup> And a court of equity will not interfere to restrain permissive waste, or to give compensation therefor.<sup>230</sup> In this country it has been held that a tenant for years is liable for permissive waste,<sup>231</sup> and likewise a life tenant.<sup>232</sup> A tenant at will has never

<sup>224</sup> Co. Litt. 53a; Anonymous, Moore, 62.

<sup>225</sup> Lothrop v. Thayer, 138 Mass. 466, Finch's Cas. 437; Co. Litt. 53a; 1 Taylor, Landl. & Ten. § 249; 4 Kent, Comm. 81.

<sup>226</sup> Co. Litt. 53a.

<sup>227</sup> Ferguson v. ———, 2 Esp. 590, 1 Gray's Cas. 583, Finch's 423; Long v. Fitzsimmons, 1 Watts & S. (Pa.) 530; Suydam v. Jackson, 54 N. Y. 450.

<sup>228</sup> Co. Litt. 53; Ferguson v. ———, 2 Esp. 590, 1 Gray's Cas. 583, Finch's Cas. 423; Leach v. Thomas, 7 Car. & P. 327; Harnett v. Maitland, 16 Mees. & W. 257; Davies v. Davies, 38 Ch. Div. 499; Yellowly v. Gower, 11 Exch. 274. See Bewes, Waste, 215.

<sup>229</sup> In re Cartwright, 41 Ch. Div. 532, Finch's Cas. 423; Patterson v. Central Canada Loan & Sav. Co., 29 Ont. 134; Barnes v. Dowling, 44 Law T. (N. S.) 809; Bewes, Waste, 220.

<sup>230</sup> Powys v. Blagrove, 4 De Gex, M. & G. 448; In re Hotchkys, 32 Ch. Div. 413.

<sup>231</sup> Moore v. Townshend, 33 N. J. Law, 284, 1 Gray's Cas. 605, Finch's Cas. 427; Long v. Fitzsimmons, 1 Watts & S. (Pa.) 530; Suydam v. Jackson, 54 N. Y. 450.

<sup>232</sup> Stevens v. Rose, 69 Mich. 259, Finch's Cas. 442; Miller v. Shields, 55 Ind. 71; Wilson v. Edmonds, 24 N. H. 517, 545; Schulting v. Schulting, 41 N. J. Eq. 130. See Moore v. Townshend, 33 N. J. Law, 284, 1 Gray's Cas. 605, Finch's Cas. 427; Harvey v. Harvey, 41 Vt. 373. Contra, Richards v. Torbert, 3 Houst. (Del.) 172.

been regarded as liable for permissive waste, the statutes in regard to waste not applying in terms to such tenants.<sup>222</sup> A tenant is liable for waste done by a stranger, on the theory that he could have prevented it,<sup>224</sup> but not for that resulting from the act of God, public enemies, or the law.<sup>225</sup> Whether, under the Statute of Gloucester, a tenant for life or years was liable in case of injury by accidental fire, as for permissive waste, is a matter on which there is a difference of opinion,<sup>226</sup> but at the present day such a liability, if it ever

<sup>222</sup> Litt. § 71; Co. Litt. 57a; Countess of Shrewsbury's Case, 6 Coke, 13, 1 Gray's Cas. 563; Harnett v. Maitland, 16 Mees. & W. 257; Moore v. Townshend, 33 N. J. Law, 284, 1 Gray's Cas. 605, Finch's Cas. 427; Coale v. Hannibal & St. J. R. Co., 60 Mo. 227. On this principle, it has even been held that the burning of the premises through the negligence of a tenant at will, in not guarding a fire used for heating the premises, is not ground for recovery by the landlord, it being merely permissive waste. Lothrop v. Thayer, 138 Mass. 466, Finch's Cas. 437.

<sup>224</sup> Co. Litt. 54a; Wood v. Griffin, 46 N. H. 230, 237; Powell v. Dayton, S. & G. R. R. Co., 16 Or. 33, 8 Am. St. Rep. 251; Austin v. Hudson River R. Co., 25 N. Y. 334; Cook v. Champlain Transp. Co., 1 Denio (N. Y.) 91, 1 Gray's Cas. 559, note; Fay v. Brewer, 3 Pick. (Mass.) 203; Parrott v. Barney, 2 Abb. (U. S.) 197, Fed. Cas. No. 10,773, Finch's Cas. 465; Attersoll v. Stevens, 1 Taunt. 198; White v. Wagner, 4 Har. & J. (Md.) 273, 7 Am. Dec. 674; Moore v. Townshend, 33 N. J. Law, 284, Finch's Cas. 427, 1 Gray's Cas. 605.

<sup>225</sup> Co. Litt. 53a; Abbot of Shirbourne's Case, Y. B. 12 Hen. IV. 8, 1 Gray's Cas. 557; Saner v. Bilton, 7 Ch. Div. 815; United States v. Bostwick, 94 U. S. 53; Sheer v. Fisher, 27 Ill. App. 464; Earle v. Arbogast, 180 Pa. St. 409; Machen v. Hooper, 73 Md. 342.

<sup>226</sup> Lord Coke says, without any citation of authority, that "burning of the house by negligence or mischance is waste" (Co. Litt. 53b), and Mr. Hargrave, in his notes to Co. Litt. 57a, states that, under the Statute of Gloucester, an accidental burning was waste, and that the tenant was relieved from liability in this regard only by the Statutes of Anne, c. 31 (A. D. 1707), and 14 Geo. III. c. 78, § 86 (A. D. 1774), which in terms exempted from liability persons on whose premises a fire accidentally began from liability for dam  
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existed, is repudiated by the courts.<sup>237</sup> For negligence resulting in injury to the premises, whether by fire or otherwise, the tenant is liable.<sup>238</sup>

There are some decisions in this country to the effect that a particular tenant who is under an obligation to pay taxes is guilty of waste if he allows the land to be sold for taxes,<sup>239</sup>—a rather singular extension, it would seem, of the law of waste.

### § 255. Remedies for waste.

At common law, an action could be brought on account of waste against tenants in dower or by curtesy, and against guardians in chivalry, but not against lessees for life or years; this distinction being based on the ground that, while the interests of the former were created by act of the law, in the case of the latter the lessor could have provided in the lease

age caused thereby, and seem rather directed at cases of fire spreading from one tenant to another. Mr. Hargrave's view is adopted in 4 Kent, Comm. 82. On the other hand, the words of Lord Coke have been, in connection with the context, construed as stating a liability only in case of negligence. Blackburne, C. J., in *White v. McCann*, 1 Ir. C. L. 205, 217, quoted, apparently with approval, in *Bewes, Waste*, 250. The cases before the passage of the English statutes mentioned, in which a liability on the part of the tenant was asserted, appear usually to have charged negligence on the part of the tenant. *Salop v. Crompton*, Cro. Eliz. 777; *Hicks v. Downing*, 1 Ld. Raym. 99.

<sup>237</sup> *Sampson v. Grogan*, 21 R. I. 174, 178; *Wainscot v. Silvers*, 13 Ind. 497; *Levey v. Dyess*, 51 Miss. 501; *Warner v. Hitchins*, 5 Barb. (N. Y.) 666; *Earle v. Arbogast*, 180 Pa. St. 409; *Wolfe v. McGuire*, 28 Ont. 45; *United States v. Bostwick*, 94 U. S. 53; *Nave v. Berry*, 22 Ala. 383; *Maggort v. Hansbarger*, 8 Leigh (Va.) 536.

<sup>238</sup> *Warder v. Henry*, 117 Mo. 530; *Duer v. Allen*, 96 Iowa, 36; *Wilcox v. Cate*, 65 Vt. 478; *Robinson v. Wheeler*, 25 N. Y. 252.

<sup>239</sup> *Cannon v. Barry*, 59 Miss. 289; *Finch's Cas.* 433; *Stetson v. Day*, 51 Me. 434; *Phelan v. Boylan*, 25 Wis. 679; *McMillan's Lessee v. Robbins*, 5 Ohio, 23 (statute).

against waste.<sup>240</sup> Owing, however, to the frequent commission of waste by lessees, the Statute of Marlbridge<sup>241</sup> was passed, by which it was provided that "fermors, during their terms, shall not make waste, sale, nor exile of houses, woods, and men, nor of anything belonging to the tenements that they have to farm," and that, if they so do, they shall yield full damage.<sup>242</sup> Subsequently, the Statute of Gloucester<sup>243</sup> gave a writ of waste "against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower," and provided that the person guilty of waste should forfeit the land, and pay "thrice so much as the waste shall be taxed at."

A tenant at will was never regarded as within the scope of these statutes, and consequently, if such a tenant commits acts injurious to the inheritance, which, in the case of other tenants, would constitute waste, he is considered to have committed, not waste, but a trespass, which terminates the tenancy, and renders him liable to an action for damages as in the case of any wrongdoer.<sup>244</sup>

The action of waste, as it existed in certain cases at common law, and generally under these statutes, was gradually superseded by an action on the case to recover damages for

<sup>240</sup> Co. Litt. 54; 2 Co. Inst. 299, 305; *Moore v. Townshend*, 23 N. J. Law, 284, *Finch's Cas.* 427, 1 *Gray's Cas.* 605.

<sup>241</sup> 52 Hen. III. c. 23, § 2 (A. D. 1267).

<sup>242</sup> "Fermors (farmarii) do comprehend all such as hold by lease for life or lives or for years, by deed or without deed." 2 Inst. 145, note 1.

<sup>243</sup> 6 Edw. I. c. 5 (A. D. 1278).

<sup>244</sup> Litt. § 71; Co. Litt. 57a; *Countess of Shrewsbury's Case*, 8 Coke, 13, 1 *Gray's Cas.* 562; *Phillips v. Covert*, 7 Johns. (N. Y.) 1, *Finch's Cas.* 463; *Chalmers v. Smith*, 152 Mass. 561; *Perry v. Carr*, 44 N. H. 118. The proper form of action against the tenant at will is consequently trespass, and not trespass on the case. *Salop v. Crompton*, Cro. Eliz. 777; *Goodright v. Vivian*, 8 East, 190; *Chalmers v. Smith*, *supra*.

the waste,<sup>245</sup> and the old action of waste now no longer exists in England.<sup>246</sup>

To what extent the Statutes of Marlbridge and Gloucester are in force in this country is a matter of considerable uncertainty.<sup>247</sup> But even where they are not in force, though there are no state statutes on the subject, an action of trespass on the case, or its equivalent code action, will lie to recover actual damages sustained by acts of voluntary waste.<sup>248</sup> In most states, however, there is an express statutory provision for the recovery of damages for waste, and sometimes a liability for double or treble damages is imposed.<sup>249</sup>

In view of the completeness of the remedy by an action of trespass on the case, the question whether these early English statutes are in force in any particular jurisdiction seems to be of practical importance only as regards the provisions in the Statute of Gloucester imposing liability to forfeiture and to treble damages upon the tenant committing waste. There are, in a number of states, statutes providing for one or both of these penalties,<sup>250</sup> but that of forfeiture, under either the Statute of Gloucester or local state statutes, has never been

<sup>245</sup> *Greene v. Cole*, 2 Saund. 252, notes; *Bewes, Waste*, 5.

<sup>246</sup> See 3 & 4 Wm. IV. c. 27, § 36 (A. D. 1833).

<sup>247</sup> To the effect that these statutes are not in force, see *Moore v. Ellsworth*, 3 Conn. 483; *Smith v. Follansbee*, 13 Me. 273; *Parker v. Chambliss*, 12 Ga. 235; *Woodward v. Gates*, 38 Ga. 205. That they are in force partially or wholly, see *Dozier v. Gregory*, 46 N. C. 100; *Sackett v. Sackett*, 8 Pick. (Mass.) 309.

<sup>248</sup> *Greene v. Cole*, 2 Saund. 233, note; *Bewes, Waste*, 5; 4 Kent, Comm. 81; *Thackeray v. Eldigan*, 21 R. I. 481; *Randall v. Cleaveland*, 6 Conn. 328. See *Dozier v. Gregory*, 46 N. C. 100; *Yocum v. Zahner*, 162 Pa. St. 468.

<sup>249</sup> 1 Stimson's Am. St. Law, §§ 1332, 1343. See *Stetson v. Day*, 51 Me. 434; *Moore v. Townshend*, 33 N. J. Law, 284, *Finch's Cas.* 427, 1 *Gray's Cas.* 605; *Stevens v. Rose*, 69 Mich. 259, *Finch's Cas.* 442. For summary of statutes imposing liability for waste on tenant by dower or curtesy, see 1 Stimson's Am. St. Law, §§ 3231, 3308.

<sup>250</sup> 1 Washburn, Real Prop. 122, note; 1 Stimson's Am. St. Law, §§ 1332, 1343.

avored by the courts,<sup>251</sup> and, after the rise of the action of trespass on the case for waste, but little attempt to enforce a forfeiture under the statute was made, a special provision for forfeiture in case of waste being usually inserted in the lease.<sup>252</sup>

The common-law action of waste could be brought only by one who had an estate of inheritance following immediately upon the tenancy of him committing the waste;<sup>253</sup> and it was furthermore necessary that there be what was termed "privity" between the plaintiff and defendant.<sup>254</sup> But an action on the case for waste may be brought by one having a reversion or remainder for life or years, as well as by one having a fee simple or fee tail,<sup>255</sup> and there is, by some authorities, to sustain such action, no requirement of privity of

<sup>251</sup> *Jackson v. Andrew*, 18 Johns. (N. Y.) 434; *Williard v. Williard*, 56 Pa. St. 119; *Thacher v. Phinney*, 7 Allen (Mass.) 146; *Stevens v. Rose*, 69 Mich. 259, Finch's Cas. 442.

<sup>252</sup> Notes to *Greene v. Cole*, 2 Saund. 252.

<sup>253</sup> Co. Litt. 218b, Butler's note.

<sup>254</sup> Co. Litt. 53b; 2 Inst. 301; *Foot v. Dickinson*, 2 Metc. (Mass.) 611; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260, Finch's Cas. 460; *Lander v. Hall*, 69 Wis. 331; 1 Washburn, Real Prop. 118.

"At common law, the assignee of the tenant by the curtesy cannot be sued in waste. The action ought to have been brought against the tenant himself by the heir; and the books state that thereby he shall recover the lands against the assignee, for the privity which is between the heir and tenant by the curtesy. Walker's Case, 3 Coke, 23. So, if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed, and the grantee cannot have any action of waste, but only against the assignee, for between them is privity in estate, and between them and the tenant in dower, or the tenant by the curtesy, is no privity at all." *Bates v. Shraeder*, 13 Johns. (N. Y.) 260, Finch's Cas. 460.

<sup>255</sup> *Greene v. Cole*, 2 Saund. 253, note; *McLaughlin v. Long*, 8 Har. & J. (Md.) 113; *Dozier v. Gregory*, 46 N. C. 100.



estate.<sup>256</sup> Generally, where there is a statutory provision as to waste, the persons entitled to bring the action are specified.<sup>257</sup>

— Injunction.

A court of equity may interpose by injunction to prevent the contemplated commission of waste of either a legal or equitable character,<sup>258</sup> and this it will do upon the application of any person interested in remainder or reversion.<sup>259</sup> An injunction will not generally be granted unless the applicant therefor shows that the tenant in possession has attempted to commit waste, or has taken active measures looking towards its commission, or has at least threatened to commit it.<sup>260</sup>

<sup>256</sup> *Chase v. Hazelton*, 7 N. H. 171; *Randall v. Cleaveland*, 6 Conn. 328; *Dickinson v. City of Baltimore*, 48 Md. 583; *Dupree v. Dupree*, 49 N. C. 387, 69 Am. Dec. 767; *Robinson v. Wheeler*, 25 N. Y. 252. Contra, *Bacon v. Smith*, 1 Q. B. 345; *Foot v. Dickinson*, 2 Metc. (Mass.) 611. An action on the case cannot, however, be brought by one whose interest is merely contingent. *Sager v. Galloway*, 113 Pa. St. 500. So, where the statute provides for an action by the person having the next immediate estate of inheritance. *Hupt v. Hall*, 37 Me. 363.

<sup>257</sup> 1 *Stimson's Am. St. Law*, § 1353. See *Curtiss v. Livingston*, 36 Minn. 380; *Robinson v. Wheeler*, 25 N. Y. 252.

<sup>258</sup> *O'Brien v. O'Brien*, 1 Amb. 107, 1 Gray's Cas. 580; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Fortescue v. Bowler*, 55 N. J. Eq. 741; *Williamson v. Jones*, 43 W. Va. 562; *Dickinson v. Jones*, 36 Ga. 97; *Robertson v. Meadora*, 78 Ind. 43; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Disher v. Disher*, 45 Neb. 100.

<sup>259</sup> *Bewes, Waste*, 339; *Perrot v. Perrot*, 3 Atk. 94, 1 Gray's Cas. 579; *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; *University v. Tucker*, 31 W. Va. 621; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707; *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 93; *Cannon v. Barry*, 59 Miss. 289. But not if such person's interest is so remote as to render the injury to him trivial. *Bewes, Waste*, 340; *Strother v. Barr*, 5 Bing. 136, 153. See *McLaughlin v. Long*, 5 Har. & J. (Md.) 113.

<sup>260</sup> *Bewes, Waste*, 340; *Jackson v. Cator*, 5 Ves. 688; *Hext v. Gill*, 7 Ch. App. 699.

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In cases in which an injunction is granted, an accounting may be ordered in the same proceeding as to waste already committed,<sup>261</sup> and it may, it seems, be ordered in some cases where the circumstances render an injunction unavailable.<sup>262</sup> And the person committing waste may be compelled to restore the things wasted, when this is possible.<sup>263</sup>

### § 256. The right to the proceeds of waste.

When the tenant has committed waste by severing from the land something that is a part of the inheritance, as a structure or timber on the land, the thing so severed generally belongs to the owner of the first estate of inheritance, as it does when severed by accident, as by a windstorm.<sup>264</sup>

<sup>261</sup> *Jesus College v. Bloom*, 3 Atk. 262; *Winship v. Pitta*, 3 Paige (N. Y.) 259; *Fleming v. Collins*, 2 Del. Ch. 230; *Ackerman v. Hartley*, 8 N. J. Eq. 476; *Armstrong v. Wilson*, 60 Ill. 226; *Williamson v. Jones*, 43 W. Va. 562. So, under the Code system. *Disher v. Disher*, 45 Neb. 100.

<sup>262</sup> *Bewes, Waste*, 351; *Seagram v. Knight*, 2 Ch. App. 623. See *Crockett v. Crockett*, 2 Ohio St. 180. An accounting for waste may also be ordered as incident to a discovery. *Whitfield v. Brevit*, 2 P. Wms. 240.

<sup>263</sup> *Klie v. Van Broock*, 56 N. J. Eq. 18; *Vane v. Lord Barnard*, 2 Vern. 738, 1 Gray's Cas. 572; *Rolt v. Lord Somerville*, 2 Eq. Cas. Abr. 759, 1 Gray's Cas. 577.

<sup>264</sup> *Bewes, Waste*, 193; *Bowles' Case*, 11 Coke, 79, 1 Gray's Cas. 564; *Herlakenden's Case*, 4 Coke, 62a; *Mooers v. Wait*, 3 Wend. (N. Y.) 104, *Finch's Cas.* 466, 20 Am. Dec. 667; *Bewick v. Whitfield*, 2 P. Wms. 267, 1 Gray's Cas. 574; *Lushington v. Boldero*, 15 Beav. 1, 1 Gray's Cas. 584, *Finch's Cas.* 468; *White v. Cutler*, 17 Pick. (Mass.) 248, *Finch's Cas.* 447; *Bulkley v. Dolbeare*, 7 Conn. 232; *Richardson v. York*, 14 Me. 216; *Johnson v. Johnson*, 18 N. H. 584, *Finch's Cas.* 445; *Lane v. Thompson*, 43 N. H. 320; *Williamson v. Jones*, 43 W. Va. 562.

The exceptions to this general rule, established in the English courts of equity, apply in the case of timber cut on land which is settled for life and in remainder, and have little application in this country. They exist in the case of cutting by collusion between the life tenant and a remainderman, to the injury of one whose estate is (578)

A tenant is entitled to the proceeds of such wood as may be rightfully severed by him, whether he makes the severance,<sup>265</sup> or it is the result of a windstorm or other action of the elements;<sup>266</sup> and the same principle applies to the proceeds of other acts which do not involve waste. So, in the case of a tenancy without impeachment of waste, the proceeds of trees or minerals severed from the land, either by the elements or by a stranger, belong to the tenant, as if they were severed by him;<sup>267</sup> and he is also, upon the vesting of his estate in possession, entitled to the proceeds of a severance made during the possession of previous tenants for life, unimpeachable of waste, under the same settlement.<sup>268</sup>

### § 257. Waste by cotenant.

While, at common law, there was no right of action in favor of one tenant in common against a cotenant for waste

tate of inheritance vests subsequently, in which case the latter is protected, and also when the cutting is by order of court, or the court ratifies the cutting, in which cases the proceeds are settled so as to follow the land itself, the life tenant thus receiving the income. See *Garth v. Cotton*, 1 Ves. 546, 1 White & T. Lead. Cas. Eq. 961; *Honywood v. Honeywood*, L. R. 18 Eq. 306, 1 Gray's Cas. 598; *Gent v. Harrison*, Johns. 517, 1 Gray's Cas. 589; *Lushington v. Boldero*, 15 Beav. 1, 1 Gray's Cas. 584, Finch's Cas. 468.

In England, while timber wrongfully cut by the tenant belongs to the inheritance, other wood cut by him under such circumstances that the cutting is waste belongs, at least at law, to the tenant himself. *Honywood v. Honeywood*, L. R. 18 Eq. 306, 1 Gray's Cas. 598.

<sup>265</sup> *Clement v. Wheeler*, 25 N. H. 361; *Keeler v. Eastman*, 11 Vt. 293; *Proffitt v. Henderson*, 29 Mo. 325; *Crockett v. Crockett*, 2 Ohio St. 180.

<sup>266</sup> *Bateman v. Hotchkin*, 31 Beav. 436, 1 Gray's Cas. 574, note; *Herlakenden's Case*, 4 Coke, 63a; *Bowles' Case*, 11 Coke, 79b, 1 Gray's Cas. 564.

<sup>267</sup> *Bowles' Case*, 11 Coke, 79b, 1 Gray's Cas. 564; *Bewes, Waste*, 151; *Anonymous, Mosely*, 237; *In re Barrington*, 33 Ch. Div. 523.

<sup>268</sup> *Gent v. Harrison*, Johns. 517, 1 Gray's Cas. 589; *Lowndes v. Norton*, 6 Ch. Div. 139.

committed by the latter, this right was given by an early statute.<sup>269</sup> There are in some states in this country somewhat similar statutes giving a right of action to a tenant in common or joint tenant against his cotenant on account of waste committed by the latter.<sup>270</sup> In some states there is such a right of action, it seems, independently of statute.<sup>271</sup>

The cutting of timber may thus give a right of action to a cotenant if carried on to such an extent as to diminish the value of the property, and if not within the limits of its reasonable use and enjoyment.<sup>272</sup> Since, however, each tenant is entitled to the possession and enjoyment of the common property, acts of one tenant cannot, it seems, be regarded as waste, unless they amount in effect to an ouster of the other, or a destruction of the common property.<sup>273</sup>

An injunction may issue to restrain waste by a cotenant when otherwise irreparable injury might result, but generally, as a cotenant is entitled to the possession and use of the land, an injunction will not issue.<sup>274</sup>

<sup>269</sup> *St. Westminster II.* (13 Edw. I., A. D. 1285) c. 22. See *Co. Litt.* 200a, 200b; 2 *Cruise, Dig.* tit. 18, c. 1, § 65; *Id.* tit. 20, § 9; *Wilkinson v. Haygarth*, 12 Q. B. 837, 6 *Gray's Cas.* 646.

<sup>270</sup> *McCord v. Oakland Quicksilver Min. Co.*, 64 *Cal.* 134, 49 *Am. Rep.* 687, *Finch's Cas.* 396; *Murray v. Haverty*, 70 *Ill.* 318; *Maxwell v. Maxwell*, 31 *Me.* 184, 50 *Am. Dec.* 657; *Benedict v. Torrent*, 83 *Mich.* 181, 21 *Am. St. Rep.* 589; *Cosgriff v. Dewey*, 164 *N. Y.* 1; *Childs v. Kansas City, St. J. & C. B. R. Co. (Mo.)* 17 *S. W.* 954; *Cecil v. Clark* 47 *W. Va.* 402; *Morrison v. Morrison*, 122 *N. C.* 598. See 1 *Stimson's Am. St. Law*, § 1377.

<sup>271</sup> *Dodge v. Davis*, 85 *Iowa*, 77; *Childs v. Kansas City, St. J. & C. B. R. Co.*, 117 *Mo.* 414.

<sup>272</sup> *Martyn v. Knowllys*, 8 *Term R.* 145, 6 *Gray's Cas.* 645; *Maxwell v. Maxwell*, 31 *Me.* 184, 50 *Am. Dec.* 657; *Benedict v. Torrent*, 83 *Mich.* 181, 21 *Am. St. Rep.* 589; *Elwell v. Burnside*, 44 *Barb. (N. Y.)* 447; *Johnson's Adm'r v. Johnson*, 2 *Hill Eq. (S. C.)* 277, 29 *Am. Dec.* 72, *Finch's Cas.* 398.

<sup>273</sup> *Co. Litt.* 322; *McCord v. Oakland Quicksilver Min. Co.*, 64 *Cal.* 134, 49 *Am. Rep.* 687, *Finch's Cas.* 396. See *Jacobs v. Seward*, *L. R.* 5 *H. L.* 464.

<sup>274</sup> *Hole v. Thomas*, 7 *Ves.* 539; *Russell v. Merchants' Bank of* (580)

## VII. BOUNDARIES.

Equity may appoint a commission to determine the boundary line between adjoining owners, if there is some ground other than the uncertainty of the boundary for the interposition of equity. By statute, likewise, in some states, an owner may take proceedings to have his boundary determined.

An oral agreement between adjoining owners, settling a disputed boundary line, is valid, at least if followed by possession in accordance therewith.

In many states continued recognition by adjoining owners of a certain line as the boundary line between their lands is conclusive upon both.

## § 258. Judicial determination.

The questions most frequently arising in connection with the subject of the boundaries of land involve their ascertainment with reference to a description in a particular conveyance; that is, the determination of the exact limits of the tract conveyed. These questions will be discussed in a subsequent part of the work in connection with conveyances of land.<sup>275</sup> The question whether the government or the littoral or riparian proprietor is the owner of land under water is frequently discussed as a matter of boundary, but it has seemed preferable to treat it separately as a question whether the ownership of the submerged land is a right incident to the ownership of the littoral or riparian land.<sup>276</sup>

There is, apart from statute, no proceeding at law by which one owner of land can obtain an adjudication as to the proper location of a boundary line, as between him and the adjoining

Lake City, 47 Minn. 286, 28 Am. St. Rep. 368; *Obert v. Obert*, 5 N. J. Eq. 397; *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 687, *Finch's Cas.* 396.

<sup>275</sup> See post, §§ 387-393.

<sup>276</sup> See post, §§ 264-267.

ing owner, though he has a remedy by trespass or ejectment for disregard of the proper line by the latter.<sup>277</sup>

A court of equity will, in some cases, issue a commission for the determination of a boundary line, but this will not be done unless there is some ground for equitable interference other than the uncertainty of the boundary.<sup>278</sup> Such equitable ground for the issuance of a commission exists when the effect will be to avoid a multiplicity of suits,<sup>279</sup> and also when one of the parties is in the relation of tenant to the one seeking relief, and therefore under an obligation to preserve the boundary between the land of his landlord and any land adjacent thereto which he may own.<sup>280</sup>

In many of the states, jurisdiction is expressly given by statute to particular courts to ascertain and establish boundary lines which are uncertain or in dispute, by means of officials to be named, frequently called "processioners," who, after investigating the question of the boundary, report thereon to the court, which may or may not approve their finding.<sup>281</sup>

<sup>277</sup> 2 Leake, 10; Sedgwick & W. Trial of Title to Land, § 865.

<sup>278</sup> 3 Pomeroy, Eq. Jur. § 1384; Wake v. Conyers, 1 Eden, 331, 2 White & T. Lead. Cas. Eq. 850; Miller v. Warmington, 1 Jac. & W. 492; Wetherbee v. Dunn, 36 Cal. 249; Perry v. Pratt, 31 Conn. 433; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; De Veney v. Gallagher, 20 N. J. Eq. 33; Norris' Appeal, 64 Pa. St. 275; Hough v. Martin, 22 N. C. 379, 34 Am. Dec. 403; Wolfe v. Scarborough, 2 Ohio St. 361; Stuart's Heirs v. Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731, note; Cresap v. Kemble, 26 W. Va. 603.

<sup>279</sup> Wake v. Conyers, 1 Eden, 331, 2 White & T. Lead. Cas. Eq. 850; Bute v. Glamorganshire Canal Co., 1 Phillip, 681; Culver v. Rodgers, 33 Ohio St. 537; De Veney v. Gallagher, 20 N. J. Eq. 33; Boyd v. Dowle, 65 Barb. (N. Y.) 237.

<sup>280</sup> Attorney General v. Fullerton, 2 Ves. & B. 264; Spike v. Harding, 7 Ch. Div. 871.

<sup>281</sup> See 4 Am. & Eng. Enc. Law (2d Ed.) 842; Perry v. Pratt, 31 Conn. 433; Love v. Morrill, 19 Or. 545; Gates v. Brooks, 59 Iowa 110; Washington Co. v. Matteson, 11 R. I. 550; Atkins v. Huston, (582)

**§ 259. Express agreement as to boundary.**

There are, in this country, a great number of decisions bearing upon the effect of an agreement by adjoining owners as to the boundary line between their lands, or of their recognition of a certain line as the boundary without any express agreement in relation thereto. These decisions are frequently most unsatisfactory in their discussion of the principles involved, and, purporting, as they variously do, to be based on principles of agreement, "acquiescence," "practical location," estoppel, or the statute of limitations, it is impossible to deduce from them any generally accepted rules upon the subject.

An agreement between adjoining owners as to the location of a boundary line, though merely oral, is not, it is generally conceded, invalid as being within the Statute of Frauds, provided the agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided, further, that the proper location of the line is uncertain or in dispute; the theory being that the agreement does not, in such case, involve any transfer of title to land, but merely an application of the language of the instruments under which the owners claim.<sup>282</sup> On the other hand, it is

106 Ill. 492; *Amos v. Parker*, 88 Ga. 754; *Johnson v. Norton*, 3 B. Mon. (Ky.) 429; *Porter v. Durham*, 90 N. C. 55.

<sup>282</sup> *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *White v. Spreckels*, 75 Cal. 610; *Fisher v. Bennehoff*, 121 Ill. 426; *Berg-hoefer v. Frazier*, 150 Ill. 577; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Brummell v. Harris*, 148 Mo. 430; *Archer v. Helm*, 69 Miss. 730; *Tritt v. Hoover*, 116 Mich. 4; *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. 242; *O'Donnell v. Penney*, 17 R. I. 164; *Lindsay v. Springer*, 4 Har. (Del.) 547; *Coleman v. Smith*, 55 Tex. 254; *Gwynn v. Schwartz*, 32 W. Va. 487; *Harrell v. Houston*, 66 Tex. 278; *Clark v. Hulsey*, 54 Ga. 608; *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109; *Young v. Woollett*, 16 Ky. Law Rep. 767, 29 S. W. 879; *Helm v. Wilson*, 76 Cal. 476; *Tritt v. Hoover*, 116 Mich. 4; *Idaho Land Co. v. Parsons*, 2 Idaho, 1191; *St. Bede College v. Weber*, 168 Ill. 324.

held that, if the boundary line is not doubtful or in dispute, an oral agreement for its change is invalid, this involving an actual transfer of land, within the statute.<sup>283</sup> Why the agreement, to be effective as locating the line, must be followed by possession in accordance therewith, in order to be outside of the scope of the statute, does not appear from the decisions, and, according to some cases, it would seem that the oral agreement would be sufficient without such subsequent possession.<sup>284</sup>

An agreement thus effectual, as between the parties thereto, also concludes their successors in title.<sup>285</sup>

By a few cases, however, an agreement as to the line, based on a mistake by one of the parties as to the proper location of the line, is not regarded as binding on him; and such an agreement, even if followed by possession in accordance therewith, is merely evidence upon the question of the true line.<sup>286</sup>

### § 260. Implied agreement or acquiescence.

Though there be no express agreement as to the location

<sup>283</sup> *Olin v. Henderson*, 120 Mich. 149; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *Gayheart v. Cornett*, 19 Ky. Law Rep. 1052, 42 S. W. 730; *De Long v. Baldwin*, 111 Mich. 466; *Vosburgh v. Teator*, 32 N. Y. 561; *Lennox v. Hendricks*, 11 Or. 33; *Hartung v. Witte*, 59 Wis. 285; *Nichol v. Lytle's Lessee*, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240.

<sup>284</sup> *Galbraith v. Lunsford*, 87 Tenn. 89; *Hitchcock v. Libby* (N. H.) 47 Atl. 269; *Terry v. Chandler*, 16 N. Y. 354, 69 Am. Dec. 707; *Boyd's Lessee v. Graves*, 4 Wheat. (U. S.) 513; *Bobo v. Richmond*, 25 Ohio St. 115; *Hagey v. Detweiler*, 35 Pa. St. 409; *Lecomte v. Toudouze*, 82 Tex. 208, 27 Am. St. Rep. 870.

<sup>285</sup> *Orr v. Foote*, 10 B. Mon. (Ky.) 387; *Bartlett v. Young*, 63 N. H. 265; *Hagey v. Detweiler*, 35 Pa. St. 409; *Trussell v. Lewis*, 13 Neb. 415, 42 Am. Rep. 767; *Leonard v. Quinlan*, 121 Mass. 579; *Smith v. McCorkle*, 105 Mo. 135.

<sup>286</sup> *Liverpool Wharf v. Prescott*, 7 Allen (Mass.) 494; *Tolman v. Sparhawk*, 5 Metc. (Mass.) 469; *Gove v. Richardson*, 4 Me. 377; *Schraeder Min. & Mfg. Co. v. Packer* 129 U. S. 688. See *Coom v. Smith*, 29 N. Y. 392; *Pickett v. Neison*, 71 Wis. 542, 79 Wis. 2.



of the boundary line, it has been frequently decided that adjoining proprietors cannot question a line which they have, for a considerable number of years, recognized as the correct line between their properties. Some of the cases base this doctrine upon the theory that such recognition of or "acquiescence" in a certain line is evidence of an agreement,<sup>287</sup> while others seem rather to regard it as an independent rule of law, dictated by general considerations of justice and expediency, in order that uncertainty and disturbance of boundaries be avoided.<sup>288</sup> In a few states, however, such acquiescence in or recognition of a line is merely evidence in regard thereto, and may be contradicted.<sup>289</sup>

Some of the cases require this acquiescence, in order to be thus conclusive, to have continued for the length of time fixed by the statute of limitations for the recovery of land, not, apparently, on the view that the case is within that statute, but by way of analogy thereto.<sup>290</sup> Others suggest no such requirement, it being stated merely that the acquiescence in the line must have continued for "a considerable time," or equivalent language being used, and no rule as to the number of years being laid down.<sup>291</sup> The erection and continued ex-

<sup>287</sup> *Clayton v. Feig*, 179 Ill. 534; *O'Donnell v. Penney*, 17 R. I. 164; *Galbraith v. Lunsford*, 87 Tenn. 89; *Jacobs v. Moseley*, 91 Mo. 457; *Ernsting v. Gleason*, 137 Mo. 594; *Dibble v. Rogers*, 18 Wend. (N. Y.) 536; *Pickett v. Nelson*, 71 Wis. 542, 79 Wis. 9; *Gwynn v. Schwartz*, 32 W. Va. 487.

<sup>288</sup> *Sherman v. Kane*, 86 N. Y. 57; *Baldwin v. Brown*, 16 N. Y. 359; *O'Donnell v. Penney*, 17 R. I. 164; *Miller v. Mills County*, 111 Iowa, 654.

<sup>289</sup> *Bohny v. Petty*, 81 Tex. 524; *Whitcomb v. Dutton*, 89 Me. 212; *Hathaway v. Evans*, 108 Mass. 267.

<sup>290</sup> *Miller v. Mills County*, 111 Iowa, 654; *O'Donnell v. Penney*, 17 R. I. 164; *Sneed v. Osborn*, 25 Cal. 619; *Gwynn v. Schwartz*, 32 W. Va. 487; *Lowndes v. Wicks*, 69 Conn. 15. See *Richardson v. Chickering*, 41 N. H. 380; *Mullaney v. Duffy*, 145 Ill. 559.

<sup>291</sup> *Husted v. Willoughby*, 117 Mich. 56; *Palmer v. Dosch*, 148 Ind. 10; *Welton v. Poynter*, 96 Wis. 346; *Katz v. Kaiser*, 154 N. Y. 294; *Wollman v. Ruehle*, 100 Wis. 31; *Whitcomb v. Dutton*, 89 Me. 212;

istence of a fence has been regarded as an acquiescence in the fence as marking the boundary, provided the fence is recognized as a partition fence, and not as an erection for mere purposes of convenience.<sup>292</sup>

It is sometimes said that the "practical location" of a boundary line is conclusive. This expression, as between the parties to a conveyance, means merely its practical construction by them by a location of the boundaries;<sup>293</sup> but when used in reference to a line between adjoining owners, not parties to a conveyance, it seems to have the same meaning as the term "acquiescence," explained above.<sup>294</sup>

§ 261. Estoppel to question boundary.

The principle of estoppel *in pais* is sometimes applied so as to prevent one who has recognized a certain line as the boundary between his own and other land from thereafter asserting that this is not the correct line, especially when improvements have been made by the other proprietor with reference to such line.<sup>295</sup> And the same result follows misrepresentations as to the boundary line made to an intending purchaser of land by the owner of the adjoining land.<sup>296</sup>

*Lowndes v. Wicks*, 69 Conn. 15; *Coleman v. Smith*, 55 Tex. 254; *Haring v. Van Houten*, 22 N. J. Law, 61; *Smith v. Hamilton*, 20 Mich. 433, 4 Am. Rep. 398; *Brummell v. Harris*, 148 Mo. 430; *Robards v. Rogers*, 20 Ky. Law Rep. 1017, 48 S. W. 154; *Sherman v. Kane*, 86 N. Y. 57; *Culbertson v. Duncan* (Pa.) 13 Atl. 996.

<sup>292</sup> *Darst v. Enlow*, 116 Ill. 475; *Jones v. Smith*, 64 N. Y. 180; *Columbet v. Pacheco*, 48 Cal. 395; *Burris v. Fitch*, 76 Cal. 395. But see *West v. St. Louis, K. C. & N. Ry. Co.*, 59 Mo. 510; *Hockmuth v. Des Grands Champs*, 71 Mich. 520.

<sup>293</sup> See post, § 390.

<sup>294</sup> See *Jones v. Smith*, 64 N. Y. 180; *Corning v. Troy Iron & Nail Factory*, 44 N. Y. 577; *Beardsley v. Crane*, 52 Minn. 537.

<sup>295</sup> *Major's Heirs v. Rice*, 57 Mo. 384; *Joyce v. Williams*, 26 Mich. 332; *Sumner v. Seaton*, 47 N. J. Eq. 103; *Trustees of Town of Brookhaven v. Smith*, 118 N. Y. 634; *Galbraith v. Lunsford*, 87 Tenn. 89; *Ross v. Ferree*, 95 Iowa, 604.

<sup>296</sup> *Pitcher v. Dove*, 99 Ind. 175; *Merriwether v. Larmon*, 3 Sneed (586)

In the cases previously referred to, the fact that the person estopped was ignorant of or mistaken as to the true line at the time of assenting to the correctness of another line seems to have been regarded as not affecting the estoppel; but, by other cases, knowledge that the line indicated or assented to was incorrect is regarded as essential,<sup>297</sup>—a view which is apparently more in consonance with the principles underlying the law of estoppel.

#### VIII. FENCES.

At common law one must fence his land to prevent his cattle from trespassing on others' land, but not to prevent trespasses by others' cattle on his land. This rule prevails in some states in this country, and in others a contrary rule prevails. Railroads are subject to the same rules as private owners in this respect, except in jurisdictions where the statute requires railroads to be fenced.

##### § 262. The duty to fence.

At common law, an owner of land is under no obligation to fence his land, in order to keep the cattle of others from straying thereon, but there is an absolute obligation upon the owner of cattle to restrain them, by fences or other means,

(Tenn.) 447; *Spiller v. Scribner*, 36 Vt. 245; *Richardson v. Chickering*, 41 N. H. 380; *Chadwell v. Chadwell*, 93 Tenn. 201; *Swayze's Ex'r v. Carter*, 41 N. J. Eq. 231; *Weisbrod v. Chicago & N. Ry. Co.*, 18 Wis. 40, 86 Am. Dec. 743; *Hefner v. Downing*, 57 Tex. 576; *Timon v. Whitehead*, 58 Tex. 290.

<sup>297</sup> *Cheaney v. Nebraska & C. Stone Co.*, 41 Fed. 740; *Liverpool Wharf v. Prescott*, 7 Allen (Mass.) 494; *Combs v. Cooper*, 5 Minn. 254 (Gil. 200); *Parker v. Brown*, 15 N. H. 176; *Titus v. Morse*, 40 Me. 348, 63 Am. Dec. 665; *Stanwood v. McLellan*, 48 Me. 275; *Maye v. Yappen*, 23 Cal. 306; *Brewer v. Boston & B. R. Corp.*, 5 Metc. (Mass.) 478, 39 Am. Dec. 694; *Lovelace v. Carpenter*, 115 N. C. 424; *Mullaney v. Duffy*, 145 Ill. 559; *Proctor v. Putnam Mach. Co.*, 137 Mass. 159; *Liverpool Wharf v. Prescott*, 7 Allen (Mass.) 494; *Cronin v. Gore*, 28 Mich. 381.

from straying on the land of others,<sup>298</sup> except in the single case of cattle which are being properly driven on the highway.<sup>299</sup>

In some of the states the common-law rule has been recognized as in force, enabling the owner of unfenced land to recover for injury caused by cattle trespassing thereon, without reference to the negligence of their owner,<sup>300</sup> and in some states this rule has been confirmed by statute.<sup>301</sup> In many, perhaps a majority, of the states, this rule is no longer in force, owing either to express legislation to the contrary, or as being inconsistent with the custom of the community to allow live stock to run at large, and legislation recognizing such custom;<sup>302</sup> and in some states the question whether cattle shall be allowed to run at large, and whether the owner of land must fence against them, is a matter which each

<sup>298</sup> 3 Bl. Comm. 211; Gale, Easements (7th Ed.) 440; Boyle v. Tamlyn, 6 Barn. & C. 329, 337; Rust v. Low, 6 Mass. 90.

<sup>299</sup> Hartford v. Brady, 114 Mass. 466, 19 Am. Rep. 377; Lord v. Wormwood, 29 Me. 282; Avery v. Maxwell, 4 N. H. 36; Dovaston v. Payne, 2 H. Bl. 527, 2 Gray's Cas. 580.

<sup>300</sup> 2 Shearman & R. Neg. (5th Ed.) 655; Holladay v. Marsh, 3 Wend. (N. Y.) 143, 20 Am. Dec. 678; Thayer v. Arnold, 4 Metc. (Mass.) 589; Noyes v. Colby, 80 N. H. 143; Bonner v. De Loach, 78 Ga. 50; Webber v. Closson, 35 Me. 26; Vandegrift v. Rediker, 22 N. J. Law, 185, 51 Am. Dec. 262.

<sup>301</sup> Bulpit v. Matthews, 145 Ill. 345; Wells v. Beal, 9 Kan. 597; Hahn v. Garratt, 69 Cal. 146; Little v. McGuire, 38 Iowa, 560.

<sup>302</sup> Merritt v. Hill, 104 Cal. 184; Savannah, F. & W. Ry. Co. v. Gelger, 21 Fla. 669, 58 Am. Rep. 697; Delaney v. Errickson, 10 Neb. 492; Sprague v. Fremont, E. & M. V. R. Co., 6 Dak. 86; Kerwhaker v. Cleveland, O. & C. R. Co., 3 Ohio St. 172, 63 Am. Dec. 246; Seeley v. Peters, 10 Ill. 130; Pruitt v. Ellington, 59 Ala. 454; Hine v. Wooding, 37 Conn. 123; Clark v. Stipp, 75 Ind. 114; Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Pace v. Potter, 85 Tex. 473. See 1 Stimson's Am. St. Law, § 2189; 12 Am. & Eng. Enc. Law (2d Ed.) 1042 et seq.

The common-law rule has been decided not to apply to cattle grazing on public lands of the United States. Buford v. Houts, 133 U. S. 320.

particular county or other municipal division of the state is allowed to decide for itself.<sup>303</sup>

The effect of statutes altering the common law is limited to negating a right of recovery for injuries by trespassing cattle, and they impose no obligation upon one to fence land belonging to him, as against the public.<sup>304</sup>

### § 263. Railroad fences.

The common-law rule exempting landowners from the obligation of fencing against animals, where it is in force and there is no special statute on the subject, applies to railroad companies as well as to individuals, and such a company is consequently entitled to recover for injuries caused by animals trespassing on its grounds or track, and is not liable for injuries to such animals unless guilty of such negligence as would render it liable to any trespassers.<sup>305</sup> In those states where the common-law rule is not in force, "the owners of cattle, except as otherwise prescribed by statute, are not bound to keep them in, and railroad companies are not bound to keep them out."<sup>306</sup> The owner of the cattle is, accordingly, not liable for damage to the railroad by reason of their trespass thereon, and he may recover for injuries to them caused by the failure of the company to use ordinary care.<sup>307</sup>

<sup>303</sup> *Mathis v. Jones*, 84 Ga. 804; *Bulphitt v. Matthews*, 145 Ill. 345; *Lammert v. Lidwell*, 62 Mo. 188; *Wells v. Beal*, 9 Kan. 597; 1 *Stimson's Am. St. Law*, § 2190.

<sup>304</sup> 12 *Am. & Eng. Enc. Law* (2d Ed.) 1044; *Westgate v. Carr*, 43 Ill. 450; *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59; *Kerwhaker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246.

<sup>305</sup> 2 *Shearman & R. Neg.* § 418; *Fawcett v. York & N. M. Ry. Co.*, 16 Q. B. 610; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202; *Vandergrift v. Rediker*, 22 N. J. Law, 185, 51 Am. Dec. 262.

<sup>306</sup> 2 *Shearman & R. Neg.* § 419.

<sup>307</sup> *Mobile & O. R. Co. v. Williams*, 53 Ala. 593; *Kerwhaker v.*

In England and in many states in this country, there is a statutory regulation requiring all railroad tracks to be fenced.<sup>308</sup> In some jurisdictions these statutes either expressly or by implication impose a duty on the railroad company for the benefit of the adjoining landowner only,<sup>309</sup> while in others they are regarded as for the benefit of the public generally, and as giving a right of action to any person injured by their violation.<sup>310</sup>

#### IX. LAND UNDER WATER.

Land under navigable tide waters belongs *prima facie* to the state, as does, in some states, land under navigable non-tidal streams. In other states, land under such streams belongs to the riparian proprietors or other individuals, as does land under non-navigable streams in all the states.

Land under the larger lakes belongs generally to the state, and that under the smaller lakes and ponds to individuals.

The owner of land bordering on navigable water has generally a right of access to the water for purposes of navigation, of which he cannot be deprived, and likewise he has rights, varying in different states, of erecting wharves or making reclamations on the shore or banks.

Cleveland, C. & C. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; *Moses v. Southern Pac. R. Co.*, 18 Or. 385; *Layne v. Ohio River R. Co.*, 35 W. Va. 438; *Prickett v. Atchison, T. & S. F. R. Co.*, 33 Kan. 748; *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573; *Hill v. Missouri Pac. Ry. Co.*, 49 Mo. App. 520, 121 Mo. 477.

<sup>308</sup> 2 Shearman & R. Neg. § 421 et seq.; 12 Am. & Eng. Enc. Law. 1063.

<sup>309</sup> *Ricketts v. East & West India, D. & B. J. Ry. Co.*, 12 C. B. 160; *Dawson v. Midland Ry. Co.*, L. R. 8 Exch. 8; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Allen v. Boston & Maine R. R.*, 87 Me. 326; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246; *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676.

<sup>310</sup> *Warren v. Keokuk & D. M. R. Co.*, 41 Iowa. 484; *Jeffersonville, M. & I. R. Co. v. Nichols*, 30 Ind. 321; *McCall v. Chamberlain*, 13 Wis. 637; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Gill v. Atlantic & G. W. Ry. Co.*, 27 Ohio St. 240. See 12 Am. & Eng. Enc. Law, 1067.

(590)

The private owner of land under water is entitled to the ice formed on the water, while the public are entitled to that formed over land belonging to the state.

§ 264. Tide waters.

Tide waters are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description. A body of water cannot be considered as tidal merely because, under unusual circumstances, the level of the water is affected by the tide,<sup>311</sup> nor is the amount of salt in the water material.<sup>312</sup>

The crown in England, and in this country the state, has rights of jurisdiction and control over the sea and the bed thereof for a distance of three miles from low-water mark.<sup>313</sup>

Land under tide waters within the state, below low-water mark, belongs to the state,<sup>314</sup> except, it seems, in the case of creeks and inlets of the sea so small as not to be susceptible of use for navigation.<sup>315</sup>

Land bordering on the sea, or on an arm thereof, and lying above ordinary low-water mark, but below ordinary high-water mark, is known as the "shore," and this belongs, *prima facie*, to the state.<sup>316</sup> The state's right of ownership in the

<sup>311</sup> *Reece v. Miller*, 8 Q. B. Div. 626, 2 Gray's Cas. 567.

<sup>312</sup> *Peyroux v. Howard*, 7 Pet. (U. S.) 343; *Attorney General v. Woods*, 108 Mass. 436; *People v. Tibbetts*, 19 N. Y. 523; *Gould, Waters*, § 44.

<sup>313</sup> *Gould, Waters*, §§ 7-16. See *Reg. v. Keyn*, 2 Exch. Div. 63; *Manchester v. Massachusetts*, 139 U. S. 241.

<sup>314</sup> *Martin v. Waddell's Lessee*, 16 Pet. (U. S.) 367; *Shively v. Bowlby*, 152 U. S. 1; *Com. v. City of Roxbury*, 9 Gray (Mass.) 451; *State v. Sargent*, 45 Conn. 358; *Coburn v. Ames*, 52 Cal. 385; *Langdon v. City of New York*, 93 N. Y. 129.

<sup>315</sup> *Com. v. Inhabitants of Charlestown*, 1 Pick. (Mass.) 179, 186; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 343, 359; *Gould, Waters*, § 43, note.

<sup>316</sup> *Gould, Waters*, §§ 4, 27, 169-175, 178; 3 Kent, Comm. 427; *Barney v. Keokuk*, 94 U. S. 324; *Gough v. Bell*, 21 N. J. Law, 156;

shore is, however, merely in trust for the public, and it cannot dispose of the shore to an individual so as to enable him to make use of it in a way which will impair the public rights of navigation and fishing.<sup>317</sup> Subject to this requirement, that the rights of the public shall be protected, the state may grant the shore to the owner of the adjoining land or to any other individual,<sup>318</sup> and the latter may, it seems, obtain title thereto by acts of user continued for such a length of time as to give prescriptive rights.<sup>319</sup>

Whether the ownership of the shore is in the state or an

*Hathaway v. Wilson*, 123 Mass. 361; *People v. Morrill*, 26 Cal. 336; *Eisenbach v. Hatfield*, 2 Wash. St. 236. See, especially, the opinion of Justice Gray in *Shively v. Bowlby*, 152 U. S. 1, where the whole law of the subject is reviewed. The "ordinary" high-water mark, for determining the line between the shore and the land of the adjoining proprietor, is that indicated "by the average of these medium tides in each quarter of a lunar revolution" (*Attorney General v. Chambers*, 4 De Gex, M. & G. 206, 2 Gray's Cas. 543), or, as otherwise expressed, by "the medium line between the ordinary line of high water in ordinary spring tides at the full and change of the moon, and the ordinary line of high water at neap tides, at about midway in time between the full and change of the moon" (*Com. v. City of Roxbury*, 9 Gray [Mass.] 451, 483).

<sup>317</sup> *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348, 357; *Com. v. Alger*, 7 Cush. (Mass.) 53, 65; *Nichols v. City of Boston*, 98 Mass. 39; *Bell v. Gough*, 23 N. J. Law, 624, affirming 23 N. J. Law, 441; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71; *Clement v. Burns*, 43 N. H. 609. See *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387.

<sup>318</sup> *Shively v. Bowlby*, 152 U. S. 1; *Rivas v. Solary*, 18 Fla. 123; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71; *Gough v. Bell*, 22 N. J. Law, 441; *Com. v. Alger*, 7 Cush. (Mass.) 53; *City of Galveston v. Menard*, 23 Tex. 349.

<sup>319</sup> 2 Kent, Comm. 427; *Gould, Waters*, §§ 22, 23, 37; *Nichols v. City of Boston*, 98 Mass. 39; *Church v. Meeker*, 34 Conn. 421.

In Maine and Massachusetts, by the terms of a general grant made at an early date, the shore in most cases belongs to the proprietor of the land adjoining. *Duncan v. Sylvester*, 24 Me. 482; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Com. v. City of Roxbury*, 9 Gray (Mass.) 451.



individual, it is subject to the right of navigation in the public, and also to the right of the public to take fish thereon and therefrom.<sup>320</sup> The public has, as against an individual proprietor of the shore, in case this has been granted by the state, no right to make use thereof for any purpose other than navigation and fishing. Hence there is no general right to take sand or gravel therefrom, or even fish shells, as distinct from fish;<sup>321</sup> nor can the public go on the shore for the purpose of bathing.<sup>322</sup>

If the shore belongs to the state, the individual proprietor of the adjoining land has no right to the seaweed on the shore,<sup>323</sup> but an individual owning the shore is entitled to the seaweed lying thereon,<sup>324</sup> though not to that floating in the water thereover.<sup>325</sup>

### § 265. Navigable non-tidal streams.

As to the ownership of the bed of a stream which is navigable, but not tidal, or of that part of a navigable stream above the ebb and flow of the tide, the decisions in this country are not in accord. In England, where most, if not all, navigable streams are subject to the ebb and flow of the tide, the terms "navigable" and "tidal" are, in effect, synonymous; and the rule there established, that the bed of navigable rivers *prima facie* belongs to the crown, gives the bed, in effect, to

<sup>320</sup> See post, §§ 368, 369.

<sup>321</sup> Gould, *Waters*, § 24; *Porter v. Shehan*, 7 Gray (Mass.) 435; *Clement v. Burns*, 43 N. H. 609; *Merwin v. Wheeler*, 41 Conn. 14; *State v. Wilson*, 42 Me. 9, 28.

<sup>322</sup> *Blundell v. Catterall*, 5 Barn. & Ald. 268, 2 Gray's Cas. 519; *Hetfield v. Baum*, 35 N. C. 394, 57 Am. Dec. 563.

<sup>323</sup> *Mather v. Chapman*, 40 Conn. 382, Finch's Cas. 351.

<sup>324</sup> *Emans v. Turnbull*, 2 Johns. (N. Y.) 313; *Phillips v. Rhodes*, 7 Metc. (Mass.) 322; *Church v. Meeker*, 34 Conn. 421; *Nudd v. Hobbs*, 17 N. H. 524.

<sup>325</sup> *Anthony v. Gifford*, 2 Allen (Mass.) 549. See *Chapman v. Kimball*, 9 Conn. 38.

the crown, only where the tide ordinarily ebbs and flows, and beyond that point the soil is presumptively in the riparian owners.<sup>326</sup>

In this country the English rule, regarding a "navigable" river as one in which the tide ebbs and flows, has been adopted in some states, the result being that the title to the bed above tide water is in the riparian owners, and not in the state.<sup>327</sup> In many states, however, in view of the numerous streams which are navigable, but not tidal, the English rule has been discarded, and ownership is regarded as resting in the state wherever the waters are capable of use for navigation.<sup>328</sup> In the United States courts, moreover, the English rule has been repudiated in the determination of the limits of the admiralty jurisdiction over navigable waters.<sup>329</sup> In states in which the English rule is thus repudiated, the riparian owner is, by some decisions, regarded as holding to high-water mark,<sup>330</sup> and by others as holding to low-water mark.<sup>331</sup>

<sup>326</sup> *Royal Fishery of the Banne*, Sir John Davies, 149; *Murphy v. Ryan*, 2 Ir. R. C. L. 143; *Pearce v. Scotcher*, 9 Q. B. Div. 162; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Reece v. Miller*, 8 Q. B. Div. 626, 2 Gray's Cas. 567.

<sup>327</sup> *Inhabitants of Deerfield v. Arms*, 17 Pick. (Mass.) 41, *Finch's Cas.* 108; *Washington Ice Co. v. Shortall*, 101 Ill. 46, *Finch's Cas.* 137; *Brown v. Chadbourne*, 31 Me. 9, 2 Gray's Cas. 573, 50 Am. Dec. 641; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Day v. Day*, 22 Md. 530; *June v. Purcell*, 36 Ohio St. 396; *Com. v. Chapin*, 5 Pick. (Mass.) 199. See Gould, *Waters*, §§ 56-75.

<sup>328</sup> *Carson v. Blazer*, 2 Bin. (Pa.) 475, 4 Am. Dec. 463, 2 Gray's Cas. 570; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 84 Am. Dec. 527; *McManus v. Carmichael*, 3 Iowa, 1; *State v. Black River Phosphate Co.*, 27 Fla. 276; *People v. Canal Appraisers*, 33 N. Y. 461; *Benson v. Morrow*, 61 Mo. 345; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, *Finch's Cas.* 146; *Collins v. Benbury*, 27 N. C. 118, 42 Am. Dec. 155; *Packer v. Bird*, 71 Cal. 134.

<sup>329</sup> *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Barney v. Keokuk*, 94 U. S. 324.

<sup>330</sup> *Barney v. Keokuk*, 94 U. S. 324; *McManus v. Carmichael*, 3 (594)

## § 266. Non-navigable streams.

In England, and also in this country, the bed of a non-navigable stream is not in the government, but is *prima facie* in the owners of the land abutting thereon, each having title to the middle of the stream, though their rights in this respect may be changed by express provisions in the conveyances under which they claim.<sup>322</sup> It has been provided by a United States statute, with reference to such streams within the public lands, that the stream and bed thereof shall be common to both the riparian owners.<sup>323</sup>

## § 267. Lakes and ponds.

The views taken in the various states as to the ownership of land under lakes and ponds are not in accord with one another.

The title to the beds of what are known as the "Great Lakes" has always been regarded as being vested in the state in which the particular portion of the lake happens to lie.<sup>324</sup> In the case of other lakes of a large size, the view is generally

Iowa, 1; St. Louis, I. M. & S. Ry. Co. v. Ramsey, 53 Ark. 314, 22 Am. St. Rep. 195; Johnson v. Knott, 13 Or. 308.

<sup>321</sup> Elder v. Burrus, 6 Humph. (Tenn.) 358; Bainbridge v. Sherlock, 29 Ind. 364; Union Depot, St. Ry. & Transfer Co. v. Brunswick, 31 Minn. 301, 47 Am. Rep. 789; Fulmer v. Williams, 122 Pa. St. 191, 9 Am. St. Rep. 88; Barre v. Fleming, 29 W. Va. 314.

<sup>322</sup> Gould, Waters, § 46; Royal Fishery of the Banne, Sir John Davies, 149; Mickelthwait v. Newlay Bridge Co., 33 Ch. Div. 133; Ingram v. Threadgill, 14 N. C. 59; Welles v. Bailey, 55 Conn. 292. 3 Am. St. Rep. 48; Inhabitants of Deerfield v. Arms, 17 Pick. (Mass.) 41; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Hayes' Ex'r v. Bowman, 1 Rand. (Va.) 417; Seneca Nation of Indians v. Knight, 23 N. Y. 498; Barclay Railroad & Coal Co. v. Ingham, 36 Pa. St. 194; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751; Muller v. Landa, 31 Tex. 265, 98 Am. Dec. 529.

<sup>323</sup> St. Paul & Pac. R. Co. v. Schurmeir, 7 Wall. (U. S.) 272.

<sup>324</sup> Illinois Cent. R. Co. v. Illinois, 146 U. S. 387; People v. Kirk, 162 Ill. 133, 53 Am. St. Rep. 277; People v. Silberwood, 110 Mich. 103; Miller v. Mendenhall, 43 Minn. 95, 19 Am. St. Rep. 219.

taken that the title to the bed is in the state,<sup>325</sup> while the bed of small lakes or ponds is in the riparian proprietors.<sup>326</sup> The question of navigability is sometimes made the test in this regard, the title being in the riparian owner whenever the lake is not navigable, and otherwise in the state.<sup>327</sup> In Massachusetts and Maine, by virtue of the ordinances of 1641 and 1647 and subsequent legislation, the title to the land under what are known as "great ponds," containing more than ten acres of land, is in the state in trust for the public, and all persons have the right to make use of them for all lawful purposes, the riparian owners thereon having no special rights therein superior to others.<sup>328</sup>

<sup>325</sup> *Austin v. Rutland R. Co.*, 45 Vt. 215; *State v. Gilmanton*, 9 N. H. 461; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1; *Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 314, 24 Am. Rep. 386; *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399. The decisions as to the effect of meander lines under the system of United States surveys are not uniform. In Indiana, the meander lines do not limit the boundaries of the land of the riparian owner, and he takes the whole subdivision, though it appears as a mere fractional subdivision or "lot" on the survey. *Stoner v. Rice*, 121 Ind. 51. In Illinois, on the other hand, a grant of land on a meandered lake conveys only to the water's edge. *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380.

<sup>326</sup> *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626; *Grand Rapids Ice Co. v. South G. R. Ice Co.*, 102 Mich. 227, 47 Am. St. Rep. 516; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462. In New Jersey, where there are no lakes of any considerable size, the bed of a lake having no connection with tide water is regarded as belonging to the riparian owners. *Cobb v. Davenport*, 32 N. J. Law, 369. And in *Hardin v. Jordan*, 140 U. S. 371, a majority of the court hold that, by the common law, the bed of a non-tidal lake belongs to such owners.

<sup>327</sup> *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828.

<sup>328</sup> *Gould, Waters*, § 84; *Paine v. Woods*, 108 Mass. 160; *Wattuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 154 Mass. 305; *Brastow v. Rockport Ice Co.*, 77 Ma. 100.

**§ 268. Riparian rights of access.**

The owner of lands bordering on navigable waters, even though not owner of the land below the water, has a right of access to the water, of which right, by the weight of authority, he cannot be deprived, even by legislative act, without adequate compensation.<sup>339</sup>

**§ 269. Erections and reclamations on the shore.**

In a number of the states the owner of land on tide water may make use of the shore, though it belongs to the state, for the purpose of erecting wharves, and may reclaim the shore to low-water mark, provided he does not thereby interfere with navigation, and in so doing conforms to all regulations imposed by the state. The matter is frequently a subject of statutory provision.<sup>340</sup>

Likewise, even when the title to the bed of navigable non-tidal waters is vested in the state, the riparian owners may

<sup>339</sup> *Lyon v. Fishmongers Co.*, 1 App. Cas. 662; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 20; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.*, 13 R. I. 348, 361; *Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Hanford v. St. Paul & D. R. Co.*, 43 Minn. 104; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 136 N. Y. 543, overruling *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *Gould, Waters*, §§ 149-154. But that the legislature may deprive the adjacent owner of the right of access to the water by a grant of the shore to another, without providing for compensation, see *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law, 532; *Thayer v. New Bedford R. Co.*, 125 Mass. 253. And see *Gibson v. United States*, 166 U. S. 269.

<sup>340</sup> *Gould, Waters*, §§ 167-178; *Shively v. Bowlby*, 152 U. S. 1; *Prior v. Swartz*, 62 Conn. 132, 36 Am. St. Rep. 333; *Geiger v. Filor*, 8 Fla. 325, 339; *Bell v. Gough*, 23 N. J. Law, 624; *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law, 532; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348, 363; *City of Norfolk v. Cooke*, 27 Grat. (Va.) 430; *Horner v. Pleasants*, 66 Md. 475; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 20. But see *Com. v. Alger*, 7 Cush. (Mass.) 53; *Town of Ravenswood v. Flemings*, 22 W. Va. 52, 46 Am. Rep. 485; *Eisenbach v. Hatfield*, 2 Wash. St. 236.

generally construct, within limits of a somewhat uncertain character, wharves and piers, provided they do not obstruct navigation,<sup>341</sup> and may also erect embankments to protect their land, and may even reclaim marsh land lying between their own land and the channel of the river or lake.<sup>342</sup>

### § 270. Rights as to ice.

The ownership of ice is determined by the ownership of the bed under the water upon which the ice is formed. Thus, in the case of a non-tidal stream which is also not navigable, the ice usually belongs to the riparian owners,<sup>343</sup> though, if the bed belongs to another, he owns the ice also.<sup>344</sup> In the case of navigable non-tidal rivers, the riparian owner's right to the ice depends upon the question whether, in that jurisdiction, the rule that the riparian owner also owns the bed of the stream is in force.<sup>345</sup> So, in the case of lakes and ponds, the ice belongs to the owner of the land under the water.<sup>346</sup> The owner of land is entitled to ice formed there-

<sup>341</sup> Gould, *Waters*, §§ 179-181; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Musser v. Hershey*, 42 Iowa, 356; *Union Depot, St. Ry. & Transfer Co. v. Brunswick*, 31 Minn. 301, 47 Am. Rep. 789; *Hanford v. St. Paul & D. R. Co.*, 43 Minn. 104; *Bainbridge v. Sherlock*, 29 Ind. 364; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Dutton v. Strong*, 1 Black (U. S.) 23.

<sup>342</sup> *Dutton v. Strong*, 1 Black (U. S.) 23; *Musser v. Hershey*, 42 Iowa, 356; *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399.

<sup>343</sup> *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Marsh v. McNider*, 88 Iowa, 390, 45 Am. St. Rep. 240; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Paine v. Woods*, 108 Mass. 172; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902.

<sup>344</sup> *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51.

<sup>345</sup> *Washington Ice Co. v. Shortall*, 101 Ill. 46, *Finch's Cas.* 136; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, *Finch's Cas.* 146; *Reysen v. Roate*, 92 Wis. 543; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Serrin v. Grefe*, 67 Iowa, 196.

<sup>346</sup> *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669; *Clute v. Fisher*, 65 Mich. 48.

over, even though it results from the exercise by another person of a right to cause water to flow over the land.<sup>347</sup> When the title to the land under the water is in the state, the right to take ice inures to the benefit of the public, and the first person who appropriates the ice is entitled thereto.<sup>348</sup> In one state it has been decided that a sale of ice formed on a certain extent of water is a sale of personalty, stress being laid in the opinion on the "ephemeral" nature of ice, and its want of utility in connection with the soil.<sup>349</sup> In other cases it is apparently regarded as of a real, rather than a personal, nature.<sup>350</sup>

#### X. ANIMALS AND FISH.

Animals *ferae naturae* do not belong to the owner of the land on which they may be, but are his, if captured or killed by him. Fish do not belong to the owner of land under the water if there is any mode of escape for them to other water. The owner of land has, however, the exclusive right of fishing thereover, except in the case of a grant of the shore by the state to an individual, in which case, as in the case of all waters covering land which belongs to the state, each member of the public has the right of fishing.

<sup>347</sup> *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 184, Finch's Cas. 141; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Paine v. Woods*, 108 Mass. 160; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Dodge v. Berry*, 26 Hun (N. Y.) 246. But see *Mill River W. Mfg. Co. v. Smith*, 34 Conn. 462.

<sup>348</sup> *Wood v. Fowler*, 26 Kan. 632, 40 Am. Rep. 330, Finch's Cas. 146; *People's Ice Co. v. Davenport*, 149 Mass. 323, 14 Am. St. Rep. 425; *Inhabitants of West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Brastow v. Rockport Ice Co.*, 77 Me. 100; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342.

<sup>349</sup> *Higgins v. Kusterer*, 41 Mich. 312, 32 Am. Rep. 160, Finch's Cas. 149.

<sup>350</sup> *Washington Ice Co. v. Shortall*, 101 Ill. 46, Finch's Cas. 136; *State v. Pottmeyer*, 33 Ind. 402.

## § 271. Animals.

The owner of land has no right of property in animals *ferae naturae*, or wild animals, merely because they are upon the land.<sup>351</sup> He may, however, acquire a qualified ownership in them—that is, an ownership while in his possession or control—by their capture,<sup>352</sup> and an absolute ownership by killing them.<sup>353</sup> The right of the landowner to such animals is so far exclusive, however, that other persons cannot, while upon such land as trespassers, acquire rights in the animals by capture or killing, and the animals so captured or killed become, it seems, the property of the landowner, unless another person had previously a qualified property in them.<sup>354</sup>

## § 272. Fish.

Fish at large in a stream or other body of water are *ferae naturae*, and the right of property in them, so far as it can exist, is in the public, or in the state for the benefit of the public.<sup>355</sup> They are, however, if lawfully captured or confined by an individual, or when contained in a private pond having no communication through which they can pass to other waters, the subject of a qualified ownership.<sup>356</sup>

<sup>351</sup> *Blades v. Higgs*, 11 H. L. Cas. 621; *Geer v. Connecticut*, 161 U. S. 519.

<sup>352</sup> 4 Bl. Comm. 588; *Goff v. Kilts*, 15 Wend. (N. Y.) 550, *Finch's Cas.* 368; *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; *Ulery v. Jones*, 81 Ill. 403.

<sup>353</sup> *Blades v. Higgs*, 11 H. L. Cas. 621; *Rexroth v. Coon*, 15 R. L. 35, 2 Am. St. Rep. 863, *Finch's Cas.* 365.

<sup>354</sup> *Blades v. Higgs*, 11 H. L. Cas. 621; *Rexroth v. Coon*, 15 R. L. 35, 2 Am. St. Rep. 863, *Finch's Cas.* 365; *Goff v. Kilts*, 15 Wend. (N. Y.) 550, *Finch's Cas.* 368.

<sup>355</sup> 2 Bl. Comm. 391 et seq.; *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42, 2 Gray's Cas. 547; *State v. Lewis*, 134 Ind. 250; *Treat v. Parsons*, 84 Me. 520; *State v. Blount*, 85 Mo. 543; *People v. Bridges*, 142 Ill. 30; *Peters v. State*, 96 Tenn. 682.

<sup>356</sup> *Gentile v. State*, 29 Ind. 409; *Treat v. Parsons*, 84 Me. 520; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. Rep. 404.



The ownership by an individual of land under non-tidal waters, whether in the case of a navigable stream, a non-navigable stream, or a lake or pond, involves the exclusive right to fish in such water, and to appropriate the fish when caught,<sup>357</sup> unless this right has been granted to another person, constituting in him a right to a "*profit a prendre*."<sup>358</sup> This right to take fish does not, however, involve the right to interfere with the passage of fish to other waters, as by the erection of dams or weirs,<sup>359</sup> and the right must always be exercised in subordination to the right of navigation in the public.<sup>360</sup>

The mode in which the right of fishing shall be exercised, so as not to interfere with the rights of the public in the preservation and propagation of fish, is frequently the subject of statutory regulation.<sup>361</sup>

When the land under water belongs to the state, as in the case of navigable tidal waters, the larger lakes, and, in some states, of navigable non-tidal waters, the right to take fish, including shell fish, is common to all the public;<sup>362</sup> and the

<sup>357</sup> 2 Leake, 174; 3 Kent, Comm. 409; Holyoke Water Power Co. v. Lyman, 15 Wall. (U. S.) 500; Beckman v. Kreamer, 43 Ill. 447, 92 Am. Dec. 146, Finch's Cas. 360; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; People v. Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Trustees of Brookhaven v. Strong, 60 N. Y. 56; Cobb v. Davenport, 32 N. J. Law, 369; Skinner v. Hetttrick, 73 N. C. 53.

<sup>358</sup> See post, § 339.

<sup>359</sup> 3 Kent, Comm. 411; Parker v. People, 111 Ill. 581; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199.

<sup>360</sup> See post, § 369.

<sup>361</sup> See Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Parker v. People, 111 Ill. 581; State v. Blount, 85 Mo. 543; People v. Collison, 85 Mich. 105; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813; Peters v. State, 96 Tenn. 682.

<sup>362</sup> Bagott v. Orr, 2 Bos. & P. 472, 2 Gray's Cas. 516; Martin v. Waddell, 16 Pet. (U. S.) 367; Manchester v. Massachusetts, 139 U. S. 240; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Morris

right which thus originally resides in the public to take fish upon the shore is not affected by the fact that, by grant or prescription, the title to the shore has become vested in an individual.<sup>363</sup> The state may, however, grant to an individual the exclusive right, as against the public, of fishing in a particular body of water,<sup>364</sup> and has full power to regulate the mode in which the public shall exercise the right of fishing.<sup>365</sup>

*v. Graham*, 16 Wash. 343; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Com. v. Chapin*, 5 Pick. (Mass.) 199, 16 Am. Dec. 336; *Weston v. Sampson*, 3 Cush. (Mass.) 347, 2 Gray's Cas. 549; *Martin v. Waddell*, 18 N. J. Law, 496; *Collins v. Benbury*, 27 N. C. 113, 42 Am. Dec. 155; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. (Pa.) 71; *Allen v. Allen*, 19 R. I. 114.

<sup>363</sup> *Gould, Waters*, §§ 20, 26, 27; 3 Kent, Comm. 417; *Weston v. Sampson*, 3 Cush. (Mass.) 347, 2 Gray's Cas. 549; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 59; *Packard v. Ryder*, 144 Mass. 440, 2 Gray's Cas. 553; *Bickel v. Polk*, 5 Har. (Del.) 325. But the owner of the shore has the exclusive right of catching fish by means of fixtures annexed to the soil. *Matthews v. Treat*, 75 Me. 594; *Locke v. Motley*, 2 Gray (Mass.) 265.

<sup>364</sup> *Heckman v. Swett*, 107 Cal. 276; *Paul v. Hazleton*, 37 N. J. Law, 106; *Collins v. Benbury*, 25 N. C. 277, 38 Am. Dec. 722. See *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. Rep. 404.

<sup>365</sup> *Gould, Waters*, § 189; *Manchester v. Massachusetts*, 139 U. S. 240.

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## PART III

### RIGHTS TO DISPOSE OF LAND NOT BASED ON OWNERSHIP.

#### CHAPTER X.

##### POWERS.

- § 273. Common-law powers.
- 274. Statutory powers.
- 275. Powers taking effect as executory limitations.
- 276. Equitable powers.
- 277. Powers of appointment.
- 278. Discretion as to execution—Powers in trust.
- 279. Powers coupled with an interest.
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- 281. Scope of the power.
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- 288. Illusory appointments.
- 289. Fraud on powers.
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- 291. The extinguishment of powers.
- 292. Appointed property as assets.
- 293. State statutory systems.
- 294. The rule against perpetuities as applied to powers.

A power is a proprietary right in a person to create an estate or interest in land, or to impose a lien thereon, which, when exercised, takes effect in diminution or to the destruction of the right of others in the land, or, if it takes effect in dimi-

nation or to the destruction of an estate belonging to the person exercising the power, does so by reason of the power alone, without reference to his ownership of the estate.

Powers may be divided into four classes, according to their mode of creation and operation:

- (1) "Common-law powers," which have effect at the common law.
- (2) "Statutory powers," which are authorities given by statute to create or transfer estates or interests.
- (3) Powers taking effect as executory limitations.
- (4) "Equitable powers," which take effect by force of rules of equity, and are recognized only therein.

The person to whom a power is given (the donee) has generally a discretion as to whether to exercise the power. If this is not the case, and the power is imperative, it is known as a power "in the nature of a trust," and is so treated.

A power can be executed only by the persons or person to whom it is given, except in the case of powers given to trustees or executors, which, if it was not otherwise intended by the donor, can usually, sometimes by force of a statute, be exercised by the person or persons at the time executing the trust.

A power must be executed in the mode, and subject to the requirements, named in the instrument by which it is created.

Equity will usually relieve against a formal defect in the execution of a power, and likewise against its execution from an ulterior motive not warranted by the power, this being known as a "fraud on the power."

An execution which is "excessive," as being in favor of persons not within the scope of the power as well as of those who are, or as creating estates or interests greater than authorized by the power, or as imposing unauthorized conditions upon the enjoyment of the estates or interests created, is valid, so far as it is in consonance with the power, if the part in deviation therefrom can be ascertained and separated.

A power is extinguished upon the cessation of the purpose of its creation. Likewise, a power is usually extinguished by a conveyance, by the donee of the power, of an estate in the land,  
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if this is such that a subsequent execution of the power would derogate from the grant.

Land over which one has a power is not, apart from statute, liable for his debts; but any estates created by an execution of the power, in favor of persons not paying a valuable consideration, is so liable.

The rule against perpetuities applies to powers, so as to prevent the creation of an estate under the power which will not vest within the legal period.

### § 273. Common-law powers.

Following the classification of powers stated in the above summary, common-law powers are first to be considered.<sup>1</sup>

The only common-law powers, properly so called, which need be here mentioned, are those given by will to executors, authorizing them to sell lands for the payment of debts or legacies. Such powers existed at common law where land was by custom devisable,<sup>2</sup> and after the passage of the Statute of Wills, making land generally devisable, their validity in wills was established.<sup>3</sup>

When executors are thus given a power of sale without being given the title to the land, the title vests in the heir or residuary devisee till the sale is made,—that is, till the “execution” of the power,—and then it passes to the vendee, by force of the will, as if it were an executory devise to him, and not by force of the conveyance by the executors; this case being distinguished from that in which there is a devise

<sup>1</sup> The classification as given is practically that of Mr. Edwards, as stated in his *Law of Property in Land* (2d Ed.) 203. This author's admirable outline of the subject of powers has been very considerably utilized in the following pages.

<sup>2</sup> Litt. § 169; Co. Litt. 112b; Edwards, 203; Gray, *Perpetuities*, § 124. Mr. Chance shows that there were probably certain other common-law powers, of an unusual character. See Chance, *Powers*, §§ 5-12.

<sup>3</sup> Co. Litt. 112b; *Townsend v. Walley*, Moore, 241.

of the land itself to the executors, with power in them to alienate it, the title in the latter case vesting in the executors till the execution of the power, and then passing by their conveyance, and not by the will.<sup>4</sup>

— Powers of agency.

Powers of attorney, by which one person is nominated as an agent to make a transfer or do some other act in the name and stead of the principal, are sometimes spoken of as common-law powers. Such an authority, however, while it did exist at common law, is entirely different from the powers here considered, since it is merely an agency in the person to whom the power is given, authorizing him to execute an instrument of conveyance or to do some other act in the place and stead of his principal, the title passing, not by the power of attorney, but by the conveyance subsequently made, which is regarded as made by the principal.<sup>5</sup> A power of attorney creates merely a contractual relation,—rights in *personam*,—as does any other contract of agency; while a

<sup>4</sup> Litt. § 169; Co. Litt. 112b, 181b, 236a; Sugden, Powers, 111-115; Mandelbaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61; Hope v. Johnson, 2 Yerg. (Tenn.) 123; Mitchell v. Spence, 62 Ala. 450; Guyer v. Maynard, 6 Gill & J. (Md.) 420; Hoyt v. Day, 32 Ohio St. 101; Shelton v. Homer, 5 Metc. (Mass.) 462; Den d. Elle v. Young, 23 N. J. Law, 478; Thompson v. Gaillard, 3 Rich. Law (S. C.) 418; Brumfield v. Drock, 101 Ind. 190; Todd v. Wortman, 45 N. J. Eq. 723; Greenough v. Welles, 10 Cush. (Mass.) 571; Clark v. Hornthal, 47 Miss. 434; Bradt v. Hodgdon, 94 Me. 559; Smith v. McConnell, 17 Ill. 135, 63 Am. Dec. 340; Ryan v. Duncan, 88 Ill. 144; Spruance v. Darlington, 7 Del. Ch. 111; Moore v. Bedford (Tenn.) 56 S. W. 1038; Ashby v. Ashby, 59 N. J. Eq. 536; In re Journey's Estate, 7 Del. Ch. 1. In the former case, the executor has a "naked power"; in the latter, a "power coupled with an interest." See post, § 279.

In Pennsylvania it is provided by statute that a power of sale in the executors shall give them, in effect, an estate. See Shippen's Heirs v. Clapp, 29 Pa. St. 265.

<sup>5</sup> Sugden, Powers, 45, 199.

power, such as we here treat of, involving dominion over land to a greater or less extent, creates in the person to whom the power is given rights *in rem* of a proprietary character.<sup>6</sup>

#### § 274. Statutory powers.

If a power to alien land is given by legislative act, an alienation in pursuance thereof derives its effect from the act.<sup>7</sup> Such a power may be given to the owner of an interest in land, as in the case of the power given in England by statute to life tenants to make leases extending beyond their lives,<sup>8</sup> or the power of sale frequently given by statute to a mortgagee;<sup>9</sup> or it may be given to the holder of an office, as in the case of the power of sale given to the assignee under the present bankruptcy law,<sup>10</sup> or that given by statute to an executor to sell land for the payment of debts.<sup>11</sup>

#### § 275. Powers taking effect as executory limitations.

In discussing the effect of the Statute of Uses, reference was made to the fact that, by means thereof, legal estates could be created to spring up or shift in the future, not according to limitations in the instrument creating them, but according to the appointment or direction of a person named in such instrument. Similarly, land may be devised to vest in the future according to the direction or "appointment" of a person named in the will. In both these cases there is, in effect, an executory interest limited to a person to be named in the future. The person to whom authority to name the taker is given is said to have a power of appointment, and, upon the

<sup>6</sup> See 2 Austin, Jurisprudence (3d Ed.) 833; Edwards, Prop. Land, 202; Williams (18th Ed.) 362.

<sup>7</sup> Sugden, Powers, 45.

<sup>8</sup> Edwards, Prop. Land, 76; Farwell, Powers, 597.

<sup>9</sup> Post, § 555.

<sup>10</sup> Act 1898, § 70; Collier, Bankruptcy, 454.

<sup>11</sup> 3 Weerner, Administration, § 337. See post, § 474.

making of the appointment by him, the person in whose favor he exercises the power takes an interest in the land as if there had been an executory limitation in his favor in the original instrument.<sup>12</sup> Thus, one may convey land to A. and his heirs to such uses as A. (or B., or even the grantor himself) may appoint, and, upon the making of the appointment in favor of C. and his heirs, the land vests in C. in fee simple, by way of springing use, as if the original limitation had been to him; the fee resulting, until appointment, to the grantor. And so one may devise land to such person, and for such an interest, as A. may appoint, and, on the making of the appointment in favor of B. and his heirs, the fee simple vests in B., as by an executory devise to him.<sup>13</sup>

In case, however, the estate created by the exercise of the power is immediately preceded by another estate, it will take effect as a remainder, and not as an executory interest, in accordance with the rule before stated that a future limitation will always be so treated, if possible.<sup>14</sup>

By means of a power of this character, the grantor of an estate may reserve to himself the power to revoke the grant, as in the case of a conveyance by A. to the use of B. and

<sup>12</sup> Sugden, Powers, 31, 147, 196; Co. Litt. 271b, Butler's note vii. 1; 1 Leake, 114.

<sup>13</sup> A power of appointment given by will is frequently spoken of as a common-law power or authority. See Sugden, Powers, 45; 1 Leake, 377. The expression "common-law" power is in such cases evidently used in contradistinction to a power arising by force of the Statute of Uses. See Farwell, Powers, 175; 1 Leake, 377. A power created by will takes effect under the Statute of Wills (Sugden, 199; Chance, Powers, § 5; Townesend v. Walley, Moore, 341), and is not, except in the case of a power to executors to sell, which may be distinguished as having been recognized at common law. any more a common-law authority, strictly speaking, than an executory interest is a common-law interest. Sugden calls even a statutory power a common-law authority. Sugden, Powers, 45.

<sup>14</sup> Whitby v. Mitchell, 42 Ch. Div. 494, 44 Ch. Div. 85, 5 Gray's Cas. 604.



his heirs, with the reservation of a power in A. (or in a third person) to revoke the use thus limited, in which case B.'s estate in fee simple will terminate on the exercise of such power.<sup>15</sup>

### § 276. Equitable powers.

Equitable powers are of two kinds. The first kind consists of powers of appointment, similar to those of the class last described, except that they are exercisable only with reference to equitable interests in the land, the legal title being outstanding in trustees, and not within the purview of the power. Thus, the legal fee may be vested by conveyance or devise in trustees for A. for life, with remainder in trust to such persons as A. shall appoint, and, in default of appointment, in trust for B. in fee simple, in which case the exercise by A. of the power in favor of C. will divest the equitable interest of B. in favor of C., without, however, affecting the legal ownership in the trustees, except that they will, in equity, be compelled to hold for the benefit of C.<sup>16</sup>

Another kind of equitable power, and one which is of very frequent occurrence, exists when the legal owner of the estate, holding for the benefit of another, is given power to sell or lease or otherwise create estates or interests in the land which will bind the equitable as well as the legal interest. In these cases the grant of the power relieves the legal owner to that extent from the effect of the equitable

<sup>15</sup> Sugden, Powers, 363, 478; *Jones v. Clifton*, 101 U. S. 225; *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565; *Reidy v. Small*, 154 Pa. St. 505. So it has been held that the grantor may reserve a power to mortgage the land. *Bouton v. Doty*, 69 Conn. 531.

Powers of revocation are expressly recognized by the New York statute, and statutes of other states modeled thereon. *Chaplin, Exp. Trusts*, c. 23.

<sup>16</sup> Sugden, Powers, 200; *Farwell, Powers*, 2.

rules which prevent him from transferring his legal title free from the claims of the beneficiaries.<sup>17</sup> These powers frequently occur in the case of grants or devises to trustees, with powers of sale or to make leases. A devise of land to executors, with power in them to sell, is an instance of a power of this class, they holding the legal title as trustees.

### § 277. Powers of appointment.

Powers taking effect, as explained above, as executory limitations, and the analogous class of powers operating upon equitable interests without affecting the legal title, both of which are known as "powers of appointment," constitute a very important branch of the English law of land, and, as will appear later, they are subject to various rules which do not apply to other classes of powers. In this country, owing to the infrequency of family settlements of land, such powers are less common, though by no means unusual.

The creator of a power of appointment is known as the "donor" of the power, and the person to whom the power is given as the "donee." The exercise or execution of the power is frequently termed the "appointment," and the person in favor of whom it is exercised is termed the "appointee."

A power of appointment is "general" if the donee is given authority thereby to appoint to any person, including himself, and is not restricted as to the estate or interest which he may appoint, while it is a "particular," "special," or "limited" power if, by the instrument creating the power, the appointment is restricted to particular persons, or a particular class of persons, known as "objects" of the power, or if it can be

<sup>17</sup> Lewin, *Trusts*, 674; Goodeve, *Real Prop.* (4th Ed.) 303; Edwards, *Prop. Land*, 208. See, as to powers in trustees to lease, *Collins v. Foley*, 63 Md. 158, 52 Am. Rep. 505; *Wentz's Appeal*, 106 Pa. 321.

exercised only for certain named purposes or under certain conditions.<sup>18</sup>

Since, upon the execution of a power of appointment, the estates limited by the execution take effect as if they had been limited in the original instrument creating the power, it follows that they take priority over all estates limited in default of appointment, or limited to continue until appointment.<sup>19</sup> Likewise, by the execution of a power, the dower right of the wife of the person entitled thereto in default of appointment is defeated,<sup>20</sup> as is the lien of a judgment against such person, or an execution which is levied upon the land.<sup>21</sup>

§ 278. Discretion as to execution—Powers in trust.

The exercise of a power, strictly so called, lies entirely in the discretion of the person to whom it is given, and he cannot be compelled to execute it, even by a court of equity.<sup>22</sup> An important distinction must here be made, however, between a mere power and what is known as a power "in the nature of a trust," or a power "coupled with a trust," which exists when, by the instrument creating the power, the execution thereof is made an imperative duty, and is therefore regarded in equity as a trust to be carried out by the person to whom it is given. The nonexecution of such a power will be aided in equity, on the same principle on which courts of equity will enforce any trust; and if the donee refuses to exercise it, or dies without exercising it, the court will exer-

<sup>18</sup> Co. Litt. 271b, Butler's note, 271b, III. 4; Sugden, Powers, 394; Farwell, Powers, 7; Goodeve, Real Prop. (4th Ed.) 298.

<sup>19</sup> Sugden, Powers, 478; Farwell, Powers, 276; Christy v. Pulliam, 17 Ill. 59; Orender v. Call, 101 N. C. 399.

<sup>20</sup> Sugden, Powers, 480. See ante, § 183, note 87.

<sup>21</sup> Wigan v. Jones, 10 Barn. & C. 459, 5 Gray's Cas. 345; Brandies v. Cochrane, 112 U. S. 344; Leggett v. Doremus, 25 N. J. Eq. 122.

<sup>22</sup> Sugden, Powers, 538; Farwell, Powers, 9; Lewin, Trusts, 676; 2 Story, Eq. Jur. § 1061; 1 Perry, Trusts, § 248. And see post, § 282.

cise it, so far as it is able to do so. This relation of trust may exist not only in the case of powers of appointment, but in connection with the other classes of powers above named;<sup>23</sup> and in such case, if the power be in favor of a class, though the donee might have exercised it in favor of certain members of the class, equity will enforce it in favor of all equally.<sup>24</sup> As an example of a power in the nature of a trust may be mentioned a power of sale given by will to an executor or trustee with specific directions to apply the proceeds for the benefit of individuals named.<sup>25</sup>

#### § 279. Powers coupled with an interest.

A "power coupled with an interest" is quite frequently referred to by the courts, generally in contradistinction to a "naked" or "bare" power, and it is important to have a

<sup>23</sup> Sugden, Powers, 588; Lewin, Trusts, 677, 950; 1 Perry, Trusts, c. 8; 2 Story, Eq. Jur. § 106; Brown v. Higgs, 8 Ves. 561; Randolph v. East Birmingham Land Co., 104 Ala. 355; Thorp v. McCullum, 6 Ill. 615; Ingraham v. Ingraham, 169 Ill. 432; Miller v. Meetch, 8 Pa. St. 417; Faulkner v. Davis, 18 Grat. (Va.) 651; Greenough v. Welles, 10 Cush. (Mass.) 571; Atkinson v. Dowling, 33 S. C. 414; Druid Park Heights Co. v. Oettinger, 53 Md. 46.

"It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, this court cannot execute it. It is equally clear that wherever a trust is created, and the execution of that trust falls by the death of the trustee or by accident, this court will execute the trust. \* \* \* But there are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power the court consider it as partaking so much of the nature and qualities of a trust that, if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place." Lord Eldon, in Brown v. Higgs, 8 Ves. 570.

<sup>24</sup> 1 Perry, Trusts, §§ 250, 255; Withers v. Yeadon, 1 Rich. Eq. (S. C.) 324.

<sup>25</sup> Greenough v. Welles, 10 Cush. (Mass.) 571; Druid Park Heights Co. v. Oettinger, 53 Md. 46; Bailey, Petitioner, 15 R. I. 60.

clear conception of what is meant by these terms. The phrase "power coupled with an interest" is applied to an equitable power of the second class above described; that is, a power in a trustee or *quasi* trustee to create estates. So, a trustee having power to sell or to lease is said to have a power coupled with an interest, since he has both the power and the title;<sup>26</sup> and the term is, for the same reason, applied to the case of a power of sale in executors who are also given an estate in the land.<sup>27</sup> On the other hand, in the case of what we have referred to above as a common-law power in executors to sell, not accompanied by any devise to them of the land, they have not a power coupled with an interest, but a "naked" or "bare" power.<sup>28</sup>

Sometimes the expression "naked" power has been used in contradistinction to what we have described above as a power in the nature of a trust;<sup>29</sup> but it is important to dis-

<sup>26</sup> *Gray v. Lynch*, 8 Gill (Md.) 403; *Lorings v. Marsh*, 6 Wall. (U. S.) 337, 354.

The term "power coupled with an interest" is used in contradistinction to "naked power" by Lord Hardwicke to describe a power of appointment the execution of which will operate on a beneficial interest in the donee of the power, what is hereafter referred to as a power "appendant" or "appurtenant." See *Godolphin v. Godolphin*, 1 Ves. Sr. 21; *Hearle v. Greenbank*, 1 Ves. Sr. 298; *Marlborough v. Godolphin*, 2 Ves. Sr. 60. The phrase is not, apparently, so used by later authorities.

<sup>27</sup> *Co. Litt.* 112b, 181b; 4 Kent, Comm. 320; *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Franklin v. Osgood*, 14 Johns. (N. Y.) 553, affirming 2 Johns. Ch. (N. Y.) 1; *Williams' Lessee v. Veach*, 17 Ohio, 171. See, also, cases cited ante, note 4, and post, note 75.

<sup>28</sup> *Taylor v. Benham*, 5 How. (U. S.) 233, 266; *Den d. Snowhill v. Snowhill*, 23 N. J. Law, 447; *Den d. Elle v. Young*, 23 N. J. Law, 478; *Moore v. Moore*, 41 N. J. Law, 440; *Bergen v. Bennett*, 1 Caines' Cas. (N. Y.) 1; *Hoyt v. Day*, 32 Ohio St. 101; *Haskell v. House*, 3 Brev. (S. C.) 242; *Brumfield v. Drook*, 101 Ind. 190; *Jamison v. Smith*, 4 Bibb (Ky.) 307; *Atwater v. Perkins*, 51 Conn. 188; *Guyer v. Maynard*, 6 Gill & J. (Md.) 420; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

<sup>29</sup> *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Shelton v. Homer*, 5 Metc. (Mass.) 462.

tinguish between these powers in trust and those coupled with an interest. A power may be imperative, and hence in the nature of a trust, though it is a mere power of appointment or sale in one having no title to or interest in the premises; while, on the other hand, a power in a trustee or executor having title to the land, though coupled with an interest, may be purely discretionary, and so not in the nature of a trust.<sup>30</sup>

It is quite frequently stated, in discussing the revocability of an agent's authority, that a "power coupled with an interest" is not revocable, and is not revoked by the death of the principal or person who conferred the power, and the phrase is explained, in this connection, to mean a power given to one who is also given the title to the property involved, so that he may exercise the power in his own name.<sup>31</sup> The power coupled with an interest thus referred to is, however, a power conferring proprietary rights, which, as we have explained, is entirely distinct from a power of agency, and the reference is therefore confusing, rather than helpful. A power thus given to one who is given the legal title is usually, if not always, an equitable power of the second class, and these, like other powers conferring proprietary rights, are not revocable, for the reason that a proprietary right

<sup>30</sup> This distinction between powers in trust and those coupled with an interest seems not always to have been clear to the courts. See, e. g., *Peter v. Beverley*, 10 Pet. (U. S.) 532, 564.

<sup>31</sup> See *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, affirming 2 Mason, 244, Fed. Cas. No. 6,889; *Missouri v. Walker*, 125 U. S. 339; *Frink v. Roe*, 70 Cal. 296; *Hartley's Appeal*, 53 Pa. St. 212; *Hawley v. Smith*, 45 Ind. 183; *McNeill v. McNeill*, 43 W. Va. 765; *State v. Walker*, 88 Mo. 279; *Fisher v. Fair*, 34 S. C. 203; *Wilburn v. Spofford*, 4 Sneed (Tenn.) 698. In England, the term "power coupled with an interest" is applied apparently to any agency which is given for a consideration in order to secure some benefit to the agent, and which is accordingly considered to be irrevocable. *Smart v. Sandars*, 5 C. B. 395; *Clerk v. Laurie*, 1 Hurl. & N. 199.

cannot, in the absence of a special provision or limitation to that effect in its creation, be divested at the will of or by the death of the person who conferred it. A mere power of agency stands, of course, on an entirely different footing in this respect. The use of the expression "naked" or "bare" power, in contradistinction to the term "power coupled with an interest," in connection with the question of the revocation of a power of agency, is accordingly to be carefully distinguished from its use, previously referred to, to designate a power conferring proprietary rights on one who is not given any title to the property.

### § 280. Creation of powers.

Powers of appointment may be created by a limitation *inter vivos* or by will. No particular form of words is necessary for the creation of a power; any expression, however informal, being sufficient, if it clearly indicates an intention to give or reserve a power. Usually, the power is given by words which express the effect of its exercise, in terms empowering the donee to sell, lease, or mortgage, as the case may be.<sup>33</sup>

In the case of a trustee or executor appointed by will, a power of sale, though not expressly given, is frequently inferred from provisions in the will imposing on him duties as to the distribution of the estate which cannot be performed without a sale;<sup>33</sup> as when he is required to divide testator's estate among persons named, and the estate is not divisible in kind.<sup>34</sup> Likewise, a power in a life tenant to sell land

<sup>33</sup> Sugden, Powers, 102, 104.

<sup>33</sup> 2 Perry, Trusts, § 766; Lindley v. O'Reilly, 50 N. J. Law, 636, 7 Am. St. Rep. 802; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Winston v. Jones, 6 Ala. 550; Belcher v. Belcher, 38 N. J. Eq. 126; Vaughan v. Farmer, 90 N. C. 607; Putnam Free School v. Fisher, 30 Me. 523; Beurhats v. Cole, 94 Wis. 617.

<sup>34</sup> Corse v. Chapman, 153 N. Y. 466; Tomkins v. Miller (N. J. Ch.) 27 Atl. 484; Stoff v. McGinn, 178 Ill. 46.

is generally implied from a limitation over, after his or her death, of what may remain.<sup>35</sup>

In case the testator directs his estate to be sold, without declaring by whom the sale is to be made, if the proceeds of sale are distributable by the executor, a power in him to make the sale is implied.<sup>36</sup>

### § 281. Scope of the power.

The person or persons in whose favor a power may be exercised, or the estates or interests which may be created thereunder, is a question of the intent of the creator of the power, as determined by a construction of the instrument creating it.<sup>37</sup>

In the case of a general power of appointment, there is no restriction upon the persons in favor of whom the appointment may be made, and it may be exercised for the benefit of the donee himself.<sup>38</sup> But in the case of a special or particular power, the appointment can be made only in favor of the specified person or persons of the specified class; for instance, under a power to appoint among children, an appointment cannot be made to grandchildren.<sup>39</sup>

<sup>35</sup> *Clark v. Middlesworth*, 82 Ind. 240; *Paine v. Barnes*, 100 Mass. 470; *Henderson v. Blackburn*, 104 Ill. 227; *Smith v. McIntyre*, 37 C. C. A. 177, 95 Fed. 585; *Roberts v. Lewis*, 153 U. S. 367.

<sup>36</sup> *Sugden, Powers*, 115 et seq.; 2 *Woerner, Administration*, § 339; *Peter v. Beverly*, 10 Pet. (U. S.) 532, 565; *Rankin v. Rankin*, 36 Ill. 293, 87 Am. Dec. 205; *Ogle v. Reynolds*, 75 Md. 145; *Hale v. Hale*, 137 Mass. 168; *Lippincott's Ex'r v. Lippincott*, 19 N. J. Eq. 121; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Wood v. Hammond*, 16 R. I. 98; *Clark v. Hornthal*, 47 Miss. 434; *Lockart v. Northington*, 1 Sneed (Tenn.) 318; *Gay v. Grant*, 101 N. C. 206.

<sup>37</sup> *Sugden, Powers*, 433; *Pomery v. Partington*, 3 Term R. 665, 674; *Kerr v. Verner*, 66 Pa. St. 326; *Carson v. Smith*, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539.

<sup>38</sup> *Farwell, Powers*, 8, 486; *Hicks v. Ward*, 107 N. C. 392; *Beck's Appeal*, 116 Pa. St. 547.

<sup>39</sup> *Farwell, Powers*, 493; *Smith v. Lord Camelford*, 2 Ves. Jr. 633; *Austin v. Oakes*, 117 N. Y. 577; *Smith v. Hardesty*, 88 Md. 387.



— Exclusive and nonexclusive powers.

A power to appoint to a class of persons, such as children, may authorize a selection among members of the class, as when it is in terms to appoint "to such," or "to one or more," of the class; such a power being termed an "exclusive" power.<sup>40</sup> More generally, perhaps, the power is to appoint amongst all the members of the class, as when it uses the words "to all and every the children," or "amongst" or "between" the children; and in such case, the donee being given no authority to exclude any member of the class, it is known as a "nonexclusive" power.<sup>41</sup>

— Interests which may be created.

A power to appoint a fee-simple estate, or a power in general terms, will generally authorize an appointment of an estate less than a fee;<sup>42</sup> and it authorizes an appointment of a charge on the land, merely, such as a mortgage.<sup>43</sup>

A power of appointment over the legal estate may, according to the trend of the decisions, be executed by an appointment of an equitable estate with the legal title in trustees.<sup>44</sup>

A power to divide property among children does not necessitate that a fee-simple estate be given to each, but an-

<sup>40</sup> Farwell, Powers, 362; *Ingraham v. Meade*, 3 Wall. Jr. 32, Fed. Cas. No. 7,045; *Graeff v. De Turk*, 44 Pa. St. 527; *Huling v. Fenner*, 9 R. I. 410; *City of Portsmouth v. Shackford*, 46 N. H. 423.

<sup>41</sup> Farwell, Powers, 362; *Wilson v. Piggott*, 2 Ves. Jr. 351, 5 Gray's Cas. 357; *Faloon v. Flannery*, 74 Minn. 38; *Hatchett v. Hatchett*, 103 Ala. 556; *Lippincott v. Ridgway*, 10 N. J. Eq. 164; *Wright v. Wright*, 41 N. J. Eq. 382, note; *Thrasher v. Ballard*, 35 W. Va. 524; *Knight v. Yarbrough*, Gilmer (Va.) 27.

<sup>42</sup> Farwell, Powers, 321; *Bovey v. Smith*, 1 Vern. 84.

<sup>43</sup> Farwell, Powers, 320; *Thwaytes v. Dye*, 2 Vern. 80, 5 Gray's Cas. 451; *Asay v. Hoover*, 5 Pa. St. 21; *Hicks v. Ward*, 107 N. C. 392.

<sup>44</sup> *Trollope v. Linton*, 1 Sim. & S. 477, 5 Gray's Cas. 457; *Thorn-ton v. Bright*, 2 Mylne & C. 230, 5 Gray's Cas. 461; *In re Paget* [1898] 1 Ch. 290; *Lawrence's Estate*, 186 Pa. St. 354. *Contra*, *Safe Deposit Co. of Baltimore v. Meyers*, 73 Md. 413.

other division is proper. Thus, there may be an appointment to one for life, and a remainder or executory devise to another.<sup>45</sup>

— Powers of sale and exchange.

A power to sell land authorizes a conveyance of the fee simple in the land to the purchaser, and words of inheritance are not necessary in the creation of the power.<sup>46</sup>

A power of sale is not, in itself, usually regarded as authorizing a mortgage of the land, in the absence of anything to show an intention that a mortgage may be created.<sup>47</sup> But the rule is different if the purpose of the authorization of a sale is the raising of money for some particular objects named, or to pay charges imposed on the land;<sup>48</sup> and by some authorities, on the view that a mortgage is merely a conditional sale, the power to mortgage is regarded as *prima facie* included.<sup>49</sup>

<sup>45</sup> Farwell, Powers, 322; Sugden, Powers, 632; Beardsley v. Hotchkiss, 96 N. Y. 201, 218. And see Ricketts v. Loftus, 4 Younge & C. Exch. 519, 5 Gray's Cas. 363; Lawrence's Estate, 136 Pa. St. 354.

<sup>46</sup> Sugden, Powers, 398; Chance, Powers, § 1205; Hemhauser v. Decker, 38 N. J. Eq. 426.

<sup>47</sup> Sugden, Powers, 425; 2 Perry, Trusts, § 768; Price v. Courtney, 37 Mo. 387, 56 Am. Rep. 453; Hoyt v. Jaques, 129 Mass. 286; Butler v. Gazzam, 81 Ala. 491; Willis v. Smith, 66 Tex. 31; Arlington Bank v. Paulsen, 57 Neb. 717; McMillan v. Cox, 109 Ga. 42; Allen v. Ruddell, 51 S. C. 366; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Wilson v. Maryland Ins. Co., 60 Md. 150; Tyson v. Latrobe, 42 Md. 325; Stokes v. Payne, 58 Miss. 614, 38 Am. Rep. 314; Ferry v. Laibic, 81 N. J. Eq. 566.

<sup>48</sup> Sugden, Powers, 425; Devaynes v. Robinson, 24 Beav. 86; Hoyt v. Jaques, 129 Mass. 286; Starr v. Moulton, 97 Ill. 525; Loebenthal v. Raleigh, 36 N. J. Eq. 169; Faulk v. Dashiell, 62 Tex. 642, 50 Am. Rep. 542; Kent v. Morrison, 153 Mass. 137. And see Wood v. Kirt, 103 Mo. 329.

<sup>49</sup> So in Tennessee and Pennsylvania. Steifel v. Clark, 9 Bar. (Tenn.) 470; Jackson v. Everett (Tenn.) 58 S. W. 340; Lancaster v. Dolan, 1 Rawle (Pa.) 231; Zane v. Kennedy, 73 Pa. St. 182, 192. See English cases discussed in Farwell, Powers, 553.

A power of sale authorizes a sale for cash only, and not an exchange.<sup>50</sup> A power in a trustee to sell and exchange has been held to imply a power to partition between the joint owners of the property,<sup>51</sup> though a power of sale alone would not have this effect.<sup>52</sup>

§ 282. Who may execute a power—(a) In case of individual donee.

Since the gift of a power implies personal trust and confidence, it cannot be transferred or delegated to another, except as to details not involving the exercise of any discretion, unless a right of transfer or delegation is expressly given.<sup>53</sup> This rule does not, however, apply to a general power of appointment, unrestricted as to its beneficiaries and the mode of its execution, since there is in such case no trust and confidence, and the power is equivalent to ownership, and accordingly the donee may delegate its execution, or may appoint to such uses as another shall appoint.<sup>54</sup> If a legal power be in terms given to the donee "and his as-

<sup>50</sup> Perry, Trusts, § 769; Woodward v. Jewell, 140 U. S. 247; Russell v. Russell, 36 N. Y. 581; City of Cleveland v. State Bank, 16 Ohio St. 236.

<sup>51</sup> Phelps v. Harris, 101 U. S. 370; In re Frith v. Osborne, 3 Ch. Div. 618. Compare Farwell, Powers, 556.

<sup>52</sup> 2 Perry, Trusts, § 769; Farwell, Powers, 556; McQueen v. Farquhar, 11 Ves. 467; In re Carr, 16 R. I. 645.

<sup>53</sup> Sugden, Powers, 179; 4 Kent, Comm. 327; 4 Cruise, Dig. tit. 32, c. 16, §§ 66, 67; Ingram v. Ingram, 2 Atk. 88; Saunders v. Webber, 39 Cal. 287; Wilson v. Mason, 158 Ill. 304, 313; Singleton v. Scott, 11 Iowa, 589; Shelton v. Homer, 5 Metc. (Mass.) 462; Terrell v. McCown, 91 Tex. 231; Keim v. Lindley, 54 N. J. Eq. 418; Graham v. King, 50 Mo. 22; Hood v. Haden, 82 Va. 588; Phillips v. Brown, 16 R. I. 279. Accordingly, the donee of a power, other than a general power, cannot exercise it by appointing to another a life estate, with power in that other to appoint in remainder. Wickersham v. Savage, 58 Pa. St. 365; Farwell, Powers, 442.

<sup>54</sup> Sugden, Powers, 181, 195. See Coats' Ex'r v. Louisville & N. R. Co., 13 Ky. Law Rep. 557, 17 S. W. 564.

signs," this involves an authority to assign, and it may be executed by an assignee.<sup>55</sup>

A power in the nature of a trust,—an imperative power, as explained above,—whether given to one personally or as trustee or executor, will be enforced by equity if the donee or one of the donees refuses to execute it, or dies without having done so, or in any other case of its nonexecution.<sup>56</sup> Accordingly, the following statements in regard to the rights of persons, other than the original donee or donees, to execute the power, do not apply to such powers in trust.

Where a power, not a power in trust, is given to one who is not a trustee or executor, as in the case of an ordinary power of appointment, since the exercise of the power is within the donee's discretion, the power terminates if he fails to exercise it during his life, unless the instrument creating it otherwise provides, and equity will not cause its execution by some other hand, or, as it is usually expressed, equity will not aid the nonexecution of a power.<sup>57</sup>

A power given to a trustee, such as a power of sale, does not, in the absence of a special provision to that effect in its creation, pass to one to whom the trustee may convey

<sup>55</sup> Sugden, Powers, 180.

<sup>56</sup> Lewin, Trusts, 676; Perry, Trusts, §§ 248, 249, 505; Brown v. Higgs, 8 Ves. 561; Gibbs v. Marsh, 2 Metc. (Mass.) 243; Greenough v. Welles, 10 Cush. (Mass.) 571; Franklin v. Osgood, 14 Johns. (N. Y.) 527, affirming 2 Johns. Ch. (N. Y.) 1; Gossen v. Ladd, 77 Ala. 223; Druid Park Heights Co. v. Oettinger, 53 Md. 46; Dick v. Harby, 48 S. C. 516; Bailey, Petitioner, 15 R. I. 60; Robertson v. Gaines, 2 Humph. (Tenn.) 367; Stewart v. Stokes, 33 Ala. 494.

<sup>57</sup> 1 Chance, Powers, 688; Sugden, Powers, 588; Farwell, Powers, 266; 2 Story, Eq. Jur. § 1061; 1 Perry Trusts, §§ 248, 294; Piggot v. Penrice, Finch, Prec. Ch. 471, 5 Gray's Cas. 479; Tollet v. Tollet, 3 P. Wms. 489, 5 Gray's Cas. 480; Howard v. Carpenter, 11 Md. 259; Gilman v. Bell, 99 Ill. 144; Mitchell v. Denson, 29 Ala. 327; Lines v. Darden, 5 Fla. 51; Fronty v. Godard, 1 Bailey, Eq. (S. C.) 517; Brown v. Phillips, 16 R. I. 612.

the legal title;<sup>58</sup> nor does it, in the absence of a showing of a contrary intention, pass, on his death, to his heirs, though the legal title so passes.<sup>59</sup> Even the fact that a power is given to a trustee and "his assigns" does not authorize him, by assignment, to transfer the power to another.<sup>60</sup>

As to whether a power given to a trustee may be exercised, after his death or resignation, by one appointed in his place, a distinction is drawn. In cases in which, from the terms of the instrument creating the power, it appears that the power is attached to the office, and is not conferred upon the trustee named personally, it may be exercised by a substituted trustee;<sup>61</sup> while, if there is a personal discretion involved in the exercise of the power, no one but the original trustee can act, and neither his assignee nor a trustee appointed by the court can exercise the power, unless the instrument creating the power, or the statute, otherwise provides.<sup>62</sup>

— — Administrator cum testamento annexo.

In case a sole executor, given a power of sale, refuses to act, resigns, or dies, the question arises whether the administrator *cum testamento annexo* can exercise the power.

<sup>58</sup> Lewin, Trusts, 273, 684; 2 Perry, Trusts, § 503; Cooke v. Crawford, 13 Sim. 91; Saunders v. Webber, 39 Cal. 287.

<sup>59</sup> 1 Perry, Trusts, § 340; Loring, Trustees' Handbook (2d Ed.) 44, 46; Godefroi, Trusts (2d Ed.) 26.

<sup>60</sup> Lewin, Trusts, 685; 2 Perry, Trusts, § 496. But see Giselman v. Starr, 106 Cal. 651, a case of a trustee to secure a debt.

<sup>61</sup> 2 Perry, Trusts, § 503; Druid Park Heights Co. v. Oettinger, 53 Md. 546; Freeman v. Prendergast, 94 Ga. 369; Boutelle v. City Sav. Bank, 17 R. I. 781; Safe Deposit & Trust Co. v. Sutro, 75 Md. 361; Bradford v. Monks, 132 Mass. 405.

<sup>62</sup> 1 Perry, Trusts, §§ 287, 503; Cole v. Wade, 16 Ves. 27; Doe d. Gosson v. Ladd, 77 Ala. 223; Young v. Young, 97 N. C. 132; Edwards v. Maupin, 18 D. C. 39; Security Co. v. Snow, 70 Conn. 238; Gambell v. Trippe, 75 Md. 252. See, for a statute enabling a substituted trustee to act, Wilson v. Pennock, 27 Pa. St. 238.

Apart from statute, such administrator cannot exercise the power, unless it appears that the testator so intended.<sup>63</sup>

In many of the states there is a statute defining the duties of an administrator *c. f. a.* These statutes vary considerably in language, and have been construed by the courts with little uniformity. Some of them apparently enable such administrator to execute any power of sale given to the original executor, unless, presumably, the will contains an express provision to the contrary;<sup>64</sup> others enable him to execute such powers only if these latter are not of a discretionary or personal character;<sup>65</sup> and in one state, at least, it has been held that the statute does not give him any right to exercise such powers, they not being regarded as appertaining to the office of executor, but as being entirely distinct therefrom.<sup>66</sup>

— (b) In case of joint donees.

As a general rule, where a power is given to two or more donees, they must all execute the power, unless the instru-

<sup>63</sup> 2 Perry, Trusts, § 500; *In re Clay*, 16 Ch. Div. 3; *Conklin v. Egerton's Adm'r*, 31 Wend. (N. Y.) 429; *Wills v. Cowper*, 2 Ohio, 124; *Compton v. McMahan*, 19 Mo. App. 494; *Hodgin v. Toler*, 70 Iowa, 21; *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Jones v. Fulghum*, 3 Tenn. Ch. 193.

<sup>64</sup> See *Steele's Ex'rs v. Moxley*, 9 Dana (Ky.) 137; *Shields v. Smith*, 8 Bush (Ky.) 601; *Venable v. Mercantile Trust & Deposit Co.*, 74 Md. 187; *Bay v. Posner*, 78 Md. 42; *Saunders v. Saunders*, 108 N. C. 327; *Green v. Davidson*, 4 Bart. (Tenn.) 483; *Kidwell v. Brummagin*, 32 Cal. 436; *Elstner v. Fife*, 32 Ohio St. 358; *Sandifer v. Grantham*, 62 Miss. 412; *Dilworth v. Rice*, 48 Mo. 124; *Evans v. Blackiston*, 66 Mo. 437; *Robinson v. Ostendorff*, 38 S. C. 66; *Jackman v. Delafield*, 85 Pa. St. 381; *Potts v. Breneman*, 182 Pa. St. 295; *Mosby's Adm'r v. Mosby's Adm'r*, 9 Grat. (Va.) 584.

<sup>65</sup> See *Mitchell v. Spence*, 62 Ala. 450; *Hinson v. Williamson*, 74 Ala. 280; *Mott v. Ackerman*, 92 N. Y. 539; *Drummond's Adm'r v. Jones*, 44 N. J. Eq. 53; *Naundorf v. Schumann*, 41 N. J. Eq. 14. Compare *Coehe v. Johnson*, 69 Miss. 46; *Bailey v. Brown*, 9 R. I. 73.

<sup>66</sup> *Nicoll v. Scott*, 99 Ill. 529; *Bigelow v. Cady*, 171 Ill. 229.

ment creating the power, or the statute, otherwise declares.<sup>67</sup> Accordingly, where a power is given to two or more executors, all who are living and acting must unite in the execution.<sup>68</sup> But an executor who refuses to qualify need not join.<sup>69</sup> Nor need one who is removed from office, or renounces after qualifying.<sup>70</sup> But it seems that if the will shows that the testator intended to give a personal discretion to the particular individuals named by him as executors, to be exercised by them jointly, all must join in the execution of the power, though one renounce the office.<sup>71</sup>

On the same principle, joint trustees, if living, must all

<sup>67</sup> 1 Chance, Powers, § 603; 1 Perry, Trusts, § 294; 2 Story, Eq. Jür. § 1062.

<sup>68</sup> Chance, Powers, § 606; *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Crowley v. Hicks*, 72 Wis. 539; *Gould v. Mather*, 104 Mass. 283; *Wilder v. Ranney*, 95 N. Y. 7; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 14 Johns. (N. Y.) 562; *Deneale v. Morgan's Ex'rs*, 5 Call (Va.) 407; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162; *Noel v. Harvey*, 29 Miss. 72.

<sup>69</sup> *Warden v. Richards*, 11 Gray (Mass.) 277; *Denton v. Clark*, 36 N. J. Eq. 534; *Putnam Free School Trustees v. Fisher*, 30 Me. 523; *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Wright v. Dunn*, 73 Tex. 293; *Pahlman v. Smith*, 23 Ill. 448; *Wardwell v. McDowell*, 31 Ill. 364; *Wolfe v. Hines*, 93 Ga. 329; *Phillips v. Stewart*, 59 Mo. 491; *Heron v. Hoffner*, 3 Rawle (Pa.) 393; *Stewart v. Mathews*, 19 Fla. 752; *Wardwell v. McDowell*, 31 Ill. 364; *Corlies v. Little*, 14 N. J. Law, 373; *Meakings v. Cromwell*, 5 N. Y. 136; *Chanet v. Villepontoux*, 3 McCord (S. C.) 29. In Pennsylvania a formal renunciation is necessary. *Neel v. Beach*, 92 Pa. St. 221.

St. 21 Hen. VIII. c. 4 (A. D. 1529), provided that, if any of the executors refused to serve, all sales directed by the will should be validly made by those accepting the charge. Sugden, Powers, 125. There is a similar statute in some states, while in others the policy of the statute is adopted without any enactment.

<sup>70</sup> *Weimar v. Fath*, 43 N. J. Law, 1; *Clinefelter v. Ayres*, 16 Ill. 329; *Gould v. Mather*, 104 Mass. 283. So, by force of statute. *Weimar v. Fath*, 43 N. J. Law, 1; *Clark v. Denton*, 36 N. J. Eq. 419; *Wells v. Lewis*, 4 Metc. (Ky.) 269.

<sup>71</sup> *Tarver v. Haines*, 55 Ala. 503; *Franklin v. Osgood*, 2 Johns. Ch. (N. Y.) 21; *Clay v. Hart*, 7 Dana (Ky.) 8; *Bartlett v. Sutherland*, 24 Miss. 395.

unite in the exercise of the power,<sup>73</sup> unless one disclaims the trust, in which case the remaining trustee or trustees may act.<sup>74</sup>

— — Death of joint donee.

In the case of a power coupled with an interest, that is, when a power is given to trustees or executors, who are also given the legal title, upon the death of one or more, since the estate or interest survives and is vested in the survivor or survivors, unless a contrary intention appear,<sup>75</sup> the power also survives; while, if the power is a mere naked power, either in executors or others, it will terminate upon the death of one of the donees, unless a contrary intention is shown by the language of the instrument creating the power.<sup>76</sup>

To determine whether, in the case of a naked power, there is such an intention that it shall survive, is frequently difficult. There is no such intention, it is presumed, when a

<sup>73</sup> Lewin, Trusts, 683; 2 Perry, Trusts, §§ 493, 499; 2 Story, Eq. Jur. § 1280; Lancashire v. Lancashire, 2 Phil. Ch. 664; Boston Frank-  
linite Co. v. Condit, 19 N. J. Eq. 394; Wilbur v. Almy, 12 How. (U. S.)  
180; Chapin v. First Universalist Soc., 8 Gray (Mass.) 580; Morville  
v. Fowle, 144 Mass. 109.

<sup>74</sup> Lewin, Trusts, 683; 2 Perry, Trusts, § 502; Cooke v. Crawford,  
13 Sim. 96.

<sup>75</sup> 2 Perry, Trusts, § 505; Dillard v. Dillard, 97 Va. 434. See  
Hadley v. Hadley, 147 Ind. 423.

<sup>76</sup> Co. Litt. 112b, 113a, 131b; Lewin, Trusts, 683; 2 Perry, Trusts,  
§§ 499, 505; Lane v. Debenham, 11 Hare, 188, 5 Gray's Cas. 352; Rob-  
inson v. Allison, 74 Ala. 254; Putnam Free School Trustees v.  
Fisher, 30 Me. 523; Peter v. Beverly, 10 Pet. (U. S.) 532, 564;  
Muldrow's Heirs v. Fox's Heirs, 2 Dana (Ky.) 79; Gutman v.  
Buckler, 69 Md. 7; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 14  
Johns. (N. Y.) 527; Golder v. Bressler, 105 Ill. 419; Robertson v.  
Gaines, 2 Humph. (Tenn.) 367; Conklin v. Egerton's Adm'r, 21  
Wend. (N. Y.) 430; Compton v. McMahan, 19 Mo. App. 494; Tainter  
v. Clark, 13 Metc. (Mass.) 220; Gray v. Lynch, 8 Gill (Md.) 403;  
Parker v. Sears, 117 Mass. 513.



power is conferred, by their proper names, on two or more persons who are not executors or trustees.<sup>76</sup> But if the power is given to persons in the character of executors rather than as individuals, it appearing that it is as holders of the office that the execution of the power is intrusted to them, it may be exercised by the survivor;<sup>77</sup> and the power will, it seems, be regarded as so given when it is in aid of the administration and settlement of the estate, as a power to sell for the payment of debts and legacies, or for the sake of creating a common fund composed of the personalty and the proceeds of the realty.<sup>78</sup>

A statute sometimes provides that a surviving executor or trustee may exercise the powers originally given to the executors or trustees jointly; but even then the power will not, it seems, be exercisable after the death of one, if it was intended to rest in the joint personal discretion of the persons named as executors or trustees,<sup>79</sup> or if it was given to them in their individual rather than in their official character.<sup>80</sup>

<sup>76</sup> Co. Litt. 113a, Hargrave's note; Sugden, 128; Montefiore v. Browne, 7 H. L. Cas. 261, 267; Peter v. Beverly, 10 Pet. (U. S.) 532, 564; Marks v. Tarver, 59 Ala. 335; Glover v. Stillson, 56 Conn. 316.

<sup>77</sup> Co. Litt. 113a, Hargrave's note; Sugden, 128; Hauell v. Barnes, Cro. Car. 382, 5 Gray's Cas. 351; Peter v. Beverly, 10 Pet. (U. S.) 532, 564; Zebach's Lessee v. Smith, 3 Bin. (Pa.) 69; Putnam Free School Trustees v. Fisher, 30 Me. 523; Hazel v. Hagan, 47 Mo. 277; Weimar v. Fath, 43 N. J. Law, 1; Davis v. Christian, 15 Grat. (Va.) 11; Mastin v. Barnard, 33 Ga. 520; Chandler v. Rider, 102 Mass. 268; Bradford v. Monks, 132 Mass. 405; In re Murphy's Estate, 184 Pa. St. 310; Gaines v. Fender, 82 Mo. 497; Dick v. Harby, 48 S. C. 516; Fitzgerald v. Standish, 102 Tenn. 383.

<sup>78</sup> 2 Perry, Trusts, § 499, and note; 2 Woerner, Administration, § 339; 5 Gray's Cas. 356, note. See Zebach's Lessee v. Smith, 3 Bin. (Pa.) 69; Chandler v. Rider, 102 Mass. 268; Jackson v. Ferris, 15 Johns. (N. Y.) 346.

<sup>79</sup> Robinson v. Allison, 74 Ala. 254; Hunter v. Anderson, 152 Pa. St. 386. Compare Ely v. Dix, 118 Ill. 477.

<sup>80</sup> Lippincott v. Wikoff, 54 N. J. Eq. 107; O'Rourke v. Sherwin, 156 Pa. St. 285. Compare Weimar v. Fath, 43 N. J. Law, 1.

If a power is given to several persons as a class, as "my sons" or "my trustees," without naming them, it can, it is said, be exercised by the survivors so long as more than one remains.<sup>81</sup>

§ 283. Mode of execution.

The terms of the power in regard to the character of the instrument by which it is to be exercised, or in regard to the execution, attestation, or delivery of such instrument, must be strictly complied with; and accordingly, if the instrument creating the power declares that it shall be executed by deed, it cannot be executed by will, and *vice versa*,<sup>82</sup> and if it declare that it shall be executed by an instrument having a certain number of witnesses, it cannot be executed by an instrument, though signed and sealed, having a less number of witnesses.<sup>83</sup> If, however, the power contains no restrictions, express or implied, upon the mode of execution, it may be executed by any instrument sufficiently showing an intention to execute it.<sup>84</sup>

In some states it is provided by statute that the execution must be by an instrument, whether a will or a conveyance

<sup>81</sup> Co. Litt. 113b; Sugden, 128; 4 Kent, Comm. 326; 2 Washburn, Real Prop. 323; Story, Eq. Jur. 1062, note. See *Shelton v. Homer*, 5 Metc. (Mass.) 462; *Carroll v. Stewart*, 4 Rich. Law (S. C.) 200; *Muldrow v. Fox's Heirs*, 2 Dana (Ky.) 79. Compare 1 Chance, Powers, 655. As to aid in equity, see post, § 287.

<sup>82</sup> Sugden, 207, 210, et seq; Williams, Real Prop. 296; *Wright v. Wakeford*, 17 Ves. 454, 4 Taunt. 213; *Porter v. Turner*, 3 Serg. & R. (Pa.) 108; *Moore v. Dimond*, 5 R. I. 121; *Hacker's Appeal*, 121 Pa. St. 192; *Porter v. Thomas*, 23 Ga. 467; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150; *Hood v. Haden*, 82 Va. 588; *Gaskins v. Finks*, 90 Va. 384; *Wooster v. Cooper*, 59 N. J. Eq. 204; *Wooster v. Fitzgerald*, 61 N. J. Law, 368, 687.

<sup>83</sup> *Ladd v. Ladd*, 8 How. (U. S.) 10; *Breit v. Yeaton*, 101 Ill. 242; *Montgomery v. Agricultural Bank*, 10 Smedes & M. (Miss.) 566.

<sup>84</sup> Sugden, Powers, 203; *Christy v. Pulliam*, 17 Ill. 59; *Cueman v. Broadnax*, 37 N. J. Law, 508. And see *Schley v. McCeney*, 36 Md. 266.

*inter vivos*, which would be sufficient to pass the estate if the appointor were the owner;<sup>85</sup> and in approximately the same states it is provided that unnecessary formalities enjoined by the creator of the power need not be complied with.<sup>86</sup>

When the power is, by the terms of its creation, to be exercised at the donee's death, it must be exercised by will.<sup>87</sup>

— Showing as to intent to execute.

It is well settled that the instrument executing the power need not specifically refer to the power, provided it show an intent to execute it;<sup>88</sup> but whether the donee of a power, in executing an instrument sufficient in form for the execution of the power, but not referring specifically thereto, intended to thereby execute the power, has been the subject of frequent litigation. It is the rule in England, and has quite frequently been adjudged in this country, that the intent to execute a power must appear in one of three ways,—either (1) by reference to the power; (2) by reference to the property which is the subject of the power; or (3) by reason of the fact that the instrument will be ineffectual unless considered as an execution of the power.<sup>89</sup> On the other hand,

<sup>85</sup> 1 Stimson's Am. St. Law, § 1659; 4 Sharswood & B. Lead. Cas. Real Prop. 46; Chaplin, Exp. Trusts, § 622.

<sup>86</sup> 1 Stimson's Am. St. Law, § 1659; 4 Sharswood & B. Lead. Cas. Real Prop. 46, 59; Chaplin, Exp. Trusts, § 626.

<sup>87</sup> *Freeland v. Pearson*, L. R. 3 Eq. 658; *Porter v. Thomas*, 23 Ga. 467; *Weir v. Smith*, 62 Tex. 1. And see *Hood v. Haden*, 82 Va. 538.

<sup>88</sup> *Sugden*, Powers, 289; *Story*, Eq. Jur. § 1062a; *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357; *Lee v. Simpson*, 134 U. S. 572; *Matthews v. McDade*, 72 Ala. 377; *Bullercliff v. Wright*, 148 Ind. 477; *Chase v. Ladd*, 155 Mass. 417; *Glindrat v. Montgomery Gas-Light Co.*, 82 Ala. 596, 60 Am. Rep. 769; *Patterson v. Wilson*, 64 Md. 193; *Campbell v. Johnson*, 65 Mo. 439; *Dousadow v. Wilde*, 63 Pa. St. 170; *Scott v. Bryan*, 194 Pa. St. 41; *Weir v. Smith*, 62 Tex. 1.

<sup>89</sup> *Farwell*, Powers, 176; *Doe d. Nowell v. Roake*, 2 Bing. 497; *Den d. Nowell v. Roake*, 6 Bing. 475, 5 Gray's Cas. 333; *Walke v.*

in a number of decisions in this country, it has been held that the intent need not appear in one of these ways, but that it is to be determined, as in any other case, by a construction of the whole instrument, with reference to the circumstances under which it was executed.<sup>90</sup>

If the donee of a power over certain land makes a conveyance or devise of the specific land, and he has no estate in the land on which the conveyance or devise can operate, it will take effect as an execution of the power, since otherwise it can have no operation.<sup>91</sup>

Moore, 95 Va. 729; Young v. Mutual Life Ins. Co., 101 Tenn. 311; Dick v. Harby, 48 S. C. 516; Hollister v. Shaw, 46 Conn. 248; Farlow v. Farlow, 83 Md. 118; Ridgely v. Cross, 83 Md. 161.

<sup>90</sup> Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, 5 Gray's Cas. 421; Amory v. Meredith, 7 Allen (Mass.) 397, 5 Gray's Cas. 430; Warner v. Connecticut Mut. Life Ins. Co., 109 U. S. 361; Lee v. Simpson, 134 U. S. 572; Blake v. Hawkins, 98 U. S. 315; Bangs v. Smith, 98 Mass. 270; Chase v. Ladd, 155 Mass. 417; Funk v. Eggleston, 92 Ill. 515, 54 Am. Rep. 136; Goff v. Pensenhafer, 190 Ill. 200; Gindrat v. Montgomery Gas-Light Co., 82 Ala. 596; Andrews v. Brumfield, 32 Miss. 107; Moody v. Tedder, 16 S. C. 557; Arlington State Bank v. Paulsen, 57 Neb. 717; Kimball v. Bible Soc., 65 N. H. 139; Bredell v. Collier, 40 Mo. 287; Johnston v. Knight, 117 N. C. 123; Scott v. Bryan, 194 Pa. St. 41; McCreary v. Bomberger, 151 Pa. St. 323; Bullerdick v. Wright, 148 Ind. 477; South v. South, 91 Ind. 231, 46 Am. Rep. 591.

<sup>91</sup> Sugden, 289, 290; Clere's Case, 6 Coke, 17b, 5 Gray's Cas. 333; Scrope's Case, 10 Coke, 143b; Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, 5 Gray's Cas. 421; Taylor v. Eatman, 92 N. C. 601; Keefer v. Schwartz, 47 Pa. St. 507; Drusadow v. Wilde, 63 Pa. St. 170; Scott v. Bryan, 194 Pa. St. 41; Weir v. Smith, 62 Tex. 1; Hood v. Haden, 82 Va. 588; Hanna v. Ladewig, 78 Tex. 27.

This rule has been applied in the case of a conveyance by an executor having power of sale to his vendee. Dick v. Harby, 48 S. C. 516; Matthews v. McDade, 72 Ala. 377; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420; Faulk v. Dashiell, 62 Tex. 642, 50 Am. Rep. 542.

It is provided by statute in some states that an instrument executed by the donee of the power which he would have no right to execute except under the power shall be deemed a valid execution of the power. 4 Sharswood & B. Lead. Cas. Real Prop. §3; 1 Stimson's Am. St. Law, § 1659.

If one has an estate in the land, and also a power over the same land, a devise by him of such land,<sup>92</sup> or a conveyance thereof,<sup>93</sup> will generally be considered as affecting his estate therein only, and not as executing the power. But though the donee of the power also has an estate in the land, a conveyance which calls for a larger estate than that which he has will usually be regarded as an execution of the power, especially in favor of a purchaser for value, to whom he is under an obligation to make the conveyance effectual for the full estate conveyed. Thus, the conveyance of a fee by one who has a life estate, with power over the fee, will be regarded as an execution of the power.<sup>94</sup> In such a case the fact that the donee of the power believes that he is conveying his own property when he conveys a fee, and is not aware that he has a power merely as to the fee, is immaterial.<sup>95</sup>

In the case of a conveyance or devise, not referring to the power or to the particular land, but using general expres-

<sup>92</sup> *Clere's Case*, 6 Coke, 17b, 5 Gray's Cas. 333; *Den v. Roake*, 6 Bing. 475, 5 Gray's Cas. 410.

<sup>93</sup> *Bell v. Twilight*, 22 N. H. 500; *Jones v. Wood*, 16 Pa. St. 25; *Phillips v. Brown*, 16 R. I. 279; *Payne v. Johnson's Ex'rs*, 95 Ky. 175; *Daniel v. Felt*, 100 Fed. 727; *Towles v. Fisher*, 77 N. C. 437; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Robeno v. Marlatt*, 136 Pa. St. 35; *Lardner v. Williams*, 98 Wis. 514.

<sup>94</sup> *Sugden*, Powers, 347; *Farwell*, Powers, 267; *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357; *Band v. Boucher*, 60 Miss. 326; *McMillan v. Deering*, 139 Ind. 70; *Gingrat v. Montgomery Gas-Light Co.*, 82 Ala. 596; *Bishop v. Remple*, 11 Ohio St. 282; *Hall v. Preble*, 68 Me. 100; *Walke v. Moore*, 95 Va. 729; *Campbell v. Johnson*, 65 Mo. 439, overruling *Owen v. Switzer*, 51 Mo. 322; *Guarantee & Trust Co. v. Jones*, 103 Tenn. 245; *Runkenberger v. Meyer*, 155 Ind. 152; *Goff v. Pensénhafer*, 190 Ill. 200. But see, as suggesting a contrary view, *Towles v. Fisher*, 77 N. C. 437; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Lardner v. Williams*, 98 Wis. 514; *New England Mortgage Security Co. v. Bulce*, 98 Ga. 795; *Scott v. Bryan*, 194 Pa. St. 41; *Ridgely v. Cross*, 83 Md. 161.

<sup>95</sup> *Sugden*, Powers, 348; *Young v. Mutual Life Ins. Co.*, 101 Tenn. 311; *Terry v. Rodahan*, 79 Ga. 278, 11 Am. St. Rep. 420; *Allison v. Kurtz*, 3 Watts (Pa.) 185.

sions descriptive of land or interests therein, such as "all my real estate," or "all the residue of my real estate," or "my leasehold property," if the grantor or testator owns no interests in land to which these expressions can refer, the instrument will be regarded as an execution of the power.<sup>96</sup> If, however, the donee of the power owns other interests in lands to which these expressions can be referred, the rule is established in England that such a general conveyance or devise does not show an intention to execute the power, since this is not necessary to make it effectual; and the same rule has been adopted in a number of decisions in this country.<sup>97</sup> So far as regards the execution of general powers by will, this rule was changed in England by the Wills Act, providing that a general devise shall operate as an execution of a power, unless a contrary intent appear; and in a number of states in this country there are similar provisions, not restricted to general powers.<sup>98</sup> In some states the same rule as that

<sup>96</sup> Sugden, Powers, 318; Standen v. Standen, 2 Ves. Jr. 539, 5 Gray's Cas. 399; Lewis v. Lewellyn, Turn. & R. 104, 5 Gray's Cas. 405; Grant v. Lyman, 4 Russ. 292, 5 Gray's Cas. 409; Smith v. Curtis, 29 N. J. Law, 352; Jones v. Wood, 16 Pa. St. 42; Mory v. Michael, 18 Md. 227; Keefer v. Schwartz, 47 Pa. St. 503. But as to the possible effect on this rule of statutes providing that a will shall pass after-acquired lands, see Wooster v. Cooper, 59 N. J. Eq. 204.

In the case of personal chattels, the question whether there is any property at the time of testator's death from which a bequest of a certain sum can be paid cannot, by the English decisions, be considered to determine whether the bequest was an execution of the power. Farwell, 229; Jones v. Tucker, 2 Mer. 533, 5 Gray's Cas. 403; Grant v. Lyman, 4 Russ. 292, 5 Gray's Cas. 409. Contra, White v. Hicks, 33 N. Y. 333.

<sup>97</sup> Sugden, Powers, 312; Den v. Roake, 6 Bing. 475, 5 Gray's Cas. 410; Hollister v. Shaw, 46 Conn. 248; Bingham's Appeal, 64 Pa. St. 345; Patterson v. Wilson, 64 Md. 193; Meeker v. Breintnall, 38 N. J. Eq. 345; Cotting v. De Sartiges, 17 R. I. 668; Bilderback v. Boyce, 14 S. C. 528; Mason v. Wheeler, 19 R. I. 21; Harvard College v. Balch, 171 Ill. 275.

<sup>98</sup> 1 Vict. c. 26, § 27; Farwell, 227, 235; 1 Stimson's Am. St. Law, (630)

prescribed by these statutes has been adopted, without any legislative enactment, in regard to devises in general terms, such as a residuary devise;<sup>99</sup> and in jurisdictions where it is considered that the intent of the testator is to be determined by a construction of the whole will, with reference to the circumstances under which it was executed, the English rule may be modified in particular cases.<sup>100</sup>

#### § 284. Time of execution.

The question as to the time for the execution of a power, and the effect of a provision in regard to such time, is one of the construction of the instrument creating the power. In the case of a power of sale given to an executor or trustee, a provision that it shall be exercised within a certain number of years is usually regarded as directory, and not mandatory, and hence as not invalidating a sale after that time.<sup>101</sup> On the other hand, when the power is not to be exercised until a future event or a future time, the power being, in effect, previously nonexistent, a previous exercise thereof is generally void.<sup>102</sup> So, as a general rule, a power

§ 1659; 4 Sharswood & B. Lead. Cas. Real Prop. 62. See Lockwood v. Mildeberger, 159 N. Y. 181; Machir v. Funk, 90 Va. 284; Payne v. Johnson's Ex'rs, 95 Ky. 175; Herbert's Guardian v. Herbert's Ex'r, 85 Ky. 134.

<sup>99</sup> Amory v. Meredith, 7 Allen (Mass.) 397, 5 Gray's Cas. 430; Sewall v. Wilmer, 132 Mass. 131; Cumston v. Bartlett, 149 Mass. 243; Hassam v. Hazen, 156 Mass. 93; Johnston v. Knight, 117 N. C. 122; Emery v. Haven, 67 N. Y. 503.

<sup>100</sup> See Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, 5 Gray's Cas. 421. And see cases cited ante, note 90.

<sup>101</sup> Pearce v. Gardner, 10 Hare, 287; Cuff v. Hall, 1 Jur. (N. S.) 972; Shalter & Ebling's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552; Hale v. Hale, 137 Mass. 168; Hallum v. Silliman, 78 Tex. 347; Marsh v. Love, 42 N. J. Eq. 112; Mott v. Ackerman, 92 N. Y. 539. Contra, Daly's Lessee v. James, 8 Wheat. (U. S.) 495; Richardson v. Sharpe, 29 Barb. (N. Y.) 222. And see Hemphill v. Fry, 183 Pa. St. 603; Bakewell v. Ogden, 2 Bush (Ky.) 265.

<sup>102</sup> Want v. Stallibrass, L. R. 8 Exch. 175; Booraem v. Wells, 19 N.

of sale given to a person, such as an executor or trustee, to sell land in which another has a life estate, cannot be exercised during the latter's life.<sup>103</sup> In such a case, however, the power may be exercised before the time named, if all the parties interested are *sui juris* and consent thereto; and this is consistent with the substantial purpose of the creator of the power.<sup>104</sup> If the postponement of the time of sale is merely for the benefit of the life tenant, the latter's assent thereto will, it has been sometimes decided, be sufficient to validate the sale,<sup>105</sup> though in other cases the right to sell with the consent of the life tenant has been expressly negatived.<sup>106</sup>

J. Eq. 87; *Henry v. Simpson*, 19 Grant Ch. 522; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Raper v. Sanders*, 21 Grat. (Va.) 60; *Loomis v. McClintock*, 10 Watts (Pa.) 274; *Ruggles v. Tyson* (Wis.) 79 N. W. 766, 104 Wis. 500. But see *Snell's Ex'rs v. Snell*, 38 N. J. Eq. 119.

By the English cases, a distinction is taken between cases in which the power does not arise until the future time or event, and those in which it is called into existence immediately, but is not to be exercised till a future contingency, a premature exercise of the power in the latter case being valid. *Farwell, Powers*, 144, 147.

<sup>103</sup> *Co. Litt.* 113; *Sugden, Powers*, 266; *Want v. Stallibrass*, L. R. 8 Exch. 175; *Dohoney v. Taylor*, 79 Ky. 124; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Booraem v. Wells*, 19 N. J. Eq. 87; *Hampton v. Nicholson*, 23 N. J. Eq. 423.

<sup>104</sup> *Sugden, Powers*, 266; *Kilpatrick v. Barron*, 125 N. Y. 751; *Want v. Stallibrass*, L. R. 8 Exch. 175.

<sup>105</sup> *Truell v. Tysson*, 21 Beav. 439; *Snell's Ex'rs v. Snell*, 38 N. J. Eq. 119; *Gast v. Porter*, 18 Pa. St. 533; *Hamlin v. Thomas*, 126 Pa. St. 20.

<sup>106</sup> *Want v. Stallibrass*, L. R. 8 Exch. 175; *Henry v. Simpson*, 19 Grant Ch. 522; *Davis v. Howcott*, 21 N. C. 460; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Raper v. Sanders*, 21 Grat. (Va.) 60. And see *Lewin, Trusts* (10th Ed.) 492, and *Sugden, Powers*, 266, in which latter work it is said that since the power cannot, by the terms of its creation, be exercised till the life tenant's death, the persons in whom the fee is vested till the exercise of the power must join, in order to confer title.



## § 285. Conditions of execution.

A condition precedent to the exercise of a power must be complied with.<sup>107</sup> Accordingly, if a power of sale is to be exercised only upon the request or with the assent of another person, a sale without such request or consent is invalid.<sup>108</sup> A power to sell land when necessary for the support of a person named has been held to be badly exercised if no such necessity exists.<sup>109</sup>

A power in a trustee or executor to sell land for the payment of debts is, of course, not properly exercised if there are no debts, or if they are paid or barred by the statute of limitations;<sup>110</sup> but a purchaser is not, by the weight of authority, charged with notice of the nonexistence of debts, unless, it seems, the power is exercised after the lapse of so long a time as to raise a presumption that the debts have been paid.<sup>111</sup>

<sup>107</sup> Farwell, Powers, 148; *Austin v. Oakes*, 117 N. Y. 577; *McClintock v. Cowen*, 49 Pa. St. 256; *Petit v. Flint & P. M. R. Co.*, 114 Mich. 362.

<sup>108</sup> Sugden, Powers, 252; *Bent-Otero Improvement Co. v. Whitehead*, 25 Colo. 354; *Richardson v. Crooker*, 7 Gray (Mass.) 190; *Gordon v. Gordon* (Tenn. Ch. App.) 46 S. W. 357; *Goebel v. Thiens*, 85 Wis. 286.

<sup>109</sup> *Hull v. Culver*, 34 Conn. 403; *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; *Minot v. Prescott*, 14 Mass. 495; *Scheidt v. Crecelius*, 94 Mo. 322; *Henderson v. Blackburn*, 104 Ill. 227. Compare *Griffin v. Griffin*, 141 Ill. 373; *Crozier v. Hoyt*, 97 Ill. 23.

<sup>110</sup> *Griffin v. Griffin*, 141 Ill. 373; *Sweeney v. Warren*, 127 N. Y. 426; *Ward's Lessee v. Barrows*, 2 Ohio St. 242; *Hemphill v. Pry*, 183 Pa. St. 593; *McDonald v. Hamblen*, 78 Tex. 628; *Moore v. Moores*, 41 N. J. Law, 440.

In *Dike v. Ricks*, Cro. Car. 335, it was decided that a power of sale "in case it should fully and sufficiently appear" that the personalty was insufficient to pay debts could be exercised only in case the insufficiency so appeared. This, however, would hardly be regarded as law at the present day, when land is made by law assets for payment of debts. See Farwell, Powers, 151.

<sup>111</sup> Farwell, Powers, 82; *Smith v. McIntyre* (C. C. A.) 95 Fed. 585;

## § 286. Excessive execution.

The execution of a power is said to be "excessive" when it transgresses the rules of law or the scope of the power.<sup>113</sup> It may be excessive (1) as regards the objects, as where a power to appoint to children is exercised in favor of grandchildren; (2) in the interests given, as where, under a power to lease for twenty-one years, a lease is made for twenty-two years; (3) in conditions annexed to the gift made in execution of the power, as where an appointment is made subject to a condition that the appointee pay a particular debt.<sup>113</sup>

When an appointment is made to persons who are not objects of the power, as well as to persons who are, it will be valid as to the latter if it can be ascertained what shares the latter are, by the appointment, intended to take.<sup>114</sup>

If the appointment is for an estate or interest greater than that contemplated by the power, as when a power to appoint for life is executed by an appointment in fee, the appointment, while wholly void at law, is valid in equity as regards the estate authorized.<sup>115</sup> And so, where the power author-

Rutherford's Heirs v. Clark's Heirs, 4 Bush (Ky.) 27; Doran v. Piper, 164 Pa. St. 430; Smith v. Henning, 10 W. Va. 596.

<sup>113</sup> Farwell, Powers, 285.

<sup>113</sup> Sugden, Powers, 498.

<sup>114</sup> Farwell, Powers, 312; Alexander v. Alexander, 2 Ves. Sr. 646, 5 Gray's Cas. 452; In re Brown's Trust, L. R. 1 Eq. 74, 5 Gray's Cas. 473; Sadler v. Pratt, 5 Sim. 632, 5 Gray's Cas. 458; Cruse v. McKee, 2 Head (Tenn.) 1; Horwitz v. Norris, 49 Pa. St. 213. Contra, Varrell v. Wendell, 20 N. H. 431.

So, where a power to appoint among members of a class was exercised by appointing life estates to the members of the class, with remainders to their children, the appointments for life were treated as valid, and the remainders were divided among the members of the class. Horwitz v. Norris, 49 Pa. St. 213. But that an appointment was entirely void in such case, in view of testator's apparent intention, see Myers v. Safe Deposit & Trust Co., 73 Md. 413. And see Little v. Bennett, 58 N. C. 156,

<sup>115</sup> Sugden, Powers, 521.

izes a lease for a certain term, a lease for a greater number of years is, in equity, void as to the excess only.<sup>116</sup>

If the execution is excessive by reason of the imposition by the donee of conditions or qualifications upon the estates to be enjoyed by the appointees, as by postponing the time of vesting, or by requiring them to share with others, or to make certain payments, such conditions or qualifications, if separable from the exercise of the power, will be rejected, and the appointment otherwise upheld.<sup>117</sup>

§ 287. Defective execution—Aider in equity.

In certain cases, when an attempted appointment is bad at law because of a failure to make it in the manner required by the power, equity will aid the defective execution by compelling a transfer of the land to the appointee named by the person in whom the title is vested in default of appointment. Such relief will be given in favor of persons who have given value for the appointment, as purchasers, lessees, or creditors of the person intending to exercise the power,<sup>118</sup> or persons for whom such intending appointor was, by relationship, bound to make provision, as his wife or legitimate child,<sup>119</sup> and also in favor of a charity.<sup>120</sup>

The defects thus aided in equity are those which are not

<sup>116</sup> Sugden, Powers, 519; Campbell v. Leach, Amb. 740.

<sup>117</sup> Sugden, Powers, 515, 526; Farwell, Powers, 298; Sadler v. Pratt, 5 Sim. 632, 5 Gray's Cas. 458; Pepper's Appeal, 120 Pa. St. 235.

<sup>118</sup> Sugden, Powers, 533; Williams, Real Prop. 298; Tollet v. Tollet, 1 White & T. Lead. Cas. Eq. 227, notes; Howard v. Carpenter, 11 Md. 259; Beatty v. Clark, 20 Cal. 11; Mutual Life Ins. Co. v. Everett, 40 N. J. Eq. 245.

<sup>119</sup> Sugden, Powers, 534; Fothergill v. Fothergill, 1 Eq. Cas. Abr. 222, pl. 9, 5 Gray's Cas. 478; Porter v. Turner, 3 Serg. & R. (Pa.) 108. The defect will be supplied in favor of a child, even to the prejudice of another child, if the latter is otherwise provided for. Farwell, Powers, 341; Morse v. Martin, 34 Beav. 500, 5 Gray's Cas. 490.

<sup>120</sup> Sugden, Powers, 534; Sayer v. Sayer, 7 Hare, 377, 5 Gray's Cas. 436; Piggot v. Penrice, Finch, Prec. Ch. 411, 5 Gray's Cas. 479.

of the essence of the power, but appertain to the form of the instrument by which the power is executed. Thus, relief will be given when the power calls for an execution by an instrument under seal, and the seal is omitted,<sup>121</sup> or when the instrument by which the power is sought to be executed has less than the proper number of witnesses.<sup>122</sup> Where the power should, by its terms, be executed by deed, and is, instead, executed by will, equity will relieve;<sup>123</sup> but this will not be done if the power should be executed by will, and, instead, is executed by deed, since the intention that the power shall continue revocable is defeated by such an execution.<sup>124</sup> A mere covenant or contract to execute is considered in equity, in favor of the classes of persons before enumerated, as equivalent to an execution.<sup>125</sup> And where a tenant for life, with power to make leases, agrees, for a valuable consideration, to make a lease, the agreement will be enforced against the remainderman, provided it be valid under the Statute of Frauds.<sup>126</sup>

<sup>121</sup> *Smith v. Ashton*, 1 Ch. Cas. 263, 5 Gray's Cas. 475.

<sup>122</sup> *Wilkes v. Holmes*, 9 Mod. 485, 5 Gray's Cas. 481; *Sergeson v. Sealey*, 2 Atk. 412, 5 Gray's Cas. 482; *Schenck v. Ellingwood*, 2 Edw. Ch. (N. Y.) 175.

<sup>123</sup> *Sugden, Powers*, 558; *Tollet v. Tollet*, 2 P. Wms. 489, 5 Gray's Cas. 480.

<sup>124</sup> *Farwell, Powers*, 332; *Bentham v. Smith*, 1 Cheves Eq. (S. C.) 32. And see *Moore v. Dimond*, 5 R. I. 121; *Thrasher v. Ballard*, 33 W. Va. 285.

<sup>125</sup> *Sugden, Powers*, 550. The rule has been frequently applied in the case of a covenant, by one having power to settle a jointure, to settle it in favor of his wife. *Clifford v. Burlington*, 9 Vern. 379, 5 Gray's Cas. 477; *Fothergill v. Fothergill*, 1 Eq. Cas. Abr. 222, pl. 2, 5 Gray's Cas. 478; *Farwell, Powers*, 519.

<sup>126</sup> *Shannon v. Bradstreet*, 1 Schoales & L. 52; *Blore v. Sutton*, 3 Mer. 237, 5 Gray's Cas. 483; *Howard v. Carpenter*, 11 Md. 259.

On the same principle, where a power was given to a person to be executed after he arrived at the age of twenty-five, a covenant by her, for valuable consideration, to execute the power, made before she arrived at that age, was held to be a valid execution in equity after (636)

Equity will not aid the defective execution of a statutory power, since this would, in effect, defeat the requirements of the statute as to the mode of execution.<sup>127</sup>

§ 288. Illusory appointments.

Under the doctrine of "illusory" appointments, it was formerly the rule in England that, where one had a "nonexclusive" power,—that is, a power of appointing among *all* the members of a class, as, for instance, to all one's children,—equity would regard an appointment of a merely nominal share to one of such class as invalid, and would require a substantial share to be given him.<sup>128</sup> This doctrine has been repudiated by some courts in this country, it being considered that the claim of each of the objects is satisfied if there is any appointment to him, however small the share,<sup>129</sup> while by other courts it is apparently recognized.<sup>130</sup> It has now been abolished in England by a statutory provision, in effect making every power of appointment exclusive,—that is, authorizing an appointment which excludes members of the class named,—unless the amount of the share from which no member of the class shall be excluded is expressly stated in the instrument creating the power.<sup>131</sup>

she attained that age. *Johnson v. Touchet*, 37 Law J. Ch. 25, 5 Gray's Cas. 492.

<sup>127</sup> Farwell, Powers, 343 et seq.; *McBride's Heirs v. Wilkinson*, 29 Ala. 662; *Smith v. Bowe*, 38 Md. 463.

<sup>128</sup> Sugden, Powers, 449, 938; *Butcher v. Butcher*, 1 Ves. & B. 79, 5 Gray's Cas. 371.

<sup>129</sup> *Lines v. Darden*, 5 Fla. 51; *Fronty v. Godard*, Bailey Eq. (S. C.) 517; *Graeff v. De Turk*, 44 Pa. St. 527.

<sup>130</sup> *Thrasher v. Ballard*, 35 W. Va. 524; *City of Portsmouth v. Shackford*, 46 N. H. 423; *Hatchett v. Hatchett*, 103 Ala. 556; *Cruse v. McKee*, 2 Head (Tenn.) 1; *Degman v. Degman*, 98 Ky. 717; *McCamant v. Nuckolls*, 35 Va. 331.

<sup>131</sup> 37 & 38 Vict. c. 37, § 1 (A. D. 1874). By an earlier statute (1 Wm. IV. c. 46, A. D. 1830), the doctrine had been abolished by providing that an appointment to one of the class, however small,

## § 289. Fraud on powers.

Equity will intervene to prevent a fraud upon a power, as it is called, this consisting of an execution of a special power in a particular way for an ulterior purpose not authorized by the power, or for the pecuniary advantage of the appointor to an extent not contemplated by the creator of the power.<sup>132</sup> Thus, it is a fraud on the power for a father, having the power of appointment among his children, to appoint the portion designed for a daughter to one of his sons, with directions to withhold it from the daughter in case she marry a particular person;<sup>133</sup> as it is for a father to appoint to a child who is ill, and likely to die, in order that he himself may inherit.<sup>134</sup> So, the execution of a power was set aside when it was to a son in order that he might be able to act as bail for the appointor.<sup>135</sup> But the execution in favor of a particular person will not, it seems, be set aside because it is based on a preference for that person over others, or on animosity to those excluded, the purpose or intention only, and not the motive, being a subject for inquiry.<sup>136</sup>

should not be invalid, but requiring all the members of the class to be included. See the adverse comments on the earlier statute by Jessel, M. R., in *Gainsford v. Dunn*, L. R. 17 Eq. 405, 5 Gray's Cas. 366.

<sup>132</sup> Farwell, Powers, 403 et seq; *Duke of Portland v. Topham*, 11 H. L. Cas. 32; *Holt v. Hogan*, 58 N. C. 82; *Degman v. Degman*, 98 Ky. 717; *Shank v. Dewitt*, 44 Ohio St. 237; *Fleming v. Mills*, 182 Ill. 464; *Baird v. Boucher*, 60 Miss. 326; *Harty v. Doyle*, 49 Hun (N. Y.) 410; *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 439; *Stocker v. Foster*, 178 Mass. 591.

<sup>133</sup> *Duke of Portland v. Topham*, 11 H. L. Cas. 32.

<sup>134</sup> *Wellesley v. Mornington*, 2 Kay & J. 143.

<sup>135</sup> *Bostick v. Winton*, 1 Sneed (Tenn.) 524.

<sup>136</sup> Farwell, Powers, 428; 1 Leake, 432; *Topham v. Duke of Portland*, 5 Ch. App. 57. See *Fronty v. Godard*, 1 Bailey Eq. (S. C.) 517; *Hill v. Jones*, 65 Ala. 214; *Hamilton v. Mound City Mut. Life Ins. Co.*, 6 Lea (Tenn.) 402.

In the case of a general power, unrestricted as to purposes and objects, the donee may appoint to himself.<sup>187</sup>

§ 290. Gifts in default of execution.

In the case of a power of appointment among a certain class, instead of regarding it as a power in the nature of a trust, enforceable in favor of the objects of the power, the English courts have frequently implied a gift to such objects in default of appointment. Whether such a gift be implied, or the power regarded as one in trust for the class named, seems to be immaterial as regards results.<sup>188</sup> As to the persons in favor of whom such a gift is implied, it is decided that when the instrument creating the power contains an express gift to a class, with a power to determine, by appointment, in what shares and in what manner the members of the class are to take, the property vests, until the power is exercised, in all the members of the class, and they all take in default of appointment. Consequently, the death of one of the class before the time for the appointment does not divest his interest, and it goes to his heirs or devisees.<sup>189</sup> On the other hand, if the instrument creating the power does not contain a gift of the property to a class, but merely a power to A. to give it, as he may think fit, among

<sup>187</sup> See ante, § 281.

<sup>188</sup> See Sugden, Powers, 592; Farwell, Powers, 466, 467; Salusbury v. Denton, 3 Kay & J. 535.

<sup>189</sup> Farwell, Powers (2d Ed.) 472; Lambert v. Thwaites, L. R. 2 Eq. 151, 5 Gray's Cas. 386; Casterton v. Sutherland, 9 Ves. 445, 5 Gray's Cas. 381; Wilson v. Duguid, 24 Ch. Div. 244, 5 Gray's Cas. 392; Rhett v. Mason's Ex'x, 18 Grat. (Va.) 541; Carson v. Carson, 62 N. C. 57. So, in Lambert v. Thwaites, supra, where the property was, at the death of a life tenant, to be divided among all such tenant's children in such shares as he should declare by will, it was decided that, he not having appointed the shares by will, the surviving children, and also the devisees of a deceased child, were all entitled to share in the property.

the members of that class, the law implies an intent to give it, in default of appointment, to those only of the class to whom it might have gone under an exercise of the power; and consequently, if the power could be exercised by will only, the heir, devisee, or representative of one of the class who dies during the donee's life is not entitled to share.<sup>140</sup>

### § 291. The extinguishment of powers.

A power of appointment is generally extinguished by its execution if the entire interest in the whole property is thereby appointed, and some powers, such as powers of sale, are necessarily exhausted by a single execution covering all the property.<sup>141</sup> But a power may be executed at different times over different parts of the property, or to the extent of partial interests and estates therein, as where one appoints an estate for life at one time, and a fee at another.<sup>142</sup> A power is necessarily extinguished when the purposes for which it was created have ceased to exist,<sup>143</sup> or when the power is one to sell for purposes of division, and the persons entitled

<sup>140</sup> Farwell, Powers, 474; *Lambert v. Thwaites*, L. R. 2 Eq. 151, 5 Gray's Cas. 386; *Kennedy v. Kingston*, 2 Jac. & W. 431; *Walsh v. Wallinger*, 2 Russ. & M. 78, 5 Gray's Cas. 382. See *In re Phene's Trusts*, L. R. 5 Eq. 346, 5 Gray's Cas. 391.

In case of failure to appoint under a power to appoint among "relatives," those relations only who are the next of kin under the statute for the distribution of an intestate's personal property will take, although the property in question is real and not personal property. *Farwell, Powers*, 506; *Wilson v. Duguid*, 24 Ch. Div. 244, 5 Gray's Cas. 392.

<sup>141</sup> *Farwell, Powers*, 35, 36; *Ex parte Elliott*, 5 Whart. (Pa.) 534; *Fritsch v. Klausling*, 11 Ky. Law Rep. 788, 13 S. W. 241; *Assay v. Hoover*, 5 Pa. St. 21. But a power to sell and reinvest has been held not to be exhausted by one sale and investment. *Owsley v. Eads' Trustees*, 22 Ky. Law Rep. 355, 57 S. W. 225.

<sup>142</sup> *Sugden, Powers*, 272; *Farwell, Powers*, 35.

<sup>143</sup> *Farwell, Powers*, 33, 61; 2 *Perry, Trusts*, § 493; *Swift's Appeal*, 87 Pa. St. 502; *Hetzell v. Barber*, 69 N. Y. 1; *Wilks v. Burns*, 60 Md. 64; *Smith v. Taylor*, 21 Ill. 296.



agree to a division.<sup>144</sup> So, in the case of a power to sell in order to obtain funds for the use or support of a person named, the power will cease upon the death of such person.<sup>145</sup> Where a power is given to a person named as executor, the cessation of the executorship, or his retirement from the office, will not terminate his power if it is given to him personally,<sup>146</sup> though it will have that effect if it is annexed to the office.<sup>147</sup> A power of sale given to a trustee will terminate with the termination of the trust, unless a contrary intention appear.<sup>148</sup> A power is likewise extinguished if its exercise is dependent on the consent of another person, or of other persons, and one of such persons dies without having given consent.<sup>149</sup>

A power given to one who has no estate in the land, and to whom no estate is given, to be exercised in favor of another, termed a power "simply collateral," cannot, apart from statute, be suspended or extinguished by any act on the part of the donee with respect to the land, nor can it be released by him, except when it is for his own benefit, as a power to charge a sum of money on the land for himself.<sup>150</sup>

<sup>144</sup> *Chasy v. Gowdy*, 43 N. J. Eq. 95; *Wooster v. Cooper*, 59 N. J. Eq. 204.

<sup>145</sup> *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Wilkinson v. Bulst*, 124 Pa. St. 253; *Fidler v. Lash*, 125 Pa. St. 87; *Harmon v. Smith*, 38 Fed. 482; *Ward's Lessee v. Barrows*, 2 Ohio St. 241. But not upon the death of one of several persons, for whose benefit the sale is to be made. *Ely v. Dix*, 118 Ill. 477.

<sup>146</sup> *Smith v. McIntyre*, 37 C. C. A. 177, 95 Fed. 585; *Mordecai v. Schirmer*, 38 S. C. 294; *Larned v. Bridge*, 17 Pick. (Mass.) 339; *Scholl v. Olmstead*, 84 Ga. 693; *Hazel v. Hagan*, 47 Mo. 277.

<sup>147</sup> *Littleton v. Addington*, 59 Mo. 275; *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145. See *Hoffman v. Hoffman*, 66 Md. 563.

<sup>148</sup> *Heard v. Reade*, 171 Mass. 374; *Bakewell v. Ogden*, 2 Bush (Ky.) 265.

<sup>149</sup> *Sugden, Powers*, 252; *Barber v. Cary*, 11 N. Y. 397; *Kissam v. Dierkes*, 49 N. Y. 602; *Powles v. Jordan*, 62 Md. 499; *Peirsol v. Roop*, 56 N. J. Eq. 739. But see *Leeds v. Wakefield*, 10 Gray (Mass.) 514.

<sup>150</sup> *Sugden, Powers*, 49; *West v. Berney*, 1 Russ. & M. 431, 5 Gray's

If the donee of a power has an estate in the land, and the exercise of the power would necessarily affect his estate, as when a tenant in fee has power to appoint to others in fee, or a tenant for life has power to grant leases in possession, an alienation of his estate, or of a part thereof, by the donee, will generally destroy the power, or suspend it to the extent of the alienation, since it would be a fraud upon the alienee if the grantor could thereafter, by executing the power, derogate from his own grant. A power the exercise of which would thus operate upon the estate of the donee, and which he can therefore suspend or extinguish by alienation, is known as a power "appurtenant" or "appendant," it being to some extent dependent on the estate in the donee of the power.<sup>151</sup> But even in the case of a power "appurtenant" or "appendant," an alienation of his estate by the donee does not extinguish the power if it affect only an interest less than that to which the power extends, and a subsequent execution of the power by him is valid if he does not thereby derogate from his previous grant; and accordingly one who has a life estate with power to appoint the fee may, though he aliens his life estate, thereafter appoint the fee, if he reserved this right in his conveyance, or if his alienee assents to such appointment.<sup>152</sup> Where the donee of a power has an estate in the land, but this is not such that it would be affected by the exercise of the power, as in the case of a tenant for life who has power to appoint to his

**Cas. 341.** This is changed in England by the conveyancing act of 1881 (section 52), which allows any donee of a power to release it by deed, or contract not to exercise it. *Farwell, Powers, 11.*

<sup>151</sup> *Sugden, Powers, 46, 51, 57; Brown v. Renshaw, 57 Md. 67; Armstrong v. Snowden, 61 Md. 364.*

<sup>152</sup> *Farwell, Powers, 20; Alexander v. Mills, 6 Ch. App. 124; Hardaker v. Moorhouse, 26 Ch. Div. 417; Leggett v. Doremus, 25 N. J. Eq. 122.* So, where the conveyance of the life estate was to an assignee in bankruptcy. *Jones v. Winwood, 3 Mees. & W. 652.*

children after his death, the power is said to be "collateral" or "in gross," and an alienation of his estate does not affect the power.<sup>153</sup>

All powers other than those "simply collateral," including powers "in gross," if not, it seems, coupled with a trust,<sup>154</sup> may be released by the donee to any person having an estate of freehold in the land.<sup>155</sup>

A power of appointment is not merged in an estate in fee simple which is given to the donee of the power by the instrument creating the power,<sup>156</sup> though it is destroyed, it seems, if the donee of a power subsequently acquires the fee simple.<sup>157</sup>

#### § 292. Appointed property as assets.

Property which is subject to a general power of appointment is not, apart from statute, liable for the payment of the debts of the donee, even in equity, since the person entitled to the property in default of appointment has an equal equity with the donee's creditors.<sup>158</sup> If, however, such a power is executed by the donee in favor of one who pays no consideration, the property is thereby made assets for payment of the donee's debts, and the claims of his creditors will take

<sup>153</sup> Sugden, Powers, 46, 79; *West v. Berney*, 1 Russ. & M. 431, 5 Gray's Cas. 341.

<sup>154</sup> Farwell, Powers, 12, 15; *Saul v. Pattinson*, 34 Wkly. Rep. 561; *Dunne's Trusts*, L. R. 1 Ir. 516. See *West v. Berney*, 1 Russ. & M. 431, 5 Gray's Cas. 341; *Atkinson v. Dowling*, 33 S. C. 414.

<sup>155</sup> Sugden, Powers, 82 et seq.; *Albany's Case*, 1 Coke, 110b, 5 Gray's Cas. 328; *West v. Berney*, 1 Russ. & M. 431, 5 Gray's Cas. 341; *Smith v. Death*, 5 Madd. 371, 5 Gray's Cas. 344.

<sup>156</sup> Sugden, Powers, 93; *Maundrell v. Maundrell*, 10 Ves. 246, 256; *Sites v. Eldredge*, 45 N. J. Eq. 632.

<sup>157</sup> Farwell, Powers, 31.

<sup>158</sup> Farwell, Powers, 255; *Holmes v. Coghill*, 7 Ves. 499, 5 Gray's Cas. 447; *Jones v. Clifton*, 101 U. S. 225; *Ryan v. Mahan*, 20 R. I. 417; *Gilman v. Bell*, 99 Ill. 144; *Crawford v. Langmaid*, 171 Mass. 309.

precedence of the claims of the appointees, it being immaterial, in this connection, that the power is exercisable only by will.<sup>159</sup>

In England, execution is now allowed by statute against land over which the debtor has a power which he may exercise for his own benefit;<sup>160</sup> and in a number of states in this country a power which could be executed in favor of the donee is by statute made equivalent to an estate in fee as regards creditors, and the execution of the power may be decreed for their benefit.<sup>161</sup>

### § 293. State statutory systems.

In New York, and in five other states which have adopted its legislation in this regard, the law of powers has been the subject of statutory codification, involving many changes

<sup>159</sup> Sugden, Powers, 474; Farwell, Powers, 254; *Holmes v. Coghill*, 7 Ves. 499, 5 Gray's Cas. 447; *In re Harvey's Estate*, 13 Ch. Div. 216; *Brandies v. Cochrane*, 112 U. S. 344; *Manson v. Duncanson*, 166 U. S. 533, 546; *Knowles v. Dodge*, 1 Mackey (D. C.) 66; *Johnson v. Cushing*, 15 N. H. 298; *Gilman v. Bell*, 99 Ill. 144; *Clapp v. Ingraham*, 124 Mass. 200.

In Pennsylvania and South Carolina it has been decided that the property is not assets, even after execution of the power. *Com. v. Duffield*, 12 Pa. St. 277; *Humphrey v. Campbell*, 59 S. C. 39. In Vermont, the general rule is questioned, and it is held not to be applicable so as to render the property liable for the donee's debts existing before the creation of the power, he having been given merely an equitable life estate with a power to appoint, to take effect after his death. *Wales v. Bowdish's Ex'r*, 61 Vt. 23.

That the appointee must be a volunteer in order that the creditors may take precedence, see *Patterson v. Lawrence*, 83 Ga. 703. The appointed property is not to be subjected to payment of debts if there is other property sufficient for this purpose. *White v. Institute of Technology*, 171 Mass. 84; *Patterson v. Lawrence*, 83 Ga. 703.

<sup>160</sup> 1 Leake, 427; Williams, Real Prop. 293.

<sup>161</sup> 1 Stimson's Am. St. Law, §§ 1656, 1657; 4 Sharswood & B. Lead. Cas. Real Prop. 25, 28; Chaplin, Exp. Trusts, § 711. See *Alford's Adm'r v. Alford's Adm'r*, 56 Ala. 350; *Ford v. Ford*, 70 Wis. 19.

from the law as it exists in England and other states.<sup>153</sup> These statutory provisions in express terms abolish powers as they formerly existed, but, in the solution of questions not covered by the statute, the English law on the subject is occasionally referred to,<sup>153</sup> and in many respects the same principles apply as before the statutory change. For a discussion of this peculiar code system, and of the numerous decisions which have been rendered in the construction and application of its provisions, reference must be made to local treatises, and here there will be made mention only of the statutory classification of the subject.<sup>154</sup>

Powers are, by these statutes, divided, (1) according to the degree of control given over the property, into general and special powers, and, (2) according to the persons interested in their exercise, into beneficial powers and powers in trust. A power is general where it authorizes the transfer or incumbrance of a fee, by either a conveyance or a will or a charge, to any person whatever, while it is special if the persons or class of persons in whose favor it may be exercised are named, or if it authorizes the creation of an estate less than a fee.<sup>155</sup> This division into general and special powers corresponds with the English division into general and limited or particular powers, so far as it is based on the designation of persons in whose favor the power must be exercised.<sup>156</sup>

A power is, under these statutes, "beneficial" if no person other than the grantee has, by the terms of its creation,

<sup>153</sup> 1 Stimson's Am. St. Law, §§ 1650-1659; New York Real Prop. Law, §§ 110-160; Comp. Laws Mich. 1897, §§ 8856-8917; Gen. St. Minn. 1894, §§ 4301-4361; Rev. Codes N. D. 1895, §§ 3402-3464; Ann. St. S. D. 1901, §§ 3724-3781; Sanb. & B. St. Wis. 1898, §§ 2101-2158.

<sup>154</sup> Chaplin, Exp. Trusts, § 531.

<sup>155</sup> A Treatise on Express Trusts and Powers, by Stewart Chaplin, Esq., is probably the most reliable authority on the subject.

<sup>156</sup> New York Real Prop. Law, §§ 114, 115.

<sup>156</sup> See Farwell, Powers, 7; Sugden, Powers, 294.

any interest in its execution, while a power is "in trust" if any person or persons, other than the donee of the power, is designated as entitled to any portion of the proceeds or other benefits to result from its execution, or if the disposition or charge which it authorizes is limited to be made to a person or class of persons other than the donee.<sup>167</sup> Powers in trust are imperative unless there is an express direction, in the creation of the power, that it shall be discretionary,<sup>168</sup> and consequently powers in trust, as known to the English law, would be included in the statutory class of the same name.

§ 294. The rule against perpetuities applied to powers.

The rule against perpetuities is applicable to powers, but subject to certain peculiarities in the mode of its application, arising from the nature of a power. A power is bad if, by the terms of its creation, it may be exercised after the time fixed by the rule, since, until its exercise, the title is subject to a future limitation of a contingent character.<sup>169</sup> Accordingly, a power given to a life tenant, yet unborn, to appoint by will, is void, since the appointment might be made at a time beyond the legal period.<sup>170</sup>

A power of appointment which does not require an appointment which will transgress the rule is not bad merely because it does not preclude such an appointment, since the power alone does not create the estate, but the appointment under it, and the object of the rule is sufficiently attained by applying it to the limitations created by the appointment.<sup>171</sup>

<sup>167</sup> New York Real Prop. Law, §§ 117, 118.

<sup>168</sup> New York Real Prop. Law, §§ 117, 118.

<sup>169</sup> Gray, Perpetuities, § 475; *Bristow v. Boothby*, 2 Sim. & L. 465, 5 Gray's Cas. 702; *Woodbridge v. Winslow*, 170 Mass. 388.

<sup>170</sup> *Morgan v. Gronow*, L. R. 16 Eq. 1, 5 Gray's Cas. 726.

<sup>171</sup> Gray, Perpetuities, §§ 510-513; *Lewis, Perpetuity*, 487; *Sar* (646)

In determining the validity of limitations created by the exercise of a special power, as being within or without the rule, the time allowed by the rule is computed from the time of the creation of the power, and not from its execution.<sup>173</sup> But a general power, not restricted as to time or objects of execution, and exercisable either by conveyance or will, is equivalent to absolute ownership, and its exercise is on the same footing as an original conveyance. Consequently, the time within which limitations created by its exercise must vest is to be calculated as from the date of its exercise, and not from its creation.<sup>173</sup>

Powers given to a trustee to sell or lease land are not invalid merely because it is not expressly provided that they shall be exercised within a life or lives in being and twenty-one years thereafter.<sup>174</sup> Such powers, in the absence of an express showing of an intention to the contrary, cease, according to the English decisions, either upon the termination of the trust, or when the ultimate equitable owner is entitled to call for a conveyance of the legal title, and, after such right to call for a conveyance has accrued, the power is non-

den, Powers, 152; *Routledge v. Dorril*, 2 Ves. Jr. 357, 5 Gray's Cas. 703; *Lawrence's Estate*, 136 Pa. St. 354.

<sup>173</sup> Gray, *Perpetuities*, §§ 514-523b; Sugden, Powers, 396; *Lawrence's Estate*, 136 Pa. St. 355; *Thomas v. Gregg*, 76 Md. 169; *In re Boyd's Estate* (Pa.) 49 Atl. 299.

<sup>174</sup> Gray, *Perpetuities*, § 524; Lewis, *Perpetuity*, 482; *Bray v. Bree*, 2 Clark & F. 453, 5 Gray's Cas. 711; *Miffin's Appeal*, 121 Pa. St. 205, 6 Am. St. Rep. 781; *Lawrence's Estate*, 136 Pa. St. 355.

That a power to be exercised only by will is not a general power, within this rule, see Gray, *Perpetuities*, §§ 526-526b; *In re Powell's Trusts*, 39 Law J. Ch. 188, 5 Gray's Cas. 720; *Lawrence's Estate*, 136 Pa. St. 355; *Genet v. Hunt*, 113 N. Y. 158. Contra, *Rous v. Jackson*, 29 Ch. Div. 521; *In re Flower*, 55 Law J. Ch. 200, 5 Gray's Cas. 723.

<sup>174</sup> Gray, *Perpetuities*, §§ 490, 506; Farwell, Powers, 33, 112; *Lantsbery v. Collier*, 2 Kay & J. 709, 5 Gray's Cas. 713; *Cresson v. Ferree*, 70 Pa. St. 446; *Pulitzer v. Livingston*, 89 Me. 359.

existent for the purposes of the rule, since the equitable owner can at any time destroy it.<sup>175</sup> Under the decisions in various states, however, that the beneficiary, though absolutely entitled, cannot call for a conveyance if this would defeat the testator's intention, and those, apparently based on the same principle, that a trust is void if the *corpus* is not to be turned over to the beneficiary within the period named in the rule,<sup>176</sup> it would seem that such powers in a trustee are invalid if the trust is limited to continue beyond the period of the rule, and it is not expressly provided that they shall be exercised within that period. Even in England, if such powers are not to terminate with the trust, but may be exercised after the period of the rule, they are void.<sup>177</sup>

An appointment by way of particular estate and remainder is not void as to the particular estate, if this is within the legal period, though the appointment by way of remainder is too remote.<sup>178</sup>

<sup>175</sup> Gray, *Perpetuities*, §§ 490, 506; *Pullitzer v. Livingston*, 39 Ma. 359.

<sup>176</sup> See ante, §§ 101, 170; *Thorington v. Thorington*, 32 Ala. 439; *Atkinson v. Dowling*, 33 S. C. 414; *Grosvenor v. Bowen*, 15 R. I. 551.

<sup>177</sup> Gray, *Perpetuities*, § 493; *In re Wood* [1894] 3 Ch. 381. See *Wilkinson v. Buist*, 124 Pa. St. 253; *Kidwell v. Brummagin*, 32 Cal. 436; *Robertson v. Gaines*, 2 Humph. (Tenn.) 367.

<sup>178</sup> *Lewis, Perpetuity*, 496; Gray, *Perpetuities*, § 531; *Routledge v. Dorril*, 2 Ves. Jr. 357, 5 Gray's Cas. 703; *Lawrence's Estate*, 124 Pa. St. 355.



## **PART IV.**

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### **RIGHTS AS TO THE USE AND PROFITS OF ANOTHER'S LAND.**

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#### **CHAPTER XI.**

##### **NATURAL RIGHTS.**

- § 295. General considerations.**
- 296. Air.**
- 297. Natural watercourses.**
- 298. Surface waters.**
- 299. Water artificially collected.**
- 300. Underground waters.**
- 301. Support of land.**
- 302. Suspension of rights.**
- 303. Injuries to rights—Remedies.**

A landowner has certain natural rights restrictive of the use of other land in the vicinity by the owners thereof. Other rights in this respect can exist only by contract or grant. These natural rights are as follows:

- (1) To have the air free from unreasonable pollution by disagreeable vapors and odors, and also free from unreasonable noise.
- (2) To have water in a natural watercourse flow past his land without diminution, deterioration, or alteration, by acts on the part of others.
- (3) In some states, to discharge water on adjoining land.
- (4) In a few jurisdictions, to be free from injury by the escape of water artificially collected on another's land.
- (5) To have his land supported by adjacent and subjacent land.

**§ 295. General considerations.**

The rights which an owner of land has in reference to the use of other land, in the absence of any grant or stipulation in that regard, known as "natural rights," are summarized above, and will be specifically considered in the following sections. They owe their existence to the fact that, without them, a landowner might be, in part or wholly, deprived of the use and enjoyment of his land. A violation of one of these rights constitutes a "nuisance."

Apart from the protection given him by these natural rights, an owner of land has no right to complain of any use that may be made of adjoining or neighboring land, however such use may affect him or his property, unless he has acquired a right restrictive of such use either by the creation of an easement in his favor, or by a contract binding the other landowner personally; his right of redress for acts done upon neighboring land being otherwise restricted to cases of actual negligence.<sup>1</sup> A neighboring owner may accordingly use his land for any business whatever, provided it is not in its nature illegal, and it does not interfere with one of the rights specified;<sup>2</sup> and so one may erect any structure upon his land, though, by reason of its unsightliness, it is repugnant to the feelings of the adjacent owner, and depreciates the value of his property.<sup>3</sup> Likewise, the owner of land cannot object

<sup>1</sup> *Radcliff's Ex'rs v. City of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164; *Leavenworth Lodge v. Byers*, 54 Kan. 323; *Hummel v. Seventh St. Terrace Co.*, 20 Or. 401; *John Morris Co. v. Southworth*, 154 Ill. 118; *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Rep. 394; *Shearman & R. Negligence*, §§ 17, 701.

<sup>2</sup> *Westcott v. Middleton*, 43 N. J. Eq. 478; *Ex parte Whitwell*, 38 Cal. 73, 35 Am. St. Rep. 152; *Fisher v. Clark*, 41 Barb. (N. Y.) 329; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554; 2 Wood, *Nuisances*, § 567.

<sup>3</sup> *Falloon v. Schilling*, 29 Kan. 292, 44 Am. Rep. 642; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Harrison v. Good*, L. R. 11 Eq. 338.

that his building is deprived of light by an erection on adjacent land,<sup>4</sup> that a view from his premises is cut off thereby,<sup>5</sup> or that the view of his shop windows or signs by the public is so cut off.<sup>6</sup> Nor can he object that windows are placed in a neighboring building so as to enable persons to look into his windows or yard, his only remedy being to construct a building or fence which will shut off the neighbor's view of his premises.<sup>7</sup>

By the weight of authority, it is entirely immaterial that one's motive in so using or improving his land as to annoy his neighbor is malicious, and for the sole purpose of injuring the latter, provided the act be otherwise lawful,<sup>8</sup> though,

<sup>4</sup> *Russell v. Watts*, 10 App. Cas. 590, 596, 610; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111; *Levy v. Brothers*, 4 Misc. Rep. (N. Y.) 48; *Shipman v. Beers*, 2 Abb. N. C. (N. Y.) 435; *Tinker v. Forbes*, 136 Ill. 221; *Lapere v. Luckey*, 23 Kan. 534, 33 Am. Rep. 196; *Letts v. Kessler*, 54 Ohio St. 73. See, also, post, § 306.

<sup>5</sup> *Aldred's Case*, 9 Coke, 59; *Attorney General v. Doughty*, 2 Ves. Sr. 453; *Hawkins v. Sanders*, 45 Mich. 491; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Jenks v. Williams*, 115 Mass. 217; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Harwood v. Tompkins*, 24 N. J. Law, 425; *Lyon v. McDonald*, 78 Tex. 71; *Ray v. Lynes*, 10 Ala. 63; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62.

<sup>6</sup> *Butt v. Imperial Gas Co.*, 2 Ch. App. 153; *Smith v. Owen*, 35 Law J. Ch. 317; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182.

<sup>7</sup> *Goddard, Easements*, 53; *Tapling v. Jones*, 11 H. L. Cas. 290; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Shell v. Kemmerer*, 13 Phila. (Pa.) 502; *Christ Church v. Lavezzolo*, 156 Mass. 89; *Pierce v. Lemon*, 2 Houst. (Del.) 519.

<sup>8</sup> *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Falloon v. Schilling*, 29 Kan. 292, 44 Am. Rep. 642; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182; *Letts v. Kessler*, 54 Ohio St. 73; *Rideout v. Knox*, 143 Mass. 368, 12 Am. St. Rep. 560; *Jenkins v. Fowler*, 24 Pa. St. 308; *Fellock, Torts*, 154; *Wood, Nuisances*, §§ 6, 642. See post, § 300.

by some decisions, malice may make that a nuisance which would otherwise be entirely legal.<sup>9</sup>

### § 296. Air.

The owner of land has a "natural right" to have the air diffused over his premises in approximately its natural condition, free from pollution by smoke, dust, or vapors,<sup>10</sup> or by disagreeable odors,<sup>11</sup> and a violation of such right is a nuisance, entitling him to the recovery of damages, or an injunction against its continuance. Analogous to this right is that of a landowner to enjoy the use of his land free from disturbance by unreasonable noise or vibration.<sup>12</sup>

The exact limits of these rights are not defined by the cases with any considerable degree of exactitude, nor are they

<sup>9</sup> *Burke v. Smith*, 69 Mich. 380; *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510; *Peek v. Roe*, 110 Mich. 52. See, also, *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

Occasionally a statute forbids any malicious erection (*Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182), or a malicious erection of a particular character, as a fence (*Lord v. Langdon*, 91 Me. 231; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560).

<sup>10</sup> *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 2 Gray's Cas. 52; *Whitney v. Bartholomew*, 21 Conn. 213; *Smiths v. McConathy*, 11 Mo. 517; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *People v. Detroit White Lead Works*, 82 Mich. 471; *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cooper v. Randall*, 53 Ill. 24; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252; 1 Wood, Nuisances, §§ 677-752.

<sup>11</sup> *Morley v. Pragnel*, Cro. Car. 510, 2 Gray's Cas. 32; *Rapier v. Tramways Co.* [1893] 2 Ch. 588; *Francis v. Schoellkopf*, 53 N. Y. 152; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728; 2 Wood, Nuisances (3d Ed.) § 561 et seq.

<sup>12</sup> *Crump v. Lambert*, L. R. 3 Eq. 418; *Sturges v. Bridgman*, 11 Ch. Div. 852, 2 Gray's Cas. 57; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197; *Finch's Cas.* 382; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Hurlburt v. McKone*, 55 Conn. 21, 3 Am. St. Rep. 1; 2 Wood, Nuisances, § 611 et seq.

capable of exact definition, and the question of what constitutes a nuisance in this respect has to be determined with reference to the facts of the particular case.<sup>13</sup> One cannot, of course, demand that the air be absolutely pure, since this would exclude all occupation or use of neighboring lands, and the courts, in administering the law, recognize that the benefit of the individual must in many cases yield to the conditions of life in crowded communities, and it is said that no use of property constitutes a nuisance if it is "reasonable," with reference to the rights of others.<sup>14</sup> Accordingly, the courts generally consider the character of the particular neighborhood, and the usual mode of using property therein, in determining whether a particular use constitutes a nuisance.<sup>15</sup> The fact, however, that the business which causes an injurious pollution of the air is lawful, or even beneficial to the community as a whole, is no justification of the nuisance.<sup>16</sup>

Pollution of the air is not ground for complaint if it be merely disagreeable, but it must seriously interfere with

<sup>13</sup> See Pollock, Torts (6th Ed.) 392; 1 Wood, Nuisances, §§ 496, 559.

<sup>14</sup> Wood, Nuisances, §§ 1, 2, 498.

<sup>15</sup> 1 Wood, Nuisances, § 2; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 2 Gray's Cas. 52; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *McCaffrey's Appeal*, 105 Pa. St. 253; *Hurlburt v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595.

<sup>16</sup> *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 2 Gray's Cas. 52; *Bamford v. Turnley*, 3 Best & S. 62, 2 Gray's Cas. 41, overruling *Hole v. Barlow*, 4 C. B. (N. S.) 334, 2 Gray's Cas. 38; *Morley v. Pragnell*, Cro. Car. 510, 2 Gray's Cas. 32; *Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 317; *Meigs v. Lister*, 23 N. J. Eq. 199; *Hurlburt v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17; *Fay v. Whitman*, 100 Mass. 76; *People v. Detroit Lead Works*, 82 Mich. 471; *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 46 Am. St. Rep. 736; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595.

the ordinary enjoyment of life or comfort of existence,<sup>17</sup> though it need not be actually injurious to health.<sup>18</sup> Acts resulting in material injury to property, as when crops or grass are destroyed by the emission of noxious gases, clearly constitute a nuisance.<sup>19</sup> But an act lawful in itself, such as the carrying on of a business, does not constitute a nuisance, as causing injury to neighboring property, unless the injury is substantial, and injury discoverable only by scientific tests is not sufficient for the purpose.<sup>20</sup>

The fact that, when the noxious business was established, there was no person in the neighborhood who could be injured thereby, does not justify it as against one subsequently occupying adjacent land, it being immaterial to the latter's rights whether the contamination of the air arose from a cause existing before his acquisition of the property.<sup>21</sup>

— Passage of air.

An owner of land has no right to the passage of air to his

<sup>17</sup> *Walter v. Selfe*, 4 De Gex & S. 315; *Salvin v. North Brancepeth Coal Co.*, 9 Ch. App. 705; *Columbus Gas Co. v. Freelande*, 12 Ohio St. 392; *Wolcott v. Mellick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Pollatown Gas Co. v. Murphy*, 39 Pa. St. 257; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406, 54 Am. Dec. 45; *Wood, Nuisances*, §§ 7, 562; *Bigelow, Torts* (7th Ed.) § 627.

<sup>18</sup> *Crump v. Lambert*, L. R. 3 Eq. 409; *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18; *Catlin v. Valentine*, 9 Paige (N. Y.) 575, 38 Am. Dec. 567; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Pollock, Torts* (6th Ed.) 392.

<sup>19</sup> *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 2 Gray's Cas. 52; *People v. Detroit Lead Works*, 82 Mich. 471; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694; 1 *Wood, Nuisances*, §§ 536, 545.

<sup>20</sup> *Salvin v. Brancepeth Coal Co.*, 9 Ch. App. 705; 1 *Wood, Nuisances*, § 539 et seq.

<sup>21</sup> *Bliss v. Hall*, 4 Bing. (N. C.) 183, 2 Gray's Cas. 32; *Sturges v. Bridgman*, 11 Ch. Div. 852, 2 Gray's Cas. 57; *Hurlburt v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17; *Boston Ferrule Co. v. Hills*, 159 Mass. 147; *Wood, Nuisances*, §§ 76, 802.

land, as against the right of the owners of adjacent land to obstruct such passage by buildings.<sup>23</sup> A right to have air pass to a particular window or aperture may, however, be acquired by grant from the adjoining owner, the effect thereof being to deprive the latter of the right to obstruct such window by any erection on his land.<sup>23</sup>

### § 297. Natural watercourses.

A natural watercourse is a natural stream, flowing in a defined bed or channel, with banks and sides, and having permanent sources of supply, although in times of drought the flow may be diminished or temporarily suspended,<sup>24</sup> and even though it is supplied only at certain seasons of the year by the accumulation of water from rain and snow, if it flows in a channel in which it has been accustomed to flow from time immemorial.<sup>25</sup>

Water running in a natural watercourse is not the subject of property, but each riparian owner has certain rights, and is subject to certain obligations, in regard to the use thereof, which may be summarized in general terms by the statement that, on the one hand, he is entitled to have the water flow as it has been accustomed to flow, and, on the other hand, since the other proprietors have the same right, he cannot himself interfere with such flow to any material ex-

<sup>23</sup> *Bryant v. Lefever*, 4 C. P. Div. 172; *Webb v. Bird*, 18 C. B. (N. S.) 841; *Letts v. Kessler*, 54 Ohio St. 73; *Honsel v. Conant*, 12 Ill. App. 259; *Oldstein v. Firemen's Building Ass'n*, 44 La. Ann. 492.

<sup>23</sup> See post, § 306.

<sup>24</sup> *Angell, Watercourses*, § 4; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, 2 Gray's Cas. 174; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Hoyt v. Hudson*, 27 Wis. 656.

<sup>25</sup> *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Palmer v. Waddell*, 23 Kan. 353; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727; *Spangler v. City & County of San Francisco*, 84 Cal. 13, 18 Am. St. Rep. 158; *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 141.

tent.<sup>26</sup> It is with reference to this general rule that the specific rights of the riparian proprietors as among themselves have been formulated by judicial decisions.

— Appropriation of water.

The right of a riparian owner to appropriate water flowing past his land is, in general, limited to its use for such purposes, to such an extent, and in such a way as will not be inconsistent with a similar use by owners of other land lower down the stream,—lower “riparian proprietors,” as they are usually called.<sup>27</sup>

His right to appropriate the water for his domestic use, and also for the watering of his cattle, is not, however, according to the weight of authority, limited by considerations of the necessities of lower proprietors, and he may use the water for these “ordinary” purposes, even though the effect be to exhaust the supply.<sup>28</sup> On the other hand, his right to appropriate the water of the stream for what are considered “extraordinary” uses, such as manufacturing and irrigation, is restricted by the requirement that such appropri-

<sup>26</sup> 3 Kent, Comm. 439 et seq.; Angell, *Watercourses*, § 95 et seq.; Gould, *Waters*, § 204; Goddard, *Easements*, 84.

<sup>27</sup> 3 Kent, Comm. 439; *Mason v. Hill*, 5 Barn. & Adol. 1; *Acton v. Blundell*, 12 Mees. & W. 324, 2 Gray's Cas. 104; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 2 Gray's Cas. 145; *Garwood v. New York Cent. & Hudson River R. Co.*, 23 N. Y. 400, *Finch's Cas.* 116; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912; *Gehlen v. Knord*, 101 Iowa, 700, 63 Am. St. Rep. 416; *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262; *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141.

<sup>28</sup> Gould, *Waters*, § 205; *Miner v. Gilmour*, 12 Moore, P. C. 156; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Ferrea v. Knipe*, 28 Cal. 341, 87 Am. Dec. 128; *Arnold v. Foot*, 12 Wend. (N. Y.) 330; *Anderson v. Cincinnati Southern Ry. Co.*, 84 Ky. 45, 9 Am. St. Rep. 263; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Spence v. McDonough*, 77 Iowa, 460; *Anthony v. Latham*, 5 Pick. (Mass.) 175.



ation must not so diminish the flow of water as to materially injure other proprietors lower down the stream,<sup>29</sup> or, as the same idea is otherwise expressed, his use of the water must not be unreasonable, having regard to a like use by the lower proprietors.<sup>30</sup> What is a reasonable use for manufacture consistent with a like reasonable use by lower proprietors is, it appears, to be determined by such considerations as the width and depth of the bed, the volume of water, the fall thereof, previous usage, and, it is sometimes said, the state of improvement in manufactures and the useful arts,<sup>31</sup> and this is generally a question of fact for the jury, rather than a question of law.<sup>32</sup>

<sup>29</sup> *Embrey v. Owen*, 6 Exch. 353, 2 Gray's Cas. 109; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, 2 Gray's Cas. 119; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442, *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Rudd v. Williams*, 43 Ill. 385; *Gould v. Stafford*, 77 Cal. 66; *Garwood v. New York Cent. & Hudson River R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, *Finch's Cas.* 116; *Farrell v. Richards*, 30 N. J. Eq. 511; *Toile v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657; *Anderson v. Cincinnati Southern Ry. Co.*, 86 Ky. 44, 9 Am. St. Rep. 263; *Gould, Waters*, §§ 206, 217.

<sup>30</sup> *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156, 2 Gray's Cas. 143; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85, 2 Gray's Cas. 145; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723, 2 Gray's Cas. 164; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Chandler v. Howland*, 7 Gray (Mass.) 350, 66 Am. Dec. 487; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, note; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 806, 8 Am. Dec. 404; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Gould, Waters*, § 208.

<sup>31</sup> *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156, 2 Gray's Cas. 143; *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 463, 2 Gray's Cas. 155; *Cary v. Daniels*, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *City of Baltimore v. Appold*, 42 Md. 442; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *Mason v. Hoyle*, 56 Conn. 255; *Timm v. Bear*, 29 Wis. 254.

<sup>32</sup> *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723, 2 Gray's Cas. 164;

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A riparian owner, in order to make the reasonable use of the water allowed by law, may erect a dam, and thereby detain the water long enough for its profitable enjoyment, provided the detention is necessary and for a proper purpose, and is not unreasonable in point of duration.<sup>33</sup>

— Pollution of water.

The right of the riparian owner to have the stream flow by his land in its natural condition extends to the quality as well as the quantity of the water, and an upper proprietor has, *prima facie*, no right to so use his land or the water of the stream as to cause pollution of the latter.<sup>34</sup> This right of a lower riparian proprietor to have the water come to him free from pollution is subject, however, to the right of the upper proprietor to make a reasonable use of the water, and whether a use which affects the purity of the water is

*Elliot v. Fitchburg R. Co.*, 10 Mass. (Mass.) 191, 2 Gray's Cas. 145; *Garwood v. New York Cent. & Hudson River R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, *Finch's Cas.* 116; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Hettrich v. Deachler*, 6 Pa. St. 32.

<sup>33</sup> *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156, 2 Gray's Cas. 143; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 443; *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *Gould, Waters*, § 218.

<sup>34</sup> *Young v. Bankier Distillery Co.* [1893] App. Cas. 691; *Wood v. Waud*, 3 Exch. 748; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *Barrett v. Mount Greenwood Cemetery Ass'n*, 159 Ill. 385; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172; *Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106, 14 Am. Rep. 658; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 14 Am. St. Rep. 319; *Potter v. Froment*, 47 Cal. 165; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546, note.

reasonable in a particular case is, like the question as to excessive use, one of fact, to be determined by a consideration of the character and ordinary use of the stream, the extent of the pollution, its necessity for the purpose of making a beneficial use of the water, and the resulting injury to lower proprietors.<sup>25</sup>

— Obstruction of flow.

Watercourses are the means provided by nature for the drainage of the country through which they pass, and an owner of land has the right, as against a lower riparian owner, to have the water from his land, and from the land further up the stream, carried off by the watercourse, free from any obstruction by the lower proprietor. Consequently, a lower riparian proprietor cannot, by the erection of a dam or embankment, or other obstruction, cause such an accumulation of water that it flows back and submerges land belonging to another,<sup>26</sup> or interferes with the operation of a mill further up the stream.<sup>27</sup> Nor can he raise the level

<sup>25</sup> *Snow v. Parsons*, 28 Vt. 459, 2 Gray's Cas. 164; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Merrifield v. City of Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715; *City of Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Gould, Waters*, § 220.

<sup>26</sup> *McCormick v. Horan*, 81 N. Y. 86, 2 Gray's Cas. 171; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *City of Centerville v. Wright*, 156 Ill. 561; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Wabash & Erie Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Casebeer v. Mowry*, 55 Pa. St. 419, 38 Am. Dec. 766; *Neal v. Henry*, Meigs (Tenn.) 17, 33 Am. Dec. 125; *Rhodes v. Whitehead*, 27 Tex. 304, 34 Am. Dec. 631.

So he cannot, by an obstruction, cause the water to injure the land above, not by overflowing it, but by percolation. *Marsh v. Trullinger*, 6 Or. 356; *Pixley v. Clark*, 35 N. Y. 520, 31 Am. Dec. 72.

<sup>27</sup> *King v. Tiffany*, 9 Conn. 162; *Stout v. McAdams*, 3 Ill. 67, 33

of the stream so that water on the land of another cannot drain therein.<sup>38</sup>

The fact that the obstruction is such as to cause injury to another's land only at the time of a freshet will not excuse it, if the freshet causing the injury is such as may be expected periodically.<sup>39</sup> The rule is, however, different in the case of extraordinary floods, such as are not reasonably to be expected.<sup>40</sup>

In a number of states there are statutory provisions, known as "Mill Acts," allowing a riparian proprietor to erect a dam for the purpose of creating a water supply for his mill, though the result thereof be to cause land belonging to other persons above the dam to be submerged, the acts providing, however, for the assessment and payment by him of damages for injury so caused.<sup>41</sup>

The right to the use of a watercourse for the discharge of water exists only in respect to water of which the watercourse is the natural outlet, and does not justify the diversion of water from one stream into another stream, not its natural

Am. Dec. 441; *Omelvany v. Jaggars*, 2 Hill (S. C.) 634, 27 Am. Dec. 417, 4 Sharswood & B. Lead. Cas. Real Prop. 285; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *McIntosh v. Rankin*, 134 Mo. 340.

<sup>38</sup> *Gould, Waters*, § 210; *Treat v. Bates*, 37 Mich. 230; *Johnston v. Roane*, 48 N. C. 523.

<sup>39</sup> *Bell v. McClintock*, 9 Watts (Pa.) 119, 34 Am. Dec. 507; *McCoy v. Danley*, 20 Pa. St. 85, 2 Gray's Cas. 150; *Casebear v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Sprague v. City of Worcester*, 13 Gray (Mass.) 193; *Railroad Co. v. Carr*, 38 Ohio St. 448; *Burwell v. Hobson*, 13 Grat. (Va.) 322, 65 Am. Dec. 247. See *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61.

<sup>40</sup> *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 355; *Inhabitants of China v. Southwick*, 12 Me. 233; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107, 41 Am. Rep. 12. And see cases in preceding note.

<sup>41</sup> *Gould, Waters*, §§ 252, 579-622.

outlet, thereby subjecting lower lands on the latter to the servitude of a waterway for the water thus diverted.<sup>42</sup>

— Nonriparian proprietors.

The natural rights as to the use of the water are restricted to a riparian proprietor, and consequently, while a grantee from him of land abutting on the stream will also have such rights, a grantee of a portion of his land not so abutting will have no such rights, nor can the riparian proprietor keep the land, and at the same time assign to another the water rights based on such proprietorship.<sup>43</sup> On the same principle, a riparian proprietor cannot make use of the water for purposes not connected with his own land, as by supplying it for consumption to other persons not living thereon.<sup>44</sup>

— Prior appropriation.

By the common law, no rights are acquired by one riparian owner as against others, owing to the fact that he has first "occupied" or established a permanent means of appropriation of the water, as by building a dam or ditch for the purpose, unless the appropriation continues for such time and under such circumstances as to establish a right by prescrip-

<sup>42</sup> *McCormick v. Horan*, 81 N. Y. 86, 2 Gray's Cas. 171; *Merritt v. Parker*, 1 N. J. Law, 460; *Tillotson v. Smith*, 32 N. H. 90; *City of Baltimore v. Appold*, 42 Md. 442; *Miller v. Laubach*, 47 Pa. St. 154; *Jackman v. Arlington Mills*, 137 Mass. 277.

<sup>43</sup> *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300, 2 Gray's Cas. 134; *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. Div. 155; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Gould v. Eaton*, 117 Cal. 539; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538. But see *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

<sup>44</sup> *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.*, L. R. 7 H. L. 697; *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Garwood v. New York Cent. & Hudson River R. Co.*, 83 N. Y. 400, *Finch's Cas.* 116. See *Aetna Mills v. Inhabitants of Waltham*, 126 Mass. 422.

tion.<sup>45</sup> In the Pacific states and territories, however, a different rule prevails, and there any person who first appropriates water from a watercourse by means of a ditch, canal, or other structure, in order to apply it to some beneficial use, and does so apply it, acquires the right to a continuance of such appropriation as against all the world; this being the result of a policy adopted at the time when the lands were mostly in the hands of the government, in favor of the construction of works for the utilization of the natural resources of the country.<sup>46</sup>

### § 298. Surface waters.

Water spread upon the surface of land, or contained in depressions therein, and resulting from rain, snow, or like causes, if not flowing in a fixed channel, so as to constitute a watercourse, is known as "surface water," and is subject to rules entirely different from those applicable to a natural watercourse. Such water may be considered, firstly, with

<sup>45</sup> Gould, Waters, § 226; *Mason v. Hill*, 5 Barn. & Adol. 1; *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 468; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Pugh v. Wheeler*, 19 N. C. 50; *Stout v. McAdams*, 3 Ill. 67, 33 Am. Dec. 441; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265, *Finch's Cas.* 120; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313.

In Massachusetts and one or two other states, however, one who first erects a dam in a stream in order to utilize the water power may maintain it, even though it affects the ability of an upper proprietor to make use of the water power. See Gould, Waters, § 227.

<sup>46</sup> *Atchison v. Peterson*, 20 Wall. (U. S.) 507; *Irwin v. Phillips*, 5 Cal. 143, 63 Am. Dec. 113; *Yunker v. Nichols*, 1 Colo. 551; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Crane v. Winsor*, 2 Utah, 248; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727; Gould, Waters, § 228 et seq.; *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799, note.

reference to the right of the landowner to have it drain off through any neighboring watercourse, and, secondly, with regard to his right to have it drain off on other land.

As stated above, the owner of riparian land has a right, of which he cannot be deprived, to the use of the watercourse for the purpose of draining off this surface water from his land, and this right is not confined to the water which may drain off from his land in its natural state, but he may change and control the surface water, accelerating and increasing its flow into the stream, and, so long as he does this in the reasonable use of his own land, the lower proprietor cannot complain, if he is not injured by the discharge into the stream of surface water beyond the natural capacity of the channel.<sup>47</sup>

The question whether the owner of land has a right to have water drain off from his land upon adjacent lower land, or whether the owner of the lower land may make such improvements on his land as to prevent the natural flow of water thereon from the land lying above it, has been differently decided in different jurisdictions. In some states the rule of the civil law has been adopted, according to which land on which surface water naturally flows from another tenement is regarded as subject to a servitude of receiving such flow, and consequently the owner cannot, by any erection or improvement, prevent the escape thereon of water from the higher land.<sup>48</sup> In other jurisdictions, what is

<sup>47</sup> *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479, 2 Gray's Cas. 171; *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Noonan v. City of Albany*, 79 N. Y. 470; *Jackman v. Arlington Mills*, 137 Mass. 277; *Gould, Waters*, § 274.

<sup>48</sup> *Gould, Waters*, §§ 266, 276; *McDaniel v. Cummings*, 83 Cal. 515; *Porter v. Durham*, 74 N. C. 767; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163; *Gillham v. Madison County R. Co.*, 49 Ill. 484, 95 Am. Dec. 627;

known as the "common-law rule"<sup>49</sup> obtains, according to which the ordinary right of an owner of land to make any use whatever of his land, either by erections thereon or changes in the surface, is regarded as entirely independent of the effect which such erections or changes may have in causing water which naturally flows on his land to collect or flow on other land.<sup>50</sup>

Whether the civil or common-law rule controls, the owner of one tenement, though he may construct ditches and drains to expedite the escape of water which naturally flows on another's land, and may, to a reasonable degree, fill any depressions in which the water would otherwise collect,<sup>51</sup> cannot collect the surface water by artificial means, and throw

*Butler v. Peck*, 16 Ohio St. 335, 38 Am. Dec. 452; *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *De Lahoussaye v. Judice*, 13 La. Ann. 587.

<sup>49</sup> This is a misnomer, since there appears never to have been any direct decision on the subject in England. See the English cases bearing on the question discussed by J. C. Thomson, Esq., in 23 Am. Law Rev. 372, 387.

<sup>50</sup> *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, 2 Gray's Cas. 174; *Curtiss v. Ayrault*, 47 N. Y. 73, Finch's Cas. 126; *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 2 Gray's Cas. 168; *Bowlsby v. Speer*, 31 N. J. Law, 351, 36 Am. Dec. 216; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. City of Hudson*, 37 Wis. 656, 9 Am. Rep. 473; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276, note; *Rowe v. St. Paul, M. & M. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706; *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593; *Livingston v. McDonald*, 21 Iowa, 160, 39 Am. Dec. 563; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Beard v. Murphy*, 37 Vt. 99, 36 Am. Dec. 693; *Chadeayne v. Robinson*, 55 Conn. 345, 3 Am. St. Rep. 55; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.

<sup>51</sup> *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Peck v. Harrington*, 109 Ill. 611, 50 Am. Rep. 627; *Gregory v. Bush*, 64 Mich. 37; *Guesnard v. Bird*, 33 La. Ann. 796; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Miller v. Laubach*, 47 Pa. St. 154, 36 Am. Dec. 521; *Peck v. Goodberlett*, 109 N. Y. 180; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 3 Am. Rep. 50.



it on the lower land in new channels in such a way as to cause material damage to the lower land.<sup>53</sup>

The owner of land may appropriate or divert surface water upon his land, without reference to the resulting depletion of his neighbor's supply.<sup>53</sup>

An owner of land has no right to pollute in any way surface water collected on his land, and flowing therefrom on the land of an adjacent owner, and is liable for injuries so caused to the latter.<sup>54</sup>

<sup>53</sup> *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Martin v. Jett*, 12 La. Ann. 504, 32 Am. Dec. 120; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Rychlicki v. City of St. Louis*, 98 Mo. 497, 14 Am. St. Rep. 651; *Butler v. Peck*, 16 Ohio St. 334; *Anderson v. Henderson*, 124 Ill. 164; *Mizzell v. McGowan*, 125 N. C. 439; *Rhoads v. Davidhelser*, 133 Pa. St. 226, 19 Am. St. Rep. 630; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Jackman v. Arlington Mills*, 137 Mass. 277; *Wead v. St. Johnsbury & L. C. R. Co.*, 64 Vt. 52; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, 2 Gray's Cas. 174; *Hogenson v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 224; *Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113; *Gulf, C. & S. F. Ry. Co. v. Helsley*, 62 Tex. 593.

<sup>54</sup> *Parks v. City of Newburyport*, 10 Gray (Mass.) 28; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Frazier v. Brown*, 12 Ohio St. 294; *Green v. Carotta*, 72 Cal. 267; *Curtiss v. Ayrault*, 47 N. Y. 73; *Wheatley v. Baugh*, 25 Pa. St. 528; *Case v. Hoffman*, 100 Wis. 314; *Broadbent v. Ramsbotham*, 11 Exch. 602, 2 Gray's Cas. 116; *Chasemore v. Richards*, 7 H. L. Cas. 349, 2 Gray's Cas. 519; *Borough of Bradford v. Pickles* [1895] App. Cas. 587. See *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. By the civil law, the upper proprietor cannot appropriate the surface water, to the injury of the lower proprietor. *Domat, Civil Law* (Cushing's Ed.) § 1583. But this view is apparently not adopted even in states where the civil-law rule is adopted as to the servitude on the lower proprietor.

<sup>55</sup> *City of Jacksonville v. Lambert*, 62 Ill. 519; *Winn v. Village of Rutland*, 52 Vt. 481; *Jutte v. Hughes*, 67 N. Y. 267; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Crosland v. Borough of Pottsville*, 126 Pa. St. 511, 12 Am. St. Rep. 891; *Gould, Waters*, §§ 278, 546. Under the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, considered in the next section, one injuring the adjoining owner by the pollution of

## § 299. Water artificially collected.

If one collects water on his land by artificial means, and it thereafter escapes and flows on other land to its injury through his negligence, whether by percolation, the bursting of a dam, or otherwise, he is unquestionably liable for injury occasioned thereby on other land.<sup>55</sup> By the English decisions and those of a few states in this country, the owner of land who thus collects water thereon is liable as an insurer for injuries caused by its escape, even though he has been free from negligence, on the principle that he who brings anything on his lands which is liable to do mischief must keep it there at his peril.<sup>56</sup> In the majority of the states, however, there is no such liability, in the absence of negligence.<sup>57</sup>

## § 300. Underground waters.

Water percolating below the surface of land, either in no fixed channel, or in an unknown channel, while not, strictly speaking, the property of the owner of the soil in which it happens to be, may be appropriated by him to any extent, or may be drained off in a changed direction, though the effect be entirely to deprive other land of its previous supply of water, or to diminish the water in a stream to the injury of the riparian proprietors. In other words, a landowner has no natural right to the supply of water thus re-

surface water would apparently be liable, irrespective of his negligence.

<sup>55</sup> Gould, Waters, § 298; 2 Shearman & R. Negligence, § 723.

<sup>56</sup> Rylands v. Fletcher, L. R. 3 H. L. 330; Hurdman v. Northeastern Ry. Co., 3 C. P. Div. 173; Wilson v. City of New Bedford, 103 Mass. 261, 11 Am. Rep. 352; Baltimore Breweries Co. v. Ranstead, 78 Md. 501. See Defiance Water Co. v. Olinger, 54 Ohio St. 532; Berger v. Minneapolis Gaslight Co., 60 Minn. 296.

<sup>57</sup> Losee v. Buchanan, 51 N. Y. 476; Marshall v. Welwood, 23 N. J. Law, 329; Garland v. Towne, 55 N. H. 55; Gould, Waters, § 298.

sulting from percolation through another's land. So, an owner of land may sink a well thereon, or make any excavations on his land, though he thereby interfere with the percolation of water into his neighbor's well, or otherwise cuts off the latter's supply of water.<sup>55</sup>

By some decisions, the fact that one in thus intercepting the water supply of a neighbor acts entirely from motives of malice is immaterial, on the theory that a lawful act cannot be made unlawful by the fact that it is done from an improper motive,<sup>56</sup> while in others a different view is taken.<sup>57</sup>

Though the proprietor of land may appropriate or divert the water percolating through or from his land into the land of another, he has no right to pollute it in any way, to the injury of another landowner, his duty being, if he causes

<sup>55</sup> *Acton v. Blundell*, 12 Mees. & W. 324, 2 Gray's Cas. 104; *Chasemore v. Richards*, 7 H. L. Cas. 349, 2 Gray's Cas. 121; *Chatfield v. Wilson*, 28 Vt. 49, 2 Gray's Cas. 157; *Curtiss v. Ayrault*, 47 N. Y. 73, Finch's Cas. 126; *Ocean Grove Camp Meeting Ass'n v. Asbury Park*, 40 N. J. Eq. 447, Finch's Cas. 130; *Trustees of Village of Delhi v. Youmans*, 45 N. Y. 362, Finch's Cas. 133; *People's Gas Co. v. Tyner*, 131 Ind. 277, Finch's Cas. 372; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Hanson v. McCue*, 43 Cal. 303, 10 Am. Rep. 399; *Frazier v. Brown*, 12 Ohio St. 294; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419. But one cannot divert the waters of a stream by sinking a well or drain so near thereto that the water percolates from the stream into the well. *City of Emporia v. Soden*, 25 Kan. 583, 37 Am. Rep. 265; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 32 Am. Dec. 179; *Grand Junction Canal Co. v. Shugar*, 6 Ch. App. 487.

<sup>56</sup> *Chatfield v. Wilson*, 28 Vt. 49, 2 Gray's Cas. 157; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Walker v. Cronin*, 107 Mass. 556; *Frazier v. Brown*, 12 Ohio St. 294; *Borough of Bradford v. Pickles* [1895] App. Cas. 537. See *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467, 15 Am. Rep. 599, and ante, note 8.

<sup>57</sup> *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352 (dictum); *Chealey v. King*, 74 Me. 164, 43 Am. Rep. 569; *Wheatley v. Baugh*, 25 Pa. St. 523, 64 Am. Dec. 721 (dictum); *Bartlett v. O'Connor* (Cal.) 36 Pac. 513. See ante, note 9.

such pollution, by the discharge of sewage or otherwise, to keep the water in its polluted state upon his own land.<sup>61</sup>

Water beneath the ground, which is known to be, not diffused and percolating through the soil, but flowing in a well-defined watercourse, is governed by the rules applicable to water so flowing on the surface, and the owner of the surface above the stream has no greater rights as to its use than has a riparian proprietor on a surface stream.<sup>62</sup>

### § 301. Support of land—(1) Lateral support.

As a general rule, every landowner is entitled to have his land supported in its natural state by the land adjoining, and has a right of action against one who excavates or improves the adjoining land so as to cause a sinking of his land.<sup>63</sup> This right of support is not a right to have the

<sup>61</sup> Gould, Waters, § 288; *Tenant v. Goldwin*, 1 Salk. 360, 2 Gray's Cas. 99; *Ballard v. Tomlinson*, 29 Ch. Div. 115; *Humphries v. Cousins*, 2 O. P. Div. 239, 2 Gray's Cas. 140; *Ball v. Nye*, 99 Mass. 582; *Wahle v. Reinbach*, 76 Ill. 322; *Haugh's Appeal*, 102 Pa. St. 42, 48 Am. Rep. 193.

<sup>62</sup> *Dickinson v. Grand Junction Canal*, 7 Exch. 301; *Broadbent v. Ramsbotham*, 11 Exch. 602, 2 Gray's Cas. 116; *Chasemore v. Richards*, 7 H. L. Cas. 349, 2 Gray's Cas. 121; *Hale v. McLea*, 53 Cal. 578, *Finch's Cas.* 134; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Burroughs v. Saterlee*, 67 Iowa, 396; *Lybe's Appeal*, 106 Pa. St. 656, 51 Am. Rep. 542; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Collins v. Chartiers Valley Gas Co.*, 121 Pa. St. 143, 17 Am. St. Rep. 791; *Tampa Waterworks Co. v. Cline*, 27 Fla. 586, 53 Am. St. Rep. 262.

<sup>63</sup> *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Humphries v. Brogden*, 12 Q. B. 739, 2 Gray's Cas. 66; *Northern Transportation Co. v. City of Chicago*, 99 U. S. 635; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, 2 Gray's Cas. 89, *Finch's Cas.* 826; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 233. In some states there are statutory provisions in regard to the right

adjoining soil remain in its natural state, but merely a right to have the benefit of support, and consequently the owner of the servient tenement may substitute artificial support, such as a retaining wall, in place of the natural support, and there is no right of action for the withdrawal of support until there is a resulting subsidence of plaintiff's land.<sup>64</sup>

The right of support burdens so much of the neighboring land, whether owned by one or more persons, as would, in the natural state of things, afford the requisite support to the dominant tenement,<sup>65</sup> and land which, in the natural state of things, is so far away that its working would not affect the support of other land, is not subject to any claim

of support, which, however, make but little change in the common law rules. See Jones, Easements, § 537.

A landowner may drain his land, though he thereby withdraws support from neighboring land. *Popplewell v. Hodgkinson*, L. R. 4 Exch. 248. But he cannot affect such support by the withdrawal of wet sand or silt. *Jordeson v. Sutton, etc., Co.*, [1899] 2 Ch. 217; *Cabot v. Kingman*, 166 Mass. 403.

<sup>64</sup> *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Bonomi v. Backhouse*. EL., BL. & EL. 654; *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Schults v. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630; *Smith v. City of Seattle*, 18 Wash. 484.

But in *Noonan v. Pardee* (Pa.) 50 Atl. 255, a case of subjacent support, which, however, would, in this respect, be governed by the same principles as lateral support, it was decided that the right of action accrued upon the withdrawal of natural support without the substitution of sufficient artificial support, and that the statute of limitations ran from that time, and not from the subsidence of the land. One result of this view would seem to be that, if the subsidence did not occur within the statutory period after the withdrawal of support, there could be no recovery, or, at most, a recovery of nominal damages only, and it would, of course, be difficult to say, generally, that the support left was insufficient, until this was shown by the subsidence of the land. See, also, the criticism of the case in 15 Harv. Law Rev. 574.

<sup>65</sup> *Corporation of Birmingham v. Allen*, 6 Ch. Div. 284, 2 Gray's Cas. 81. And see *Keating v. City of Cincinnati*, 28 Ohio St. 141, 43 Am. Rep. 431.

in this respect merely because intervening land has been excavated in such a way that the working of the more remote land will cause a sinking of such other.<sup>66</sup>

The natural right of support from adjacent land does not give the right to a landowner to place an additional weight on the land, such as a building, and claim a right of support for the land with such added weight, since this would deprive the adjoining owner of the proper and natural use of his land.<sup>67</sup>

In England, and in some states in this country, it is settled that, if the land would have fallen away, even without the building, as a result of the excavation of adjoining land, the owner may recover for damage to the building as well as to the land,<sup>68</sup> and this would seem, on principle, to be a correct view of the matter, since the injury to the building is as much a proximate result of the violation of the natural right as is the injury to the land. In a number of states, however, the cases tend to support the view that, even though the land would have fallen without the buildings, there can be no recovery for injury to the buildings.<sup>69</sup>

<sup>66</sup> *Corporation of Birmingham v. Allen*, 6 Ch. Div. 234, 2 Gray's Cas. 31. But see *Foley v. Wyeth*, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

<sup>67</sup> *Wyatt v. Harrison*, 3 Barn. & Adol. 371; *Partridge v. Scott*, 3 Mees. & W. 220; *Thurston v. Hancock*, 12 Mass. 220; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, 2 Gray's Cas. 89, Finch's Cas. 326; *Moody v. McClelland*, 39 Ala. 45, 34 Am. Dec. 770; *Northern Transportation Co. v. City of Chicago*, 99 U. S. 635; *Pantos v. Holland*, 17 Johns. (N. Y.) 92, 3 Am. Dec. 369; *Dorrity v. Rapp*, 72 N. Y. 307; *Tunstall v. Christian*, 30 Va. 1, 56 Am. Rep. 581; *Charless v. Rankin*, 23 Mo. 566, 66 Am. Dec. 642.

<sup>68</sup> *Goddard, Easements* (5th Ed.) 487, 562; *Gale, Easements* (7th Ed.) 357; *Brown v. Robins*, 4 Hurl. & N. 136, 2 Gray's Cas. 75; *Hamer v. Knowles*, 6 Hurl. & N. 454; *Stearns v. City of Richmond*, 38 Va. 992, 29 Am. St. Rep. 758; *Parke v. City of Seattle*, 5 Wash. 1, 34 Am. St. Rep. 339; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242. See *Beard v. Murphy*, 37 Vt. 99, 36 Am. Dec. 693.

<sup>69</sup> *Thurston v. Hancock*, 12 Mass. 220; *Gilmore v. Driscoll*, 122 (670)

In case of negligence on the part of the person excavating the adjoining land, he will be liable for injury to the buildings caused thereby, although the land would not have fallen had there been no buildings thereon,<sup>70</sup> and it is at least evidence of negligence that he failed, before making the excavation, to notify the adjoining owner of his purpose of making it.<sup>71</sup>

A municipality is not, by some decisions, liable to an owner of land abutting on a street for depriving his land of lateral support by lowering the grade of the street,<sup>72</sup> while, by other decisions, a municipality is subject to the same lia-

Mass. 199, 2 Gray's Cas. 89, Finch's Cas. 826; *Foley v. Wyeth*, 2 Allen (Mass.) 181, 79 Am. Dec. 771; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369 (semble); *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49 (semble); *Schultz v. Byers*, 53 N. J. Law, 442, 26 Am. St. Rep. 435 (semble); *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243 (dictum); *Gildersleeve v. Hammond*, 109 Mich. 431; *McGettigan v. Potts*, 149 Pa. St. 155 (semble); *Obert v. Dunn*, 140 Mo. 476 (semble). In none of these cases, however, is the question directly considered, the question of the right to recover for a sinking of land, which would not have occurred had buildings not been erected thereon, not being distinguished generally from the right to recover for injuries to buildings caused by a sinking of land thereunder, which would have occurred had no buildings been erected. In the latest Massachusetts case cited, the decision was based entirely on the early cases in that state.

<sup>70</sup> *Shearman & R. Negligence*, § 701; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Charles v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Shrive v. Stokes*, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581.

<sup>71</sup> *Shafer v. Wilson*, 44 Md. 268; *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138; *City of Covington v. Geyler*, 93 Ky. 275; *Schultz v. Byers*, 53 N. J. Law, 442, 26 Am. St. Rep. 435.

<sup>72</sup> *Dillon, Municipal Corp.* (4th Ed.) § 990; *City of Rome v. Omborg*, 28 Ga. 46, 73 Am. Dec. 748; *Radcliff's Ex'rs v. City of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Fellowes v. City of New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

bility in such case as would be incurred by an individual removing the support.<sup>73</sup>

— (2) Subjacent support.

Where the ownership of the surface of land is in one person, and of the subjacent land, or minerals therein, is in another, the owner of the former has, in the absence of a stipulation to the contrary, a natural right of support from the subjacent land or minerals, and may consequently recover damages if injured by the withdrawal of such support, regardless of the question of negligence on the part of the subjacent owner.<sup>74</sup> The natural right of subjacent support, however, like that of lateral support, exists in favor of the land in its natural state only, and the owner of the lower stratum is under no obligation to furnish support for buildings in addition to the land.<sup>75</sup> A custom allowing the owner of the minerals, in mining, to withdraw all support from the surface, has been held to be bad, and no justification for so doing.<sup>76</sup>

§ 302. Suspension of rights.

Natural rights in the owner of one tract of land as to the

<sup>73</sup> *Dyer v. City of St. Paul*, 27 Minn. 457; *Stearns v. City of Richmond*, 83 Va. 992, 29 Am. St. Rep. 758; *Parke v. City of Seattle*, 1 Wash. 1, 34 Am. St. Rep. 839. See, also, *City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73; *Keating v. Cincinnati*, 28 Ohio St. 141, 43 Am. Rep. 421.

<sup>74</sup> *Humphries v. Brogden*, 12 Q. B. 739, 2 Gray's Cas. 66; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 556, 14 Am. Rep. 322, *Finch's Cas.* 832; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Carlin v. Chappel*, 101 Pa. St. 348, 47 Am. Rep. 722; *Mickle v. Douglas*, 76 Iowa, 78; *Burgner v. Humphrey*, 41 Ohio St. 340.

<sup>75</sup> *Goddard, Easements* (5th Ed.) 67; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322, *Finch's Cas.* 832; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242.

<sup>76</sup> *Hilton v. Granville*, 5 Q. B. 701; *Horner v. Watson*, 79 Pa. St. 242, 21 Am. Rep. 55; *Coleman v. Chadwick*, 89 Pa. St. 81, 21 Am. Rep. 92.



use of another tract may be suspended by the creation of an easement,<sup>77</sup> or by the title of the two tracts being united in one person, but they cannot be completely extinguished, since they are regarded as inseparably annexed to the soil itself, and they revive upon the termination of the easement or the severance of title.<sup>78</sup>

### § 303. Injuries to rights—Remedies.

If the use which one makes of a stream is not a reasonable use, or if it causes substantial and actual damage to a lower proprietor by diminishing the value of his land, he has a right of action for the infringement of his rights, even though, at the time, he has no mill or other work thereon to sustain actual injury.<sup>79</sup> Likewise, it seems, an action will

<sup>77</sup> See post, §§ 304-333.

A natural right, like an easement (post, § 332), may, it seems, also be suspended by the grant of a license to do something on the licensee's land, which will interfere with the exercise of the natural censee's land, which will interfere with the exercise of the natural right, as when an owner of land on a stream licenses another to erect a work which will obstruct the flow of the stream, and the work is erected. *Liggins v. Inge*, 7 Bing. 682, 2 Gray's Cas. 351. And in states where an executed license is irrevocable, this will be the case, even though the licensed act is not to be done on the licensee's land. *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Smith v. Green*, 109 Cal. 228; *McBroom v. Thompson*, 25 Or. 559, 42 Am. St. Rep. 806.

<sup>78</sup> *Goddard, Easements*, 524; *Shury v. Piggot*, 3 Bulst. 339, 2 Gray's Cas. 97; *Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. No. 6,281; *Cary v. Daniels*, 8 Metc. (Mass.) 466.

<sup>79</sup> *Embrey v. Owen*, 6 Exch. 353, 2 Gray's Cas. 109; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, 2 Gray's Cas. 119; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 2 Gray's Cas. 145; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191, Finch's Cas. 121; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Blodgett v. Stone*, 60 N. H. 167. The earlier English cases to the contrary, such as *Wright v. Howard*, 1 Sim. & S. 190, *Williams v.*

lie on account of the pollution of air by the use of neighboring land, although, owing to the fact that the plaintiff is not actually occupying the land, he does not suffer therefrom, it being sufficient that his right to have the air free from pollution has been invaded.<sup>60</sup>

In this country, the owner of the reversion of land may generally bring an action for an interference with a natural right incident to the land, if the rental value is thereby diminished.<sup>61</sup> In England, the interference must, it seems, be of a permanent character, to authorize an action by him, and it is not sufficient that it affects the rental value.<sup>62</sup>

The form of action at common law for an injury to one of the natural rights above considered is an action of damages, generally in trespass on the case, though trespass will lie when the injury consists of a direct invasion of plaintiff's land by the act of defendant.<sup>63</sup> An injunction will frequently be issued by a court of equity to prevent an injury to a natural right, especially if the legal remedy appears to

Morland, 2 Barn. & C. 910, 2 Gray's Cas. 101, and *Mason v. Hill*, 3 Barn. & Adol. 304, are to be considered as overruled. See Goddard, Easements, 500.

<sup>60</sup> *Dana v. Valentine*, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61. See *Farley v. Gate City Gas Light Co.*, 105 Ga. 323. But in England it has been decided that there is no right of action on account of noise until the plaintiff has made such use of his land that the noise is an annoyance to him. *Sturges v. Bridgman*, 11 Ch. Div. 852, 2 Gray's Cas. 57.

<sup>61</sup> *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Hastings v. Livermore*, 7 Gray (Mass.) 194 (semble); *Francis v. Schoellkopf*, 53 N. Y. 154; *Kernochan v. New York Elevated R. Co.*, 128 N. Y. 559; *Lachman v. Delsch*, 71 Ill. 59.

<sup>62</sup> *Pollock, Torts*, 414. So it has been decided that the landlord cannot sue on account of a nuisance of noise, since this may cease before the leasehold estate terminates. *Simpson v. Savage*, 1 C. B. (N. S.) 352, 2 Gray's Cas. 34; *Jones v. Chappell*, L. R. 20 Eq. 533.

<sup>63</sup> 2 Wood, Nuisances, §§ 824, 842; Gould, Waters, § 269 et seq.

be inadequate.<sup>24</sup> One whose natural rights are injured by the use made of another's land may, in case this use constitutes a nuisance, abate it, as such, of his own volition, without resort to a court of justice, if this does not involve a breach of the peace. This remedy is, however, a somewhat hazardous one, as subjecting the person pursuing it to liability in case he oversteps his exact rights in the matter, and is in practice but seldom availed of.<sup>25</sup>

<sup>24</sup> 2 Pomeroy, Eq. Jur. §§ 1350, 1351; 2 Wood, Nuisances, c. 25; Gould, Waters, c. 12.

<sup>25</sup> 2 Wood, Nuisances, §§ 244-242.

## **CHAPTER XII.**

### **EASEMENTS.**

#### **I. THE NATURE AND CLASSES OF EASEMENTS.**

- § 304. Easements distinguished from other rights.
- 305. Easements in gross.
- 306. Light and air.
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- 309. Support of land.
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#### I. THE NATURE AND CLASSES OF EASEMENTS.

An easement is a right, in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit.

The easements of most importance are: Rights in extension or diminution of natural rights in regard to air, water, and support; rights of way over another's land; rights to maintain aqueducts or drains on another's land; rights as to the use of a party wall in part or wholly on another's land; rights to have light and air pass to one's windows without obstruction; pew rights in churches and burial rights in cemeteries.

To be distinguished from easements are licenses, which merely justify acts on another's land which would otherwise be illegal. They may be revoked at any time, except, in some states, after the licensee has incurred expense under the license, and they are not assignable.

#### § 304. Easements distinguished from other rights.

Natural rights, which have just been discussed, are frequently termed "easements," and they are in most respects similar to easements. In view, however, of the fact that they are not created separately as a distinct subject of property, but are merely incidents of the right of ownership of land, while other rights as to the use of another's land are created by voluntary act, or its equivalent, on the part of such other, it seems preferable to treat these "natural rights" as entirely distinct from those created by voluntary act, and,

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so doing, to exclude them from that class of such rights known as "easements."<sup>1</sup>

An easement is to be distinguished from a *profit a prendre*, which signifies a right in a person to take a part of the soil belonging to another person, or something growing or subsisting on or in the soil.<sup>2</sup>

— Licenses.

A license given to a person to do something on the land of another should be carefully distinguished from an easement. A license is a mere permission to do something on another's land. It "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful; as, a license \* \* \* to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful."<sup>3</sup>

Since a license confers no interest in the land, and is merely a waiver of the licensor's rights, it would seem clear that no right *in rem* is created thereby which can be asserted against a third person,<sup>4</sup> and that consequently the licensee has no right of action against such person for damage caused by an obstruction of his exercise of the license.<sup>5</sup> There have

<sup>1</sup> See *Backhouse v. Bonomi*, 9 H. L. Cas. 513; *Pine v. City of New York* (C. C. A.) 112 Fed. 98; *Gray v. McWilliams*, 93 Cal. 161, 35 Am. St. Rep. 163; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224.

<sup>2</sup> See post, §§ 334-341.

<sup>3</sup> *Thomas v. Sorrel*, Vaughan, 351; *Wood v. Leadbitter*, 13 Mees. & W. 837, 2 Gray's Cas. 359. See, to the same effect, *Cook v. Stearns*, 11 Mass. 533, Finch's Cas. 480; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Foster v. Browning*, 4 R. L. 47, 67 Am. Dec. 505; *Thoenke v. Fiedler*, 91 Wis. 386.

<sup>4</sup> Pollock, Torts (6th Ed.) 366

<sup>5</sup> See *Whaley v. Laing*, 2 Hurl. & N. 476, 3 Hurl. & N. 675; *Hill v. Tupper*, 2 Hurl. & C. 121, 2 Gray's Cas. 190; per *Bramwell, B.*, *Stock* (678)

been, however, occasional decisions in which such a right of action in favor of a licensee was recognized.<sup>6</sup>

A license may be to do any of an almost infinite variety of things on another's land. Thus, one may have a license to flood land,<sup>7</sup> to erect buildings or other structures thereon,<sup>8</sup> to pass on the land,<sup>9</sup> to maintain a ditch,<sup>10</sup> to cut timber,<sup>11</sup> to use land for railroad purposes.<sup>12</sup> A very common form of license is a ticket of admission whereby one is permitted to enter on another's land to witness a spectacle, or for some similar purpose.<sup>13</sup> A contract of lodging also, giving not an exclusive right to a part of the premises, but merely a right to enter thereon and use them for certain purposes, is

port Water Works Co. v. Potter, 3 Hurl. & C. 300, 2 Gray's Cas. 134; Goddard, Easements, 430.

<sup>6</sup> Case v. Weber, 2 Ind. 108. In Paul v. Hazleton, 37 N. J. Law, 106, and Miller v. Greenwich, 62 N. J. Law, 771, a right of action in favor of a licensee against a third person was sustained, on the theory that the licensee had, in those cases, the exclusive possession of the land, or of a part thereof. But a mere licensee never has, it seems, exclusive possession of the land. London & N. W. Ry. Co. v. Buckmaster, L. R. 10 Q. B. 70; Taylor v. Caldwell, 3 Best & S. 826; Wells v. Kingston-upon-Hull, L. R. 10 C. P. 402; 1 McAdams, Landl. & Ten. § 60; Lightwood, Possession of Land, 19. And even if a licensee could have exclusive possession, his right of action against a third person would, in such case, be based, not on his license, but on his possession, and the existence of the license would seem to be immaterial as against others than the licensor. A licensee not in possession has certainly no right of action against a third person. Fletcher v. Livingston, 153 Mass. 388.

<sup>7</sup> Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445.

<sup>8</sup> Crosdale v. Lanigan, 129 N. Y. 604, 26 Am. St. Rep. 551; Malott v. Price, 109 Ind. 22. See ante, § 235, note 109.

<sup>9</sup> Forbes v. Balenselfer, 74 Ill. 133.

<sup>10</sup> Thoenke v. Friedler, 91 Wis. 386.

<sup>11</sup> Callen v. Hilty, 14 Pa. St. 286. See cases in note 24, post.

<sup>12</sup> Beck v. Louisville, N. O. & T. R. Co., 65 Miss. 172; Harlow v. Marquette, H. & O. R. Co., 41 Mich. 336.

<sup>13</sup> Wood v. Leadbitter, 13 Mees. & W. 838, 2 Gray's Cas. 359; Moore v. Marsh, 12 Gray (Mass.) 211, Finch's Cas. 807. See 14 Harv. Law Rev. 455.

in the nature of a license, and not a lease.<sup>14</sup> Likewise, the permission, generally tacit, given to an employee or other person having business with the owner of land, to enter on the land for the purpose of transacting such business, creates the relation of licensor and licensee.<sup>15</sup>

No formality is necessary for the creation of a license. It may be created by writing or orally,<sup>16</sup> or may be implied from the relations of the parties, or from the conduct of the landowner, as when he indicates an assent to the doing of certain acts on his land.<sup>17</sup> So, a person, by opening a place of business, licenses the public to enter therein for the purpose of transacting business.<sup>18</sup>

— — Revocability of license.

A license is, as a general rule, revocable at the pleasure of the licensor,<sup>19</sup> and the fact that it is created by an instrument

<sup>14</sup> See *White v. Maynard*, 111 Mass. 250; *Wilson v. Martin*, 1 Denio (N. Y.) 602.

<sup>15</sup> *Merriam v. City of Meriden*, 43 Conn. 173; *Cutler v. Smith*, 57 Ill. 252.

<sup>16</sup> *Owens v. Lewis*, 46 Ind. 439, 15 Am. Rep. 295; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529; *Pursell v. Stover*, 110 Pa. St. 43; *Wilkins v. Irvine*, 33 Ohio St. 138; *Clark v. Glidden*, 60 Vt. 702; *Lockhart v. Geir*, 54 Wis. 133.

<sup>17</sup> *Cutler v. Smith*, 57 Ill. 252; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 153; *Fletcher v. Evans*, 140 Mass. 241; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529; *Neftager v. Barkdoll*, 148 Ind. 531; *Fischer v. Johnson*, 106 Iowa, 181; *Harmon v. Harmon*, 61 Me. 222.

<sup>18</sup> *Gowen v. Philadelphia Exchange Co.*, 5 Watts & S. (Pa.) 141; *Cutler v. Smith*, 57 Ill. 252.

<sup>19</sup> *Fentiman v. Smith*, 4 East, 107, 3 Gray's Cas. 333; *Wood v. Leadbitter*, 13 Mees. & W. 845, 3 Gray's Cas. 359; *De Haro v. United States*, 5 Wall. (U. S.) 599; *Cook v. Stearns*, 11 Mass. 533, *Finch's Cas.* 480; *Morse v. Copeland*, 2 Gray (Mass.) 302, 3 Gray's Cas. 333; *Wheeler v. West*, 71 Cal. 126; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203, *Finch's Cas.* 76; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *McCrea v. Marsh*, 13 Gray (Mass.) (680)



under seal is immaterial in this regard.<sup>20</sup> There are, however, in a number of states, decisions to the effect that a license cannot be revoked after the licensee, on the strength of the license, has expended money in improvements or otherwise, the theory being that, by his implied assent to or acquiescence in the expenditure, the licensor is estopped to revoke the license.<sup>21</sup> By these decisions, the grant of a license becomes, it seems, upon the making of expenditures by the grantee, the grant of an easement in the land. But by perhaps the weight of authority, a license, at least if oral merely, is revocable in spite of any expenditures made by the licensee, it being considered that the contrary rule, as applied to an oral license, involves a clear violation of the Statute of Frauds, requiring an interest in land to be transferred by writing.<sup>22</sup> The fact that a consideration was paid for a license does not prevent its revocation.<sup>23</sup>

211, Finch's Cas. 807; Wilmington Water Power Co. v. Evans, 166 Ill. 548; Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234; Hodgkins v. Farrington, 150 Mass. 19, 15 Am. St. Rep. 168; Wood v. Michigan Air Line R. Co., 90 Mich. 334; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479, 2 Gray's Cas. 391; Barsdale v. Hainston, 81 Va. 764.

<sup>20</sup> Wood v. Leadbitter, 13 Mees. & W. 838, 2 Gray's Cas. 359; Jackson v. Babcock, 4 Johns. (N. Y.) 418; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192; East Jersey Iron Co. v. Wright, 82 N. J. Eq. 248.

<sup>21</sup> Rerick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, 2 Gray's Cas. 375; Ferguson v. Spencer, 127 Ind. 66, Finch's Cas. 804; Rhodes v. Otis, 38 Ala. 578, 78 Am. Dec. 439; Ricker v. Kelly, 1 Me. 117, 10 Am. Dec. 38; Drew v. Peer, 93 Pa. St. 234; Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Flickinger v. Shaw, 87 Cal. 126, 22 Am. St. Rep. 234; Cook v. Pridgen, 45 Ga. 331, 12 Am. Rep. 582; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574; Rislen v. Brown, 73 Tex. 135; Olmstead v. Abbott, 61 Vt. 281; Gilmore v. Armstrong, 48 Neb. 92; Custis v. La Grande Hydraulic Water Co., 20 Or. 34.

<sup>22</sup> Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192; Collins Co. v. Marcy, 25 Conn. 239; St. Louis Nat. Stock Yards v. Wiggins

A license may be coupled with a grant or interest, as when a person is given a license to hunt on another's land, and carry away the deer killed, or to cut down and remove trees thereon. In such cases the license is irrevocable.<sup>24</sup> A

Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304; *Richmond & D. R. Co. v. Durham & N. Ry. Co.*, 104 N. C. 658; *Houston v. Laffee*, 46 N. H. 506; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 537; *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 702; *Crosdale v. Langan*, 129 N. Y. 604, 26 Am. St. Rep. 551, *Finch's Cas.* 802; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406; *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442; *Thoenke v. Fiedler*, 91 Wis. 386; *Great Falls Waterworks v. Great Northern Ry. Co.*, 21 Mont. 487. Compare *Jackson-Sharp Co. v. Philadelphia, W. & B. R. Co.*, 4 Del. Ch. 180, *Finch's Cas.* 798.

But if it is shown that there was not a mere license, but an oral agreement for the giving of an easement, and that expenditures on the land in pursuance thereof were made, the agreement may be enforced on the theory of part performance. *Devonshire v. Eglin*, 14 Beav. 530, 2 Gray's Cas. 368; *McManus v. Cooke*, 35 Ch. Div. 681; *St. Louis Nat. Stock Yards Co. v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479, 2 Gray's Cas. 391.

<sup>25</sup> *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479, 2 Gray's Cas. 391; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203, *Finch's Cas.* 77; *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304; *Thoenke v. Fiedler*, 91 Wis. 386; *Kivett v. McKeithan*, 90 N. C. 106. But see *Parish v. Kaspere*, 109 Ind. 586; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *Van Ohlen v. Van Ohlen*, 56 Ill. 528.

Though the licensor may revoke the license, the licensee may bring an action for breach of contract not to revoke the license, when such a contract is expressed or implied. *Kerrison v. Smith* [1897] 2 Q. B. 445; *McCrea v. Marsh*, 12 Gray (Mass.) 211; *Pollock, Torts* (6th Ed.) 363.

<sup>26</sup> *Thomas v. Sorrell, Vaughan*, 330, 351; *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Miller v. State*, 39 Ind. 267; *Metcalf v. Hart*, 1 (682)

similar case occurs when chattels are sold while lying upon the vendor's premises, in which case, it is said, the implied license to remove them cannot be revoked.<sup>25</sup> And so, if one places his property on another's land by the latter's permission, the implied license to enter to carry it away is irrevocable.<sup>26</sup> In all such cases, however, it seems that the person to whom the grant of the particular things upon or in the land is made has, by reason merely of his right of ownership of such things, the accessory right to remove them, and the grant or implication of a separate license for the purpose is unnecessary.<sup>27</sup> The grantor may, however, exclude the grantee, or, as it is usually stated, revoke the license, if the grant is invalid, as when it should be in writing, and is merely oral.<sup>28</sup> So, in some states, an oral sale of growing trees is insufficient to pass them as such, and is regarded as giving the vendee merely a license or permission to cut the trees, which is revocable until the trees are cut, but, after they are cut, the sale takes effect upon them in their chattel character, and the vendee then, having an interest in the trees, has an irrevocable license to enter on the land for their removal.<sup>29</sup>

Wyo. 513, 31 Am. St. Rep. 122; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, *Finch's Cas.* 789.

<sup>25</sup> *Browne*, St. Frauds, § 27; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Wood v. Manley*, 11 Adol. & E. 34, 2 Gray's Cas. 357.

<sup>26</sup> *Patrick v. Colerick*, 3 Mees. & W. 483; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, *Finch's Cas.* 789.

<sup>27</sup> See *Browne*, St. Frauds, § 27.

<sup>28</sup> *Crosby v. Wadsworth*, 6 East, 602; *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653.

<sup>29</sup> *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *White v. King*, 87 Mich. 107; *Cool v. Peters Box & Lumber Co.*, 87 Ind. 531; *Giles*

— — Mode of revocation.

A license may be revoked either by express words to that effect, or by any acts indicating an intention to revoke it.<sup>80</sup> It is likewise in effect revoked by a conveyance of the land to a third person,<sup>81</sup> or by the death of the landowner,<sup>82</sup> since the license cannot excuse a trespass on property belonging to the licensor's grantee, heir, or devisee.<sup>83</sup>

— — Assignment.

A license is, in itself, a privilege personal to the grantee of the license, and it cannot be assigned by him.<sup>84</sup> If the license is coupled with an interest, however, it inures to the

v. Simonds, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *United Soc. v. Brooks*, 145 Mass. 410; *Bruley v. Garvin*, 105 Wis. 625.

<sup>80</sup> *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168; *Fliker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Carleton v. Redington*, 21 N. H. 291, 311; *Fischer v. Johnson*, 106 Iowa, 181; *Forbes v. Balen-seifer*, 74 Ill. 183; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536.

<sup>81</sup> *Wallis v. Harrison*, 4 Mees. & W. 538; *Kamphouse v. Gaffner*, 73 Ill. 453; *Drake v. Wells*, 11 Allen (Mass.) 141; *Seldensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 128; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Houx v. Seat*, 26 Mo. 178, 72 Am. Dec. 202; *Vollmer's Appeal*, 61 Pa. St. 118.

<sup>82</sup> *Bridges v. Purcell*, 18 N. C. 492, 2 Gray's Cas. 379; *De Haro v. United States*, 5 Wall. (U. S.) 599; *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Lambe v. Manning*, 171 Ill. 612.

<sup>83</sup> See 14 Harv. Law Rev. 73.

<sup>84</sup> *Wickham v. Hawker*, 7 Mees. & W. 63, 3 Gray's Cas. 478; *Ackroyd v. Smith*, 10 C. B. 188, 2 Gray's Cas. 187; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 237; *Blaisdell v. Portsmouth*, G. F. & C. R. R., 51 N. H. 483, *Finch's Cas.* 793; *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732; *Fuhr v. Deas*, 26 Mo. 116, 69 Am. Dec. 484; *Mendenhall v. Klinck*, 51 N. Y. 246.

benefit of one to whom the interest is assigned,<sup>55</sup> which is merely equivalent to saying that, as the original grantee of things upon or in the land may enter to remove them, so any person acquiring title to them from him may do so.

The license will, moreover, protect the agents or servants of the licensee if it is a license, not for pleasure, but to take profits from the land,<sup>56</sup> or if the act authorized is such as to render the employment of others to do it necessary or proper.<sup>57</sup>

### § 305. Easements in gross.

In England, an easement can exist only for the benefit of the owner of some particular land, it belonging to him as an incident of his ownership of the land. In other words, there must be, not only a "servient" tenement, subject to the easement, but also a "dominant" tenement, in favor of which the easement exists.<sup>58</sup> And the easement must, to be thus "appurtenant" to a dominant tenement, be such that it conduces to the beneficial use of such tenement.<sup>59</sup> For instance, one can have a right of way over another's land, as being the owner of neighboring land, only for the purpose of going to or from that land, and not for the purpose of going to or from other land. An easement always passes with a

<sup>55</sup> *Bassett v. Maynard*, Cro. Eliz. 819; *Wickham v. Hawker*, 7 Mees. & W. 63, 3 Gray's Cas. 478; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Sawyer v. Wilson*, 61 Me. 529; *Wiseman v. Eastman*, 21 Wash. 163.

<sup>56</sup> *Wickham v. Hawker*, 7 Mees. & W. 63, 3 Gray's Cas. 478.

<sup>57</sup> *Sterling v. Warden*, 51 N. H. 217, *Finch's Cas.* 789.

<sup>58</sup> *Goddard, Easements*, 9; *Rangeley v. Midland Ry. Co.*, 3 Ch. App. 306; *Ackroyd v. Smith*, 10 C. B. 164, 2 Gray's Cas. 187.

<sup>59</sup> *Ackroyd v. Smith*, 10 C. B. 164, 2 Gray's Cas. 187; *Hill v. Tupper*, 2 Hurl. & C. 121, 2 Gray's Cas. 190; *Linthicum v. Ray*, 9 Wall. (U. S.) 241; *Moore v. Crose*, 43 Ind. 80; *Whaley v. Stevens*, 21 S. C. 221, 27 S. C. 549. But in *Perry v. Pennsylvania R. Co.*, 55 N. J. Law 178, it is held that an easement may be made appurtenant by express language to that effect.

conveyance of the dominant tenement as an integral part thereof,<sup>40</sup> and it cannot be separated therefrom by a conveyance to a person other than the owner of such tenement.<sup>41</sup>

In this country, in a number of cases, the existence of a personal privilege in the nature of an easement, or, as it is usually termed, an "easement in gross," is recognized.<sup>42</sup> Occasionally, such a privilege is regarded as an interest in land which is assignable or inheritable,<sup>43</sup> but more frequently it is not so considered.<sup>44</sup> According to this view, an easement in gross seems to be little more than an irrevocable license. Even in jurisdictions which recognize the possibility of the existence of easements in gross, an instrument will always, by preference, be construed to create an easement appurtenant to land.<sup>45</sup>

<sup>40</sup> *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Moore v. Crose*, 43 Ind. 30; *Shields v. Titus*, 46 Ohio St. 528; *Barnes v. Lloyd*, 112 Mass. 224; *Dority v. Dunning*, 78 Me. 381; *Rhea v. Forsyth*, 37 Pa. St. 503, 78 Am. Dec. 441; *Taylor v. Dyches*, 69 Ga. 455; *Tinker v. Forbes*, 136 Ill. 221; *Spaulding v. Abbot*, 55 N. H. 423; *Voorhees v. Burchard*, 55 N. Y. 98. See post, § 393.

<sup>41</sup> *Ackroyd v. Smith*, 10 C. B. 164, 2 Gray's Cas. 187; *Moore v. Crose*, 43 Ind. 30; *Cadwalader v. Bailey*, 17 R. I. 495.

<sup>42</sup> *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 2 Gray's Cas. 194, 90 Am. Dec. 161; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758; *Amidon v. Harris*, 113 Mass. 59, 2 Gray's Cas. 196; *Poull v. Mockley*, 33 Wis. 482; *City of New York v. Law*, 125 N. Y. 380.

<sup>43</sup> *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 2 Gray's Cas. 194, 90 Am. Dec. 161; *Poull v. Mockley*, 33 Wis. 482. In *Engel v. Ayer*, 85 Me. 448, such a right was regarded as transferable, apparently on the theory that, because peculiarly profitable, it was equivalent to a profit a prendre.

<sup>44</sup> *Boatman v. Lasley*, 23 Ohio St. 614, 2 Gray's Cas. 201, *Finch's Cas.* 810; *Garrison v. Rudd*, 19 Ill. 559; *Cadwalader v. Bailey*, 17 R. I. 495; *Whaley v. Stevens*, 21 S. C. 221, 27 S. C. 549; *Fisher v. Fair*, 34 S. C. 203; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597; *Salem Capital Flour Mills Co. v. Stayton Water Ditch & Canal Co.* (C. C.) 83 Fed. 146.

<sup>45</sup> *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Louisville & (686)*

## § 306. Light and air.

As before stated, the owner of land has no "natural right" to light or air, and cannot complain that either has been cut off by the erection of buildings on adjoining land.<sup>46</sup> An owner of land may, however, acquire, by grant or its equivalent, a right to have light and air enter particular windows, free from interruption by the owner of adjacent land, and such a right constitutes an easement in his favor.<sup>47</sup>

While the owner of land is entitled to have the air diffused over his land free from pollution by any use made of neighboring land, this being a natural right, an infringement of which constitutes a nuisance,<sup>48</sup> the owner of the neighboring land may acquire, by grant or prescription, an easement consisting of the right to make such injurious use of his land, or, as it is sometimes said, he may acquire a right to maintain a nuisance.<sup>49</sup>

## § 307. Waters and watercourses.

The natural rights of adjoining or neighboring owners in regard to water have been previously considered. These nat-

*N. R. Co. v. Koelle*, 104 Ill. 455; *Dennis v. Willson*, 107 Mass. 591; *Cadwalader v. Bailey*, 17 R. L. 495; *Spensley v. Valentine*, 34 Wis. 154. See *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 134 N. Y. 435, *Finch's Cas.* 472.

<sup>46</sup> See ante, §§ 295, 296.

<sup>47</sup> *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46; *Brooks v. Reynolds*, 106 Mass. 31; *Greer v. Van Meter*, 54 N. J. Eq. 270; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497; *Lattimer v. Livermore*, 72 N. Y. 174; *White v. Bradley*, 66 Me. 254; *Keating v. Springer*, 146 Ill. 481; *Weigmann v. Jones*, 163 Pa. St. 330. See, as to air, *Chastey v. Ackland* [1895] 2 Ch. 389, [1897] App. Cas. 155; *Pollock, Torts*, 399, note.

<sup>48</sup> See ante, § 296.

<sup>49</sup> *Goddard, Easements*, 265; 2 *Wood, Nuisances*, § 704 et seq.; *Sturges v. Bridgman*, 11 Ch. Div. 562, 2 *Gray's Cas.* 57; *Dana v. Valentine*, 5 Metc. (Mass.) 8, 2 *Gray's Cas.* 61.

ural rights may, however, be suspended or modified in favor of the owner of one piece of land as against another. So, the owner of land upon a natural stream may acquire from the owner of land lower down on the same stream, by grant or prescription, the right to pollute the stream, or to appropriate what would otherwise be an unreasonable amount of water,<sup>50</sup> or he may acquire the right to obstruct the flow of the stream so as to flood the land of an upper proprietor.<sup>51</sup> So, land may be subject to an easement precluding the owner

<sup>50</sup> *Wright v. Howard*, 1 Sim. & S. 190; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300, 2 Gray's Cas. 134; *Wood v. Waud*, 3 Eri. 748; *Rood v. Johnson*, 26 Vt. 64; *Provost v. Calder*, 3 Wend. (N. Y.) 517; *Elliot v. Shepherd*, 25 Me. 371; *Warner v. Cushman*, 32 Me. 168; *Loverin v. Walker*, 44 N. H. 489; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40; *Crosby v. Bessey*, 49 Me. 539, 77 Am. Dec. 271; *Village of Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367; *Winchester v. Osborne*, 61 N. Y. 555; *Holsman v. Bolling Spring Bleaching Co.*, 14 N. J. Eq. 335, 346; *Smith v. City of Sedalia*, 152 Mo. 283; *Messinger's Appeal*, 109 Pa. St. 285; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Washburn & M. Mfg. Co. v. Salisbury*, 153 Mass. 346; *Geer v. Durham Water Co.*, 127 N. C. 349.

A right in a riparian owner, in excess of his natural right, to divert or pollute the water of the stream, is not strictly an easement upon the land of the owner injured by such diversion or pollution, since it involves no use of the latter's land, or restriction of its use. *Cockburn, C. J.*, in *Mason v. Shrewsbury & H. Ry. Co.*, L. R. 6 Q. B. 578, 2 Leake, 226; *Geer v. Durham Water Co.*, 127 N. C. 349. It is, however, convenient to class all these rights in excess of or in diminution of natural rights together as easements.

<sup>51</sup> *Wright v. Howard*, 1 Sim. & S. 190; *Ballard v. Struckman*, 123 Ill. 636; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93; *Williams v. Nelson*, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, *Finch's Cas.* 141; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Winnipegogee Lake Co. v. Young*, 40 N. H. 420; *Tourtellot v. Phelps*, 4 Gray (Mass.) 370; *State v. Suttle*, 115 N. C. 784; *Bobo v. Wolf*, 18 Ohio St. 463; *Cornwell Mfg. Co. v. Swift*, 39 Mich. 503; *Campbell v. McCoy*, 31 Pa. St. 263; *Tabor v. Bradley*, 18 N. Y. 113, 72 Am. Dec. 498; *Swan v. Munch*, 65 Minn. 500.



thereof from cutting off percolating water, to the detriment of a neighboring owner, though otherwise he has the natural right to do so;<sup>53</sup> or an easement may exist modifying the natural rights of adjoining owners as to the discharge or flow of surface waters.<sup>54</sup>

§ 308. Artificial watercourses and drains.

One may, as an adjunct to the right to divert water from a stream, or to procure water from a source of supply on other land, have the right to maintain upon the intervening land an aqueduct or artificial watercourse for the passage of water, and such a right constitutes an easement.<sup>54</sup> So, the owner of land may have an easement consisting of the right to maintain a drain through or into his neighbor's land for the discharge of surface or waste water, or of sewage.<sup>55</sup>

One through whose land an artificial watercourse flows may, in some cases, acquire a right to the use of water therefrom, as against the person through whose agency the stream exists.<sup>56</sup>

<sup>53</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349, 3 Gray's Cas. 12; *Whitehead v. Parks*, 3 Hurl. & N. 370; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Davis v. Spaulding*, 157 Mass. 431.

<sup>54</sup> *Wright v. Williams*, 1 Mees. & W. 77; *Gregory v. Bush*, 64 Mich. 37; *Phinizy v. City Council of Augusta*, 47 Ga. 260; *Ross v. Mackeney*, 46 N. J. Eq. 140; *Louisville & N. Ry. Co. v. Mossman*, 90 Tenn. 157.

<sup>55</sup> *Taylor v. Corporation of St. Helens*, 6 Ch. Div. 264; *Prescott v. White*, 31 Pick. (Mass.) 341; *Legg v. Horn*, 45 Conn. 409; *Cole v. Bradbury*, 36 Me. 380; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

<sup>56</sup> *Wood v. Saunders*, 10 Ch. App. 532, 3 Gray's Cas. 226; *Humphries v. Cousins*, 2 C. P. Div. 239, 3 Gray's Cas. 229; *White v. Chapin*, 12 Allen (Mass.) 516; *Larsen v. Peterson*, 53 N. J. Eq. 83; *Treadwell v. Inslee*, 120 N. Y. 458; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

<sup>57</sup> *Curtiss v. Ayrault*, 47 N. Y. 73, Finch's Cas. 126; *Roberts v.*  
(689)

## § 309. Support of land.

As before explained, the owner of land has a natural right to support for his land from neighboring land, as has the owner of the surface of land from subjacent soil or minerals. These natural rights may be extended or diminished by the creation of an easement in favor of one landowner by the other. The owner of land may accordingly grant to the owner of adjacent land the right to excavate the latter, even though this cause the withdrawal of support from his own land;<sup>57</sup> and the owner of the surface of land may grant or release to the owner of subjacent soil or minerals the right to work or mine the latter, even though this causes a disturbance or sinking of the surface.<sup>58</sup> But the presumption is that the right to subjacent support exists, and clear evidence is necessary to support a claim to the contrary.<sup>59</sup>

## § 310. Support of buildings.

The owner of land may acquire from the owner of adjoining land an easement consisting of a right to support for buildings on his land from adjacent land,<sup>60</sup> or from adjoining buildings,<sup>61</sup> neither of which exists as a natural right.

Richards, 50 Law J: Ch. 297; Arkwright v. Gell, 5 Mees. & W. 203; Townsend v. McDonald, 12 N. Y. 381; Belknap v. Trimble, 3 Paige (N. Y.) 577; Shepardson v. Perkins, 58 N. H. 354; City of Reading v. Althouse, 93 Pa. St. 400; Murchie v. Gates, 78 Me. 300. See Gould, Waters, § 225.

<sup>57</sup> Ryckman v. Gillis, 57 N. Y. 68.

<sup>58</sup> Rowbotham v. Wilson, 8 H. L. Cas. 362; Aspden v. Seddon, 10 Ch. App. 394; Scranton v. Phillips, 94 Pa. St. 15; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242.

<sup>59</sup> Dixon v. White, 8 App. Cas. 833; Williams v. Hay, 120 Pa. St. 485; Robertson v. Youghiogheny River Coal Co., 172 Pa. St. 566; Mickie v. Douglas, 75 Iowa, 78; Burgner v. Humphrey, 41 Ohio St. 840.

<sup>60</sup> Rigby v. Bennett, 21 Ch. Div. 559; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; Lasala v. Holbrook, 4 Paige (N. Y.) 173.

<sup>61</sup> Angus v. Dalton, 4 Q. B. Div. 162; Dalton v. Angus, 6 App

In cases in which separate floors of a building belong to different persons, there is a right of support for the upper floor or floors from the lower part of the building, and this right the owner of the latter can in no way impair, there being an implied grant to this effect in the conveyance of such upper floor or floors.<sup>63</sup>

### § 311. Party walls.

A "party wall" is a division wall between two buildings belonging to different persons, in which each of such persons has certain rights of use and ownership. The term, as stated in a modern English case,<sup>63</sup> has been used in connection with division walls in four different senses. It may refer to (1) a division wall of which, with the land beneath it, the owners of the two adjoining buildings are tenants in common;<sup>64</sup> (2) a wall divided longitudinally into two strips, each of the adjoining owners owning the strip on his side, and having a right to use that strip only;<sup>65</sup> (3) a wall lo-

Cas. 740; *Murchie v. Black*, 19 Q. B. (N. S.) 190; *Richards v. Rose*, 9 Exch. 218, 3 Gray's Cas. 485; *Lemaitre v. Davis*, 19 Ch. Div. 281; *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716, 2 Gray's Cas. 320; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

<sup>63</sup> *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Rhodes v. McCormack*, 4 Iowa, 375; *Graves v. Berdan*, 26 N. Y. 501; *Harris v. Ryding*, 5 Mees. & W. 60.

But the owner of the upper floor has, it seems, no right to demand that the owner of the lower keep it in repair for the purpose of supporting the former. See post, § 324.

<sup>64</sup> *Watson v. Gray*, 14 Ch. Div. 192, 2 Gray's Cas. 214, per Fry, J.

<sup>65</sup> It is used in this sense in the following cases: *Cubitt v. Porter*, 3 Barn. & C. 257, 2 Gray's Cas. 208; *Mayfair Property Co. v. Johnston* [1894] 1 Ch. 508; *Wiltshire v. Sidford*, 1 Man. & R. 404; *Montgomery v. Trustees of Masonic Hall*, 70 Ga. 38. See *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480, 2 Gray's Cas. 216.

<sup>66</sup> *Matts v. Hawkins*, 5 Taunt. 20, 2 Gray's Cas. 307; *Murly v. McDermott*, 3 Adol. & E. 133.

cated entirely upon the land of one of the adjoining owners, and belonging entirely to him, but subject to an easement in the other to have it maintained as a division wall between the two properties;<sup>66</sup> or (4) a wall divided longitudinally into two strips, each of the adjoining owners owning the strip on his side only, but having an easement in the other strip for the purposes of the support of his building.<sup>67</sup>

In England, a division wall is presumed to belong to the first of the above classes.<sup>68</sup> In this country, no such presumption has ever been recognized, and a party wall almost invariably belongs to the fourth class mentioned above, except in the few cases in which it belongs to the third class as having been built entirely on the land of one proprietor. For this reason, it seems proper to consider the subject of party walls exclusively as a branch of the subject of easements, though a party wall of the first or second class involves no application of the law of easements.

In England, so far as concerns property in the city of London, the matter of party walls has for many years been regulated by statute,<sup>69</sup> and in a number of states in this

<sup>66</sup> *Rogers v. Sinsheimer*, 50 N. Y. 646; *Tate v. Fratt*, 112 Cal. 612. See *Barry v. Edlavitch*, 84 Md. 95.

<sup>67</sup> *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, 2 Gray's Cas. 223, *Finch's Cas.* 834; *Graves v. Smith*, 37 Ala. 450, 13 Am. St. Rep. 60; *Ingals v. Plamondon*, 75 Ill. 118; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Hendricks v. Stark*, 37 N. Y. 106, 93 Am. Dec. 549; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; *Andrae v. Haseltine*, 53 Wis. 395, 46 Am. Rep. 635; *Dauenhauer v. Devine*, 51 Tex. 430, 33 Am. Rep. 627; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Odd Fellows' Ass'n v. Hegele*, 24 Or. 16.

<sup>68</sup> *Cubitt v. Porter*, 3 Barn. & C. 257, 2 Gray's Cas. 208; *Watson v. Gray*, 14 Ch. Div. 192, 2 Gray's Cas. 214.

<sup>69</sup> 12 Geo. III. c. 73 (A. D. 1772), since superseded by the later acts of 18 & 19 Vict. c. 122, and 57 & 58 Vict. c. 213. See *Pratt v. Hillman*, 4 Barn. & C. 269; *Standard Bank of British South America v. Stokes*, 9 Ch. Div. 68.

country there are statutory provisions upon the subject, usually authorizing an owner of land to place a wall partly on the adjoining land, the owner of the latter to have the right to use the wall when he erects a building.<sup>70</sup>

The owner of land has no right, apart from agreement or statute, to build a wall partly on the land of an adjoining owner, and, if he so does, the latter may use so much of the wall as is on his land, without making compensation therefor, it being a fixture on his land.<sup>71</sup> A promise by him to pay for the use of the wall when used may, however, it seems, be presumed from the fact of acquiescence in its construction by the adjoining owner in part on his land, with knowledge that the latter expects payment for its use.<sup>72</sup>

A wall may be a party wall for part of its height, and, as to the balance, a wall belonging entirely to one of the two adjoining owners.<sup>73</sup>

### § 312. Partition fences.

There is generally, at common law, no obligation upon a landowner to maintain a partition fence between his land

<sup>70</sup> See Jones, *Easements*, §§ 633-640, reciting the statutes in the District of Columbia, Iowa, Louisiana, Mississippi, Pennsylvania, and South Carolina. See *Vollmer's Appeal*, 61 Pa. St. 118.

A statute providing that one may erect a wall in part upon the land of an adjoining owner, to be used by both as a party wall, has been held to be unconstitutional. *Wilkins v. Jewett*, 139 Mass. 29; *Traute v. White*, 46 N. J. Eq. 437 (dictum). *Contra*, *Swift v. Calnan*, 103 Iowa, 206.

<sup>71</sup> *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480, 2 Gray's Cas. 216; *Bisquay v. Jeunelot*, 10 Ala. 245, 44 Am. Dec. 483; *Orman v. Day*, 5 Fla. 385; *Wilkins v. Jewett*, 139 Mass. 29; *Allen v. Evans*, 161 Mass. 485; *Grimey v. Davidson*, 133 Ill. 116; *Antomarchi's Ex'r v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *List v. Hornbrook*, 2 W. Va. 340.

<sup>72</sup> *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Huck v. Flentye*, 80 Ill. 258. See *Zelninger v. Schnitzler*, 48 Kan. 63.

<sup>73</sup> *Weston v. Arnold*, 8 Ch. App. 1084; *Price v. McConnell*, 27 Ill. 255. *Contra*, *Graves v. Smith*, 37 Ala. 450, 13 Am. St. Rep. 60.

and the land adjoining.<sup>74</sup> But there may be an easement, created by grant or prescription, in favor of one piece of land, by which the owner of land adjacent thereto is compellable to maintain a partition fence between them.<sup>75</sup>

There may also be a personal obligation upon the owner of land, by agreement, to maintain a fence,<sup>76</sup> and this may, it seems, in some cases, be enforceable by or against successive owners as a "covenant running with the land."<sup>77</sup>

In many states there are statutes providing for the construction of a partition fence between adjoining pieces of land at the joint expense of the owners or occupants thereof.<sup>78</sup> By these statutes, each adjoining owner or occupant is required not only to join in the construction of the fence, but also in its maintenance and repair,<sup>79</sup> and neither can, without the consent of the other, remove any part of the fence, except, in some states, at certain periods of the year, or after a prescribed notice to the other proprietor.<sup>80</sup>

<sup>74</sup> *Star v. Rookesby*, 1 Salk. 335, 2 Gray's Cas. 323; *Moore v. Levert*, 24 Ala. 310; *Rust v. Low*, 6 Mass. 90. And see *ante*, § 262.

<sup>75</sup> *Star v. Rookesby*, 1 Salk. 335, 2 Gray's Cas. 323; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274, 2 Gray's Cas. 324; *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156, 2 Gray's Cas. 328; *Castner v. Riegel*, 54 N. J. Law, 498; *Adams v. Van Alstyne*, 25 N. Y. 232.

Such an easement is sometimes spoken of as a "spurious" easement, since a true easement, it is considered, cannot involve a duty of active performance on the part of the owner of the land subject to the easement. *Gale, Easements*, 440.

<sup>76</sup> *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Bruner v. Palmer*, 108 Ind. 397; *Harriman v. Park*, 55 N. H. 471; *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230, 54 Am. Dec. 753; *O'Riley v. Diss*, 41 Mo. App. 184; *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814.

<sup>77</sup> See *post*, § 346, note 32.

<sup>78</sup> 1 *Stimson's Am. St. Law*, § 2182; 12 *Am. & Eng. Enc. Law*, 1060 et seq.

<sup>79</sup> 1 *Stimson's Am. St. Law*, § 2185; *Rhodes v. Mummery*, 48 Ind. 216; *Barrett v. Dolan*, 71 Iowa, 94; *Stephens v. Shriver*, 25 Pa. St. 78; *Guyer v. Stratton*, 29 Conn. 421; *Carpenter v. Cook*, 67 Vt. 102.

<sup>80</sup> 1 *Stimson's Am. St. Law*, § 2184.

When one owner of land desires to compel contribution by an adjacent owner of part of the cost of a partition fence under the statute, and the latter refuses to make contribution, the former is usually expressly authorized to apply to local officers, called "fence viewers," for a determination of the proportions to be built and maintained by each, or, in case the fence is already erected, for an allowance of the amount to be contributed by the party in default.<sup>81</sup> These statutes usually authorize one thus to compel his neighbor to join in the erection and maintenance of the fence only in case the latter's land is improved,<sup>82</sup> or occupied,<sup>83</sup> or inclosed;<sup>84</sup> and sometimes only when the land is used or occupied "otherwise than in common," this meaning land, it is said, which is segregated from other land by inclosure, or by use of an exclusive nature.<sup>85</sup>

An owner of land who is bound, by grant or prescription, or by reason of proceedings under the statute, to maintain a partition fence, or a part thereof, is liable to the adjoining proprietor for any injuries that may occur owing to his failure to properly maintain it, there being usually an express provision to this effect in statutes providing for partition fences.<sup>86</sup> He has no right to recover against the ad-

<sup>81</sup> 1 Stimson's Am. St. Law, § 2182; *Castner v. Riegel*, 54 N. J. Law, 498; *Thompson v. Bulson*, 78 Ill. 277; *Farmer v. Young*, 86 Iowa, 382; *Briggs v. Haynes*, 68 Me. 535; *Shriver v. Stephens*, 20 Pa. St. 138; *Burr v. Hamer*, 12 Neb. 483; *Gonzales v. Wasson*, 51 Cal. 295; *Farr v. Spain*, 67 Wis. 631; *Bronk v. Becker*, 17 Wend. (N. Y.) 320.

<sup>82</sup> *Wiggin v. Baptist Soc.*, 43 N. H. 260.

<sup>83</sup> *Maudlin v. Hanscombe*, 12 Colo. 204; *Rust v. Low*, 6 Mass. 90.

<sup>84</sup> *Kent v. Lix*, 47 Mo. App. 567; *Boyd v. Lammert*, 13 Ill. App. 632; *Boenig v. Hornberg*, 24 Minn. 307.

<sup>85</sup> *Hewit v. Jewell*, 59 Iowa, 37; *Jones v. Perry*, 50 N. H. 134. See *Perkins v. Perkins*, 44 Barb. (N. Y.) 134.

<sup>86</sup> *Powell v. Salisbury*, 2 Younge & J. 391; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179; *Saxton v. Bacon*, 31 Vt. 540; 1 Stimson's Am. St. Law, § 2189 (B).

joining proprietor for a trespass by the latter's cattle which results from his own failure to comply with his obligation to fence;<sup>87</sup> but his obligation is to his adjoining owner only, and to those lawfully using the latter's land, and he may recover against others whose cattle trespass on the adjacent land, and pass therefrom onto his land, although they do so owing to his own failure to fence.<sup>88</sup>

### § 313. Rights of way.

A right of way is a right in a person, or a particular class of persons, to pass over another's land. Such a right never exists as a natural right, but must always be created by a grant or its equivalent. A right of way may be either public or private,—that is, it may be a right of passage of which every individual may avail himself, or it may exist for the benefit of one individual or class of individuals. Public rights of way are not, properly speaking, easements, though they are frequently referred to as such, and they will be more particularly discussed in another connection.<sup>89</sup> Private rights of way, which constitute one of the most important classes of easements, will be hereafter discussed in connection with the acquisition, user, and extinguishment of easements.<sup>90</sup>

### § 314. Pews and burial rights.

The character of the rights enjoyed by the holder of a

<sup>87</sup> *Barrett v. Dolen*, 71 Iowa, 24; *Baynes v. Chastain*, 68 Ind. 376; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 49 Am. Dec. 239; *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Rangler v. McCreight*, 27 Pa. St. 95; *Roach v. Lawrence*, 56 Wis. 478.

<sup>88</sup> *Lord v. Wormwood*, 29 Me. 232, 50 Am. Dec. 536; *Rust v. Low*, 6 Mass. 90; *Lyons v. Merrick*, 105 Mass. 71; *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 75 Am. Dec. 207.

<sup>89</sup> See post, § 365.

<sup>90</sup> See post, §§ 321-323.



church pew has been the subject of numerous decisions in this country, which are, however, not entirely harmonious in character, and are frequently unsatisfactory in their discussion of the principles involved. In England, there may be an easement, consisting of the right to occupy a particular pew in the parish church, annexed to a particular house or messuage, this apparently not differing in nature from any other easement, the house or messuage constituting the dominant tenement, and the church the servient tenement.<sup>91</sup>

In this country it is generally recognized that a "pew holder" has, as such, no rights of ownership in the church edifice, or the land on which it stands, these being usually vested in the ecclesiastical authorities, in the church corporation, or in trustees.<sup>92</sup> He has rather an easement or "incorporeal hereditament."<sup>93</sup> This right to occupy the pew, however, though in the nature of an easement, is an easement

<sup>91</sup> *Hinde v. Chorlton*, L. R. 2 C. P. 104; *Brumfit v. Roberts*, L. R. 5 C. P. 224; *Phillips v. Halliday* [1891] App. Cas. 228.

<sup>92</sup> *Presbyterian Church in Newark v. Andruss*, 21 N. J. Law, 325; *Re New South Meeting House in Boston*, 13 Allen (Mass.) 497; *Sohler v. Trinity Church*, 109 Mass. 1; *Jones v. Towne*, 58 N. H. 462, 42 Am. Rep. 602; *First Baptist Soc. in Leeds v. Grant*, 59 Me. 245; *Howe v. Stevens*, 47 Vt. 262; *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Wheaton v. Gates*, 18 N. Y. 404; *Trustees of Ithaca First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *First Baptist Church in Hartford v. Witherell*, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377.

<sup>93</sup> *First Baptist Soc. in Leeds v. Grant*, 59 Me. 245; *Presbyterian Church in Newark v. Andruss*, 21 N. J. Law, 325; *Gamble's Succession*, 23 La. Ann. 9. See Washburn, *Easements*, 515.

It has been occasionally stated, rather ambiguously, that the "owners of pews have an exclusive right to their possession and occupation for the purposes of public worship, not as an easement, but by virtue of their individual right of property therein, derived, perhaps, in theory at least, from the corporation represented by the trustees who are seised and possessed of the temporalities of the church." *Shaw v. Beveridge*, 3 Hill (N. Y.) 26, 38 Am. Dec. 616; *O'Hear v. De Goesbriand*, 32 Vt. 606, 80 Am. Dec. 652.

in gross, since in this country it rarely, if ever, belongs to a particular house or messuage. Pews are also said to be, in the absence of statutory provision to the contrary, "real estate."<sup>94</sup> These prevailing views might, it would seem, be somewhat more accurately expressed by saying that the easement or *quasi* easement of using the pew is a "real" thing, of an incorporeal nature, and that an interest or estate therein, if of an indefinite duration, constitutes real property. If one's interest is limited to a term of years, or is "from year to year," it is personal property merely.<sup>95</sup>

As to the rights of the person entitled to use a pew upon the destruction of the church edifice or the sale thereof, the cases are not in entire accord. The view more generally adopted, however, is that the church corporation or trustees are liable to him for the value of his right if the building is destroyed or sold without an absolute necessity for such action, while there is no such liability in case such necessity exists.<sup>96</sup> There are occasional suggestions that the pew own-

<sup>94</sup> Attorney General v. Proprietors of Federal St. Meeting House, 3 Gray (Mass.) 1; Kimball v. Second Congregational Parish in Rowley, 24 Pick. (Mass.) 347; Trustees of Ithaca First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; Viele v. Osgood, 3 Barb. (N. Y.) 130; Price v. Lyon, 14 Conn. 280; Howe v. Stevens, 47 Vt. 262; Barnard v. Whipple, 29 Vt. 401, 70 Am. Dec. 422.

<sup>95</sup> See McNabb v. Pond, 4 Bradf. (N. Y.) 7; Johnson v. Corbett, 11 Paige (N. Y.) 265, 276; Inhabitants of First Parish v. Spear, 15 Pick. (Mass.) 144; Trustees of the Third Presbyterian Congregation v. Andruss, 21 N. J. Law, 325; St. Paul's Church in Syracuse v. Ford, 34 Barb. (N. Y.) 16. In Pennsylvania, the right to a pew is considered to be personal property. Church v. Wells' Ex'rs, 24 Pa. St. 249. And so by statute in Massachusetts. Rev. Laws 1902, c. 36, § 38.

<sup>96</sup> Cooper v. Trustees of First Presbyterian Church, 32 Barb. (N. Y.) 222; Kincaid's Appeal, 66 Pa. St. 411, 422; Gorton v. Hadsell, 9 Cush. (Mass.) 508; Kellogg v. Dickinson, 18 Vt. 266; Wheaton v. Gates, 18 N. Y. 395; Mayer v. Temple Beth El, 52 N. Y. St. Rep. 638, 23 N. Y. Supp. 1013; Sohler v. Trinity Church, 109 Mass. 1.

or would have a right to be allotted a pew in a new edifice substituted for the old.<sup>97</sup>

The right to inter bodies in a burial ground belonging to a corporation or association is usually regarded as based on a mere privilege or easement, and the fact that the right is evidenced by what is called a deed of a burial lot seems not to affect the character of the right.<sup>98</sup> Occasionally, the burial right is spoken of as a license merely.<sup>99</sup> In one or two cases, on the other hand, one to whom a lot is conveyed for burial purposes is regarded as the owner of the land.<sup>100</sup>

The corporation or society controlling the cemetery may make regulations as to the mode and limits of the use of lots therein for burial,<sup>101</sup> but such regulations must not be unreasonable or arbitrary.<sup>102</sup> All rights in the persons entitled to use the burial ground are terminated by the necessary abandonment of the use of the land for burial purposes.<sup>103</sup>

<sup>97</sup> *Mayer v. Temple Beth El*, 52 N. Y. St. Rep. 638, 23 N. Y. Supp. 1612; *Daniel v. Wood*, 1 Pick. (Mass.) 102.

<sup>98</sup> *Dwenger v. Geary*, 113 Ind. 106; *Hancock v. McAvoy*, 151 Pa. St. 460, 31 Am. St. Rep. 774; *Hook v. Joyce*, 94 Ky. 450; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 503; *Went v. Methodist Protestant Church*, 80 Hun. 266, 150 N. Y. 577.

<sup>99</sup> *Partridge v. First Independent Church*, 39 Md. 631; *Rayner v. Nugent*, 60 Md. 515; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *McGuire v. Trustees of St. Patrick's Cathedral*, 54 Hun (N. Y.) 207; *Kincaid's Appeal*, 66 Pa. St. 420, 5 Am. Rep. 377.

<sup>100</sup> *New York Bay Cemetery Co. v. Buckmaster*, 49 N. J. Law, 449; *Silverwood v. Latrobe*, 68 Md. 620.

<sup>101</sup> *Dwenger v. Geary*, 113 Ind. 106; *Farely v. Metairie Cemetery Ass'n*, 44 La. Ann. 28.

<sup>102</sup> *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209; *Mount Moriah Cemetery Ass'n v. Com.*, 81 Pa. St. 235, 22 Am. Rep. 743; *Silverwood v. Latrobe*, 68 Md. 620.

<sup>103</sup> *Craig v. First Presbyterian Church*, 38 Pa. St. 42, 32 Am. Rep. 417; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Partridge v. First Independent Church*, 39 Md. 631; *Richards v. Northwest Protestant*

## II. THE ACQUISITION OF EASEMENTS.

An easement may be created or acquired by:

- (1) Express grant.
- (2) Reservation or exception in a conveyance of land.
- (3) Implied grant of an easement corresponding to a pre-existing quasi easement.
- (4) Prescription.
- (5) A statutory proceeding, usually under the power of eminent domain.
- (6) Estoppel.

## § 315. Express grant.

Easements, being incorporeal in their nature, were regarded at common law as lying in grant, and not in livery, and consequently a grant by the owner of the servient estate has always been a recognized mode of creating them.<sup>104</sup> The word "grant," at common law, implied a conveyance under seal, and therefore a conveyance of an easement, as of any other incorporeal interest in land, must be under seal, even though the conveyance is merely for years.<sup>105</sup> In order to create an interest in fee in an easement by express grant, the word "heirs" must be used, as in the conveyance of rights

Dutch Church, 33 Barb. (N. Y.) 42; *Went v. Methodist Protestant Church*, 30 Hun, 266, 150 N. Y. 577; *Price v. Methodist Episcopal Church*, 4 Ohio, 515.

<sup>104</sup> Co. Litt. 9a, 9b, 49a, 121b, 142a, 172a, 181a; Challin, Real Prop. 41.

<sup>105</sup> *Wood v. Leadbitter*, 13 Mees. & W. 342, 2 Gray's Cas. 359; *Somerset v. Fogwell*, 5 Barn. & C. 375, 3 Gray's Cas. 230; *Bird v. Higginson*, 3 Adol. & E. 696, 3 Gray's Cas. 231, 6 Adol. & E. 324; *Hewlins v. Shippam*, 5 Barn. & C. 221; *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 N. H. 482, Finch's Cas. 793; *Cagle v. Parker*, 97 N. C. 271; *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Thompson v. Gregory*, 4 Johns. (N. Y.) 31, 4 Am. Dec. 255; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203, Finch's Cas. 76 (700)

of ownership in fee, except where the requirement has been dispensed with by statute.<sup>106</sup>

Even apart from the common-law requirement that the grant of an easement, as of any other incorporeal thing, must be by writing under seal, a writing is necessary, under the Statute of Frauds, and an attempted oral grant of an easement is no more than a license.<sup>107</sup> In some cases, however, particularly in courts exercising equitable powers, an oral grant of an easement, if acted upon by the beneficiary of the grant, has been regarded as valid, on the theory that, in such case, to allow the grant to take effect as a revocable license merely would permit the commission of a fraud by the grantor.<sup>108</sup> This is the doctrine before referred to, that an oral license, if acted upon, is irrevocable, an irrevocable license being in effect an easement.<sup>109</sup>

What is in form a covenant merely—that is, an agreement under seal—may operate as the grant of an easement, when this is clearly the intention of the parties.<sup>110</sup>

<sup>106</sup> *Bean v. French*, 140 Mass. 229; *Whitney v. Richardson*, 59 Hun (N. Y.) 601.

<sup>107</sup> *Banghart v. Flummerfelt*, 43 N. J. Law, 28; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 202, *Finch's Cas.* 76; *Dorris v. Sullivan*, 90 Cal. 279; *Harris v. Miller*, Meigs (Tenn.) 158, 33 Am. Dec. 128; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

<sup>108</sup> *Van Horn v. Clark*, 56 N. J. Eq. 476; *Texas & St. L. R. Co. v. Jarrell*, 60 Tex. 267; *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574; *Pierce v. Cleland*, 123 Pa. St. 189.

<sup>109</sup> See ante, § 304.

<sup>110</sup> *Gale, Easements* (7th Ed.) 72; *Holms v. Seller*, 3 Lev. 205; *Rowbotham v. Wilson*, 8 H. L. Cas. 348, 362; *McCarthy v. Nicrosi*, 72 Ala. 322, 47 Am. Rep. 418; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 472; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758; *Harris v. Dozier*, 72 Ill. App. 542; *Hogan v. Barry*, 143 Mass. 538; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481;

An agreement between adjoining owners of land for the construction or use of a party wall, since it involves an interest in land, must be in writing,<sup>111</sup> and an oral agreement amounts merely to a revocable license.<sup>112</sup> A part performance of an oral agreement by the construction of the wall will, however, in some states, be sufficient to create an easement of support in favor of the person building a wall partly on another's land,<sup>113</sup> and also to give him the right to recover from the adjacent owner a part of the cost upon user by the latter.<sup>114</sup>

— Grant with appurtenances.

A man cannot have an easement over his own land, but he may have been accustomed to exercise over one part of his land certain proprietary rights for the benefit of another part, which would be easements were the two parts the property of different owners. Rights so exercised by an owner of land over one part thereof for the benefit of another part have received the convenient designation of "*quasi* easements," and the part of the land benefited is known as the "*quasi* dominant tenement," while the part over which the right is exercised is known as the "*quasi* servient tenement."

The existence of such a *quasi* easement is frequently important in determining whether there is an implied grant of an actual easement when the *quasi* dominant and *quasi* servi-

Wetmore v. Bruce, 118 N. Y. 319; Barr v. Lamaster, 48 Neb. 114. Warren v. Syme, 7 W. Va. 475; Norfleet v. Cromwell, 64 N. C. 1.

<sup>111</sup> Tillis v. Treadwell, 117 Ala. 445; Rice v. Roberts, 34 Wis. 461, 1 Am. Rep. 195.

<sup>112</sup> Hodgkins v. Farrington, 150 Mass. 19.

<sup>113</sup> Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348; Rawson v. Bell, 46 Ga. 19; Hammond v. Schiff, 100 N. C. 161; Miller v. Brown, 33 Ohio St. 547.

<sup>114</sup> Rice v. Roberts, 34 Wis. 461, 1 Am. Rep. 195; Rawson v. Bell, 46 Ga. 19; Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475.

ent tenements become the property of different persons. The only question with reference to such *quasi* easements in connection with the creation of an easement by express grant is whether certain general words can be construed as including *quasi* easements. Upon this question the decisions are to the effect that the fact that a grant of the *quasi* dominant tenement is expressed to be "with the appurtenances," or with certain rights "appertaining and belonging," or that similar general terms are used, does not operate to create an easement in the grantee equivalent to the pre-existing *quasi* easement.<sup>115</sup> According to the English cases, however, a grant of land with the easements or rights "used and enjoyed therewith" will create in favor of the grantee an easement corresponding to a *quasi* easement previously existing in favor of the land conveyed.<sup>116</sup>

§ 316. Reservations and exceptions.

By the English law, an "exception" in a conveyance mere-

<sup>115</sup> *Worthington v. Gimson*, 2 Bl. & El. 618, 3 Gray's Cas. 491; *Baring v. Abingdon* [1892] 2 Ch. 374, 389; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *May v. Smith*, 3 Mackey (D. C.) 55; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Spaulding v. Abbot*, 55 N. H. 423; *Swazey v. Brooks*, 34 Vt. 451; *Oliver v. Hook*, 47 Md. 301.

<sup>116</sup> *Kay v. Oxley*, L. R. 10 Q. B. 360, 3 Gray's Cas. 523; *Watts v. Kelson*, 6 Ch. App. 166, 3 Gray's Cas. 513; *Barkshire v. Grubb*, 18 Ch. Div. 616; *Bayley v. Great Western Ry. Co.*, 26 Ch. Div. 434. So, where the owner of two adjoining tracts has used a right of way across one (the *quasi* servient tenement) for the benefit of the other (the *quasi* dominant tenement), while a conveyance of the latter tenement "with appurtenances" will not pass the right of way, the conveyance, if with the rights and easements "used and enjoyed therewith," will have that effect. Formerly it was held that this principle applied only in case the *quasi* easement had, at a former time, when the *quasi* dominant and servient tenements belonged to different persons, existed as an actual easement. *Thomson v. Waterlow*, L. R. 6 Eq. 36, 3 Gray's Cas. 509; *Langley v. Hammond*, L. R. 3 Exch. 168. This distinction is, however, no longer recognised.

ly withdraws from the operation of the conveyance a part of the thing granted, and a "reservation" merely provides for the rendition to the grantor of something, such as a rent or service, which is regarded as issuing from the thing granted.<sup>117</sup> An easement in the land granted is regarded as neither a part of the land nor as issuing therefrom, and consequently, in that country, if, upon the conveyance of land, there is in terms a reservation or exception, in favor of the grantor, of an easement in the land, these words are construed as in effect a re-grant of the easement by the grantee of the land to the grantor.<sup>118</sup> In this country, however, the view of the common law as to the restricted functions of an exception and a reservation is not usually adopted,<sup>119</sup> and it is held that an easement in the land conveyed may be created by an exception or a reservation in favor of the grantor, without resort to the fiction of a re-grant by the grantee, and consequently the fact that the conveyance is executed by the grantor alone is immaterial.<sup>120</sup> Moreover, the cases do not usually require the use of the word "heirs" in order that an easement in fee be so created in favor of the grantor, even though it is necessary in a conveyance of a fee in the land itself.<sup>121</sup>

<sup>117</sup> See post, § 383.

<sup>118</sup> *Durham & S. Ry. Co. v. Walker*, 2 Q. B. 940; *Wickham v. Hawker*, 7 Mees. & W. 63, 3 Gray's Cas. 478; *Corporation of London v. Riggs*, 13 Ch. Div. 798.

<sup>119</sup> See post, § 383.

<sup>120</sup> *Bowen v. Conner*, 6 Cush. (Mass.) 132, 3 Gray's Cas. 553; *Kent v. Waite*, 10 Pick. (Mass.) 138, 3 Gray's Cas. 538; *Borst v. Emple*, 1 Seld. (N. Y.) 33, 3 Gray's Cas. 557; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Kuecken v. Voltz*, 110 Ill. 264; *Tuttle v. Walker*, 46 Me. 280; *Haggerty v. Lee*, 54 N. J. Law, 580, 50 N. J. Eq. 464; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608; *Rose v. Bunn*, 21 N. Y. 275; *Richardson v. Clements*, 89 Pa. St. 503, 33 Am. Rep. 784; *Fischer v. Laack*, 76 Wis. 313.

<sup>121</sup> *Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Emm* (704)



## § 317. Implied grant or reservation.

In many cases, although there is no grant of an easement in express terms, a grant or reservation of an easement is implied from circumstances. The question as to when an easement will thus be implied has been the subject of much discussion and adjudication, and the cases on the subject are by no means in harmony. In connection with this question, the existence of what has been before described under the name of "*quasi* easement" may be of paramount importance.

If the owner of land, part of which is subject to a *quasi* easement in favor of another, conveys the *quasi* dominant tenement, he thereby grants, by implication, an easement corresponding to such pre-existing *quasi* easement, provided the *quasi* easement is of an apparent, continuous, and, by some decisions, necessary, character. Thus it has been held that, where the owner of two pieces of land maintains on one of them a drain for the benefit of the other, a person to whom he sells the latter is entitled to an easement of maintaining the drain as it has before been maintained.<sup>122</sup> And so if one lays pipes for the supply of water from one part of his land to another part, a purchaser of the part so benefited may have a right to such water supply, which constitutes an easement.<sup>123</sup>

*son v. Mooney*, 50 N. H. 315, 3 Gray's Cas. 579; *Smith v. Furbish*, 68 N. H. 123; *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195; *Lathrop v. Elsner*, 93 Mich. 599. See *Haggerty v. Lee*, 50 N. J. Eq. 464, 54 N. J. Law, 580. But in Massachusetts, if the words are construed as a reservation, rather than an exception, a life estate only in the easement is created in favor of the grantor, in the absence of words of inheritance. *Curtis v. Gardner*, 13 Metc. (Mass.) 457, 3 Gray's Cas. 548; *Ashcroft v. Eastern R. Co.*, 126 Mass. 196, 3 Gray's Cas. 587; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489. See, as to the distinction taken in this state between an exception and a reservation, post, § 383.

<sup>122</sup> *Thayer v. Payne*, 2 Cush. (Mass.) 327, 3 Gray's Cas. 549; *Lampman v. Milks*, 21 N. Y. 505, 3 Gray's Cas. 565.

<sup>123</sup> *Paine v. Chandler*, 134 N. Y. 285.

So, in England and one or two states in this country, it is the rule that, if one grants land on which there is a building which is lighted by windows opening on land retained by the grantor, the grantee is entitled to an easement of light over such land, and the grantor cannot obstruct his light by building on his land.<sup>124</sup> Generally, in this country, however, it has been held that no such easement of light will be implied in favor of the grantee, it being calculated to unduly burden land, and to interfere with its alienation and proper improvement;<sup>125</sup> or that it will be implied only in case the light entering the grantee's building over the grantor's land is actually necessary to the use of such building.<sup>126</sup>

That an easement, to be thus created by implied grant, must be apparent, is conceded by all the decisions,<sup>127</sup> and it is apparent, it is said, for this purpose, if its existence is indicated by signs which must necessarily be seen, or which may be seen or known on a careful inspection by a person

<sup>124</sup> *Swansborough v. Coventry*, 9 Bing. 305; *Greer v. Van Meter*, 54 N. J. Eq. 270; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300.

<sup>125</sup> *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379, 3 Gray's Cas. 577; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Kennedy v. Burnap*, 120 Cal. 488; *Ray v. Sweeney*, 14 Bush (Ky.) 1, 29 Am. Rep. 388. Compare *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Case v. Minot*, 158 Mass. 577; *Brande v. Grace*, 154 Mass. 210.

<sup>126</sup> *Robinson v. Clapp*, 65 Conn. 365; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497; *Rennyson's Appeal*, 94 Pa. St. 147, 39 Am. Rep. 777; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629. See *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444; *White v. Bradley*, 66 Me. 254.

<sup>127</sup> *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352, 3 Gray's Cas. 584; *Lampman v. Milks*, 21 N. Y. 505, 2 Gray's Cas. 565; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Whiting v. Gaylord*, 66 Conn. 337; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 544; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471.

ordinarily conversant with the subject.<sup>129</sup> Accordingly, the question whether a drain or aqueduct which is under ground or covered by buildings is apparent for the purpose of the rule depends, it seems, on whether there is any object in sight on the land purchased, such as a pump or a sink, which would indicate the presence of the aqueduct or drain.<sup>129</sup>

An easement, to be thus created by implied grant on the conveyance of land, must also be "continuous."<sup>130</sup> In some cases the view is taken that an easement is so continuous if no act of man is necessary to its continuous exercise;<sup>131</sup> while in others the question is said to be whether there is a permanent adaptation of the two tenements to the exercise of the easement.<sup>132</sup> The easement of maintaining a drain or aqueduct is regarded as continuous, whichever of these meanings be given to the word "continuous,"<sup>132</sup> while, on

<sup>129</sup> *Gale, Easements*, 100; *Pyer v. Carter*, 1 Hurl. & N. 916, 3 Gray's Cas. 488. See *Ellason v. Grove*, 85 Md. 215; *Curtiss v. Ayrault*, 47 N. Y. 73, *Finch's Cas.* 126.

<sup>129</sup> For cases in which a quasi easement involving the use of land for a drain or aqueduct was held to be apparent, see *Pyer v. Carter*, 1 Hurl. & N. 916, 3 Gray's Cas. 488; *McPherson v. Acker*, *MacArthur & M.* (D. C.) 150, 48 Am. Rep. 749; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88. Compare *Butterworth v. Crawford*, 46 N. Y. 849, 7 Am. Rep. 352, 3 Gray's Cas. 584; *Johnson v. Knapp*, 150 Mass. 267.

<sup>130</sup> *Worthington v. Gimson*, 2 El. & El. 618, 3 Gray's Cas. 491; *Wheeldon v. Burrows*, 12 Ch. Div. 31, 3 Gray's Cas. 529; *Lampman v. Milks*, 21 N. Y. 505, 3 Gray's Cas. 565; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Whiting v. Gaylord*, 66 Conn. 337; *Larsen v. Peterson*, 53 N. J. Eq. 88; *Gale, Easements*, 121.

<sup>131</sup> *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Morgan v. Meuth*, 60 Mich. 238.

<sup>132</sup> *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550; *Paine v. Chandler*, 134 N. Y. 385; *Spencer v. Kilmer*, 151 N. Y. 390.

<sup>132</sup> *Larsen v. Peterson*, 53 N. J. Eq. 88; *Paine v. Chandler*, 134 N. Y. 385.

the other hand, a mere right to go on another's land to obtain water has been regarded as not continuous.<sup>134</sup> Whether a right of way is continuous is a matter on which there has been considerable difference of opinion, and while some cases seem to regard it as necessarily discontinuous, because not constantly exercised,<sup>135</sup> other cases regard it as continuous if there is a clearly-defined road over the servient tenement, evidently intended for the use of the dominant tenement.<sup>136</sup>

In this country the cases usually, though not always, say that the easement, to be thus created by implied grant, must be "necessary," qualifying the expression, however, by other words or expressions indicating that by this is meant little more than that the easement must be highly desirable. Thus it is said that the easement must be necessary to the proper enjoyment of the land,<sup>137</sup> or to its reasonable<sup>138</sup> or conven-

<sup>134</sup> *Polden v. Bastard*, L. R. 1 Q. B. 156. Contra, *Ellason v. Grove*, 85 Md. 215, in which case, however, there was a continuous adaptation of the premises, in the shape of a gate near the well.

<sup>135</sup> *Worthington v. Gimson*, 3 El. & El. 618, 3 Gray's Cas. 491; *Brett v. Clowser*, 5 C. P. Div. 376; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *O'Rourke v. Smith*, 11 R. I. 259; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Oliver v. Hook*, 47 Md. 301; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Standiford v. Goudy*, 6 W. Va. 364; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564.

<sup>136</sup> *Gale, Easements*, 125, 137; *Brown v. Alabaster*, 37 Ch. Div. 490; *Goddard, Easements*, 185; *Thomas v. Owen*, 20 Q. B. Div. 235; *Watts v. Kelson*, 6 Ch. App. 166, 3 Gray's Cas. 513; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Cannon v. Boyd*, 73 Pa. St. 179; *Zell's Exrs v. Universalist Soc.*, 119 Pa. St. 390, 4 Am. St. Rep. 654; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Baker v. Rice*, 56 Ohio St. 463; *Ellason v. Grove*, 85 Md. 215.

<sup>137</sup> *Evans v. Dana*, 7 R. I. 306.

<sup>138</sup> *Spencer v. Kilmer*, 151 N. Y. 390; *Cave v. Crafts*, 53 Cal. 135; *Robinson v. Clapp*, 65 Conn. 365; *Ellason v. Grove*, 85 Md. 215.

ient<sup>139</sup> or beneficial<sup>140</sup> enjoyment, or "reasonably necessary" to its enjoyment or use,<sup>141</sup> or to its "convenient use,"<sup>142</sup> or "clearly necessary to its beneficial use."<sup>143</sup> It is impossible to formulate any general rule by which to determine the presence of this "necessity," so called. That the necessity need not be absolute, in the sense that there can be no use whatever of the land without the exercise of the easement, is apparent from all the decisions;<sup>144</sup> but beyond this the decisions give little aid, except in a few states, where it is stated that the question of necessity is determined by the consideration whether a substitute for the easement can be procured by "reasonable" trouble and expense.<sup>145</sup> Since the theory

<sup>139</sup> *Phillips v. Phillips*, 48 Pa. St. 178, 36 Am. Dec. 577.

<sup>140</sup> *Case v. Minot*, 158 Mass. 577.

<sup>141</sup> *Johnson v. Knapp*, 146 Mass. 70, 150 Mass. 267; *Paine v. Chandler*, 134 N. Y. 385; *Rightsell v. Hale*, 90 Tenn. 556; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Baker v. Rice*, 56 Ohio St. 463; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173 (clearly necessary to beneficial enjoyment).

<sup>142</sup> *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550 (reasonably necessary to fair enjoyment).

<sup>143</sup> *Stevens v. Orr*, 69 Me. 323.

<sup>144</sup> See *Cihak v. Klekr*, 117 Ill. 643; *McPherson v. Acker*, *MacArthur & M.* (D. C.) 150, 48 Am. Rep. 749; *Lampman v. Milks*, 21 N. Y. 505, 3 Gray's Cas. 585; *Paine v. Chandler*, 134 N. Y. 385; *Spencer v. Kilmer*, 151 N. Y. 390; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Phillips v. Phillips*, 48 Pa. St. 178, 36 Am. Dec. 577; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671.

<sup>145</sup> *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 3 Gray's Cas. 544; *Thayer v. Payne*, 2 Cush. (Mass.) 327, 3 Gray's Cas. 549; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688, 3 Gray's Cas. 576; *Randall v. McLaughlin*, 10 Allen (Mass.) 366; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173; *Warren v. Blake*, 54 Me. 276; *Smith v. Blanpled*, 62 N. H. 652.

Occasionally it has been said, in two of these states, that the grant of an easement will be implied only in cases of "strict neces-

on which these continuous and apparent easements are implied is evidently that the purchaser of land "is entitled to enjoy the thing as it was when he bought it, with all its apparent appurtenances, if those apparent appurtenances are apparently permanent, and are useful and add to its value,"<sup>146</sup> it is somewhat difficult to see why the purchaser should not have such apparent appurtenance, even though it is not "necessary," but of a merely moderate degree of utility, and in fact the decisions which dwell upon the requirement of necessity usually base their views upon the impolicy of implying a grant in excess of the express words of the conveyance. It would, perhaps, have been more satisfactory if the courts in this country, in pursuance of this policy of hostility to the implication of a grant, had repudiated entirely this doctrine of implied easements corresponding to *quasi* easements, instead of making its application, with the important

sity." *Warren v. Blake*, 54 Me. 276; *Stillwell v. Foster*, 80 Me. 333; *Buss v. Dyer*, 125 Mass. 287. But in view of other decisions in those states, it seems that this does not mean that the easement must be necessary in order to make any use whatever of the land. See *Johnson v. Knapp*, 146 Mass. 70; *Case v. Minot*, 158 Mass. 577; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173; *Stevens v. Orr*, 69 Me. 323.

<sup>146</sup> *Tooth v. Bryce*, 50 N. J. Eq. 539, per Pitney, V. C. See, also, more or less to the same effect, *Curtiss v. Ayrault*, 47 N. Y. 73; *Finch's Cas.* 126; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294; 34 Am. St. Rep. 706; *Howell v. Estes*, 71 Tex. 690; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

In *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 583, 53 Am. Rep. 550, it is said that the question of the necessity of such easement, and the expense involved in making new adjustments, is to be considered for the purpose of determining whether the purchaser took the conveyance expecting the use to be continued. This appears to be the only way in which the requirement of necessity can be brought into harmony with the reason of the doctrine, as above stated, but usually the purchaser's expectation of obtaining the apparent appurtenances would not be affected by the greater or less necessity of the apparent easement

resulting rights, dependent upon a standard of such an uncertain character as this so-called "necessity."<sup>147</sup>

By some of the English cases, and likewise by occasional decisions in this country, it is held that, upon the grant of the *quasi* servient tenement by the owner, he impliedly reserves an easement therein corresponding to the *quasi* easement before existing,—that is, that the same implication applies in favor of the grantor as that which applies in favor of the grantee.<sup>148</sup> The latest English cases, however, and some in this country, are to the effect that, on the sale of the servient part of his estate, the owner does not reserve any easements, in the absence of express stipulation, since a grantor cannot thus derogate from his own grant.<sup>149</sup> This dis-

<sup>147</sup> The English cases generally mention no such requirement, nor do the leading text-book writers. See Goddard, Easements, 174; Gale, Easements, 94 et seq. Occasionally an individual judge has used the word "necessary" (*Wheeldon v. Burrows*, 12 Ch. Div. 31, 3 Gray's Cas. 529; *Suffield v. Brown*, 9 Jur. [N. S.] 1001), but in the sense merely, it seems, of "necessary for the use of the tenement in the state it is in when severed" (see Gale, Easements, 99; *Watts v. Kelson*, 6 Ch. App. 166, 3 Gray's Cas. 513), which means no more, it would seem, than that the easement, to be so implied, must correspond to a pre-existing quasi easement. In the second, third, fourth, and fifth editions of Gale on Easements it is said, without any citation of authority, that the easement must be necessary, but in the sixth and seventh editions this is changed, and there is no reference to such a requirement. The English cases are admirably reviewed by Pitney, V. C., in *Tooth v. Bryce*, 50 N. J. Eq. 589.

<sup>148</sup> *Pyer v. Carter*, 1 Hurl. & N. 916, 3 Gray's Cas. 483; *Nicholas v. Chamberlain*, Cro. Jac. 121, 3 Gray's Cas. 466; *Seibert v. Levan*, 8 Pa. St. 383, 49 Am. Dec. 525; *Gelble v. Smith*, 146 Pa. St. 276; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294; *Cihak v. Klekr*, 117 Ill. 643 (dictum); *Greer v. Van Meter*, 54 N. J. Eq. 270; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550 (dictum); *Denton v. Leddell*, 28 N. J. Eq. 64; *Dunklee v. Wilton R. Co.*, 24 N. H. 489.

<sup>149</sup> Gale, Easements, 138-150; *White v. Bass*, 7 Hurl. & N. 722, 3 Gray's Cas. 494; *Suffield v. Brown*, 4 De Gex, J. & S. 185, 3 Gray's (711)

inction made by the later English cases between the implied grant and the implied reservation of an apparent easement is not, however, applied in the case of what are spoken of as "reciprocal easements." The only instance of such reciprocal easements given in the cases is that of the support of buildings, the rule in regard to which appears to be that, when buildings are erected together by the same owner in such a way as obviously to require mutual support, and he thereafter conveys one of them, the grantee is regarded as impliedly giving the grantor a right of support for the house retained by him in consideration of the right of support impliedly granted for the house sold.<sup>150</sup> On apparently the same principle, in this country, it is agreed that, if one builds houses separated by a partition wall, and the houses are afterwards conveyed to different persons, with the division line running longitudinally through the wall, each house is entitled to an easement of support in the part of the wall on the other's land, irrespective of whether it was conveyed by the builder before or after the conveyance of the other.<sup>151</sup>

The implication of a grant of an easement corresponding

Cas. 502; *Wheeldon v. Burrows*, 12 Ch. Div. 31, 3 Gray's Cas. 529; *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 3 Gray's Cas. 544; *Adams v. Marshall*, 138 Mass. 228; *Mitchell v. Seipel*, 53 Md. 251; *Ellison v. Grove*, 85 Md. 215; *Meredith v. Frank*, 56 Ohio St. 479. In *Wells v. Garbutt*, 132 N. Y. 430, it is said that a reservation will be implied only in case of "strict necessity," and in *Crosland v. Rogers*, 32 S. C. 130, that the necessity must be "imperious."

<sup>150</sup> *Richards v. Rose*, 9 Exch. 218, 3 Gray's Cas. 486; *Suffield v. Brown*, 4 De Gex, J. & S. 185, 3 Gray's Cas. 502; *Wheeldon v. Burrows*, 12 Ch. Div. 31, 3 Gray's Cas. 529. See *Stevenson v. Wallace*, 27 Grat. (Va.) 77; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581.

<sup>151</sup> *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Goldschmid v. Starring*, 5 Mackey (D. C.) 582; *Ingals v. Plamondon*, 75 Ill. 118; *Carlton v. Blake*, 152 Mass. 176; *Heart v. Kruger*, 121 N. Y. 386; *Doyle v. Ritter*, 6 Phila. (Pa.) 577.



to a pre-existing *quasi* easement is made in the case of simultaneous grants of the *quasi* dominant and servient tenements, as well as when the former is granted 'alone,'<sup>152</sup> and it is also made when the two tenements pass to different persons by proceedings in partition.<sup>153</sup>

— Easements of necessity.

Easements of necessity are to be distinguished from those last discussed by the fact that their existence is not dependent upon the previous existence of *quasi* easements of an apparent and continuous character, but they are implied because otherwise the land could not be utilized.

There is an implied grant of what may be regarded as an easement of necessity when one sells land to be used for a certain purpose, retaining land adjoining. Thus, if one sells land to be used for a factory, he grants such an easement, as regards pollution of air or water, as is evidently necessary to enable the land to be used for that business,<sup>154</sup> and, if he sells it for a building, he impliedly grants such rights of support as are necessary for the building.<sup>155</sup>

By far the most usual instance of an easement of necessity is a way of necessity, which arises when a man grants

<sup>152</sup> *Allen v. Taylor*, 16 Ch. Div. 355; *Barnes v. Loach*, 4 Q. B. Div. 494; *Phillips v. Low* [1892] 1 Ch. 47; *Russell v. Watts*, 25 Ch. Div. 559, 10 App. Cas. 590; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Baker v. Rice*, 56 Ohio St. 463; *Larsen v. Peterson*, 53 N. J. Eq. 88; *Greer v. Van Meter*, 54 N. J. Eq. 270. Contra, *Whyte v. Builders' League of New York*, 164 N. Y. 429.

<sup>153</sup> *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Burwell v. Hobson*, 12 Grat. (Va.) 322, 65 Am. Dec. 247; *Clark v. Debaugh*, 67 Md. 480; *Morrison v. King*, 62 Ill. 80.

<sup>154</sup> *Gale, Easements*, 98, note (b); *Goddard, Easements*, 265; *Hall v. Lund*, 1 Hurl. & C. 676; *Wood, Nuisances*, § 209. And see *Aldin v. Clark* [1894] 2 Ch. 437.

<sup>155</sup> *Caledonian Ry. Co. v. Sprot*, 2 Macq. H. L. Cas. 453; *Rigby v. Bennett*, 21 Ch. Div. 559; *Siddons v. Short*, 2 C. P. Div. 572.

to another land entirely surrounded by the grantor's land, or which can be reached only across land of the grantor or of a stranger, in which case the grantee has a way over the grantor's land, since otherwise he could not utilize his land.<sup>156</sup> A reservation or re-grant of a way of necessity is also implied in favor of a grantor of land who retains adjacent land which is accessible only through the land granted, or through that of strangers.<sup>157</sup>

A way of necessity is based entirely upon the presumption of a grant, and will never exist if the two tracts of land are not shown at some time in the past to have belonged to one person.<sup>158</sup> The grant of a way will not be implied as

<sup>156</sup> *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Pinnington v. Galland*, 9 Exch. 1, 3 Gray's Cas. 482; *Holmes v. Seely*, 19 Wend. (N. Y.) 507, *Finch's Cas.* 817; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Taylor v. Warnaky*, 55 Cal. 350; *Leonard v. Leonard*, 3 Allen (Mass.) 543; *Kimball v. Cochecho R. Co.*, 27 N. H. 448, 59 Am. Dec. 387; *Bond v. Willis*, 84 Va. 796; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Mead v. Anderson*, 40 Kan. 203. In *Kuhlman v. Hecht*, 77 Ill. 570, it is decided, contrary to the current of authority, that there is no way by necessity unless the grantee's land is rendered inaccessible by being entirely surrounded by that of the grantor, and that the fact that it is surrounded in part by the latter's land, and in part by that of strangers, is insufficient.

<sup>157</sup> *Clark v. Cogge*, Cro. Jac. 170, 3 Gray's Cas. 468; *Pinnington v. Galland*, 9 Exch. 1, 3 Gray's Cas. 482; *Corporation of London v. Riggs*, 13 Ch. Div. 798; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302, 3 Gray's Cas. 541; *New York & N. E. R. Co. v. Railroad Com'rs*, 162 Mass. 81; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Pingree v. McDuffie*, 56 N. H. 306; *Jay v. Michael*, 92 Md. 198; *Willey v. Thwing*, 68 Vt. 128; *Meredith v. Frank*, 56 Ohio St. 479. The reason that one is thus allowed to derogate from his own grant has been stated to be that it is for the public good, as otherwise the land not conveyed cannot be cultivated. *Packer v. Welsted*, 2 Sid. 39, 111, 3 Gray's Cas. 467; *Dutton v. Tayler*, 2 Lutw. 1487; *Pinnington v. Galland*, 9 Exch. 1, 3 Gray's Cas. 482.

<sup>158</sup> *Bullard v. Harrison*, 4 Maule & S. 387; *Proctor v. Hodgson*, 10 Exch. 824; *Brice v. Randall*, 7 Gill & J. (Md.) 349; *Stewart v. Hartman*, 46 Ind. 331; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. (714)

being one of necessity if there is another mode of access to the land, though much less convenient,<sup>159</sup> but it will, according to some decisions, be implied if the other access involves very great or disproportionate labor or expense,<sup>160</sup> or if, though another mode of access exists, this is insufficient for the general use of the land.<sup>161</sup> The necessity is to be determined, it seems, with reference to the condition and mode of use of the land at the time at which the ownership of the two pieces of land became vested in different persons, since it is based entirely on an implication of a grant at that time.<sup>162</sup>

621; *Whitehouse v. Cummings*, 83 Me. 98, 23 Am. St. Rep. 756. Accordingly, the fact that all the pieces of land surrounding one's land have been bought by a single corporation, and that there is no way of access to his land, does not give him a way of necessity through the corporation's land. *Ellis v. Blue Mountain Forest Ass'n*, 69 N. H. 385.

<sup>159</sup> *Dodd v. Burchell*, 1 Hurl. & C. 113, 3 Gray's Cas. 498; *Nichols v. Luca*, 24 Pick. (Mass.) 102, 3 Gray's Cas. 541; *Ward v. Robertson*, 77 Iowa, 159; *Field v. Mark*, 125 Mo. 502; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Whitehouse v. Cummings*, 83 Me. 98, 23 Am. St. Rep. 756.

<sup>160</sup> *Pettingill v. Porter*, 8 Allen (Mass.) 1, 85 Am. Dec. 671; *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572; *Smith v. Griffin*, 14 Colo. 429.

<sup>161</sup> In *Myers v. Dunn*, 49 Conn. 71, it was decided that one was entitled to a way of necessity, although he already had a way for the purpose of carrying wood and timber.

In *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572, it was decided that a way of necessity would be implied, although there was access by water, if the latter mode of access was not available for general purposes to meet the requirements of the uses to which the property would naturally be put. But in *Kingsley v. Gouldsbrough Land Improvement Co.*, 86 Me. 280; *Hildreth v. Googins*, 91 Me. 227; *Lawton v. Rivers*, 2 McCord (S. C.) 445; *Turnbull v. Rivers*, 3 McCord (S. C.) 131,—it was decided that no such right of way existed, when there was access by water, it being left, in the second of the cases cited, to the jury to say whether the access by water was "available."

<sup>162</sup> *Corporation of London v. Riggs*, 13 Ch. Div. 798; *Feoffees of*  
(715)

## § 318. Prescription.

An easement may be acquired by the adverse exercise of the right for a certain period, usually the same as that required to give title to land itself by disseisin or adverse possession. The acquisition of an easement in this manner is termed "prescription," and is based on the theory that, if the owner of land allows another to make use of the land, as, for instance, by passing over it, such acquiescence is, in order to prevent litigation, and also to obviate the difficulty of proving title after lapse of time, to be considered as conclusive evidence that the user is rightful, as being based on a title. The subject of prescription will hereafter be considered more at length.<sup>163</sup>

## § 319. Acquisition under statute.

An easement may, by force of a particular statute, be acquired in the land of another for a public use, by proceedings under the power of eminent domain, and payment of adequate compensation. The most prominent instances of easements so acquired are the right of way acquired by a railroad company through the land of an individual,<sup>164</sup> and the right of the owner of land on a watercourse, under what are known as the "Mill Acts," to flood the land of another by the erection of a dam for manufacturing or milling purposes.<sup>165</sup> In some states the statute provides for the acquisition, by a company formed for irrigation purposes, of the right to construct canals, aqueducts, or reservoirs on the land of individuals,<sup>166</sup> and a somewhat similar right is fre-

*Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572. But see *Myers v. Dunn*, 49 Conn. 71. And see post, § 321.

<sup>163</sup> See post, §§ 445-452.

<sup>164</sup> 1 Lewis, *Eminent Domain*, §§ 170, 278, 584; 3 Elliott, *Railroads*, § 950 et seq.

<sup>165</sup> Gould, *Waters*, §§ 253, 579 et seq.

<sup>166</sup> 1 Lewis, *Eminent Domain*, § 202; *Fallbrook Irrigation Dist.* (716)

quently given by statute to local associations formed to construct canals and ditches for the drainage and reclamation of marshy districts.<sup>167</sup> Another instance of an easement created by statute is the obligation, imposed by statute in some states, to contribute to the erection and maintenance of a partition fence.<sup>168</sup>

### § 320. Estoppel.

If one, in conveying land, describes it as bounded on a street, he is estopped, as against his grantee, to deny the existence of the so-called street, and the conveyance in effect creates a right of way in the grantee.<sup>169</sup> Likewise, a right of way in favor of the grantee, or an easement of light and air, may be created by a grant describing the land conveyed by reference to a plat by which adjoining land is appropriated to use as a street or a park.<sup>170</sup>

*v. Bradley*, 164 U. S. 112; *Oury v. Goodwin* (Ariz.) 26 Pac. 376; *In re Madera Irrigation Dist.*, 92 Cal. 309, 27 Am. St. Rep. 106; *Paxton & H. Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb. 384, 50 Am. St. Rep. 535.

<sup>167</sup> *Lindsay Irrigation Co. v. Mehrrens*, 97 Cal. 676; *Neff v. Reed*, 98 Ind. 341; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518.

<sup>168</sup> See ante, § 312.

<sup>169</sup> *Espley v. Wilkes*, L. R. 7 Exch. 298, 3 Gray's Cas. 518; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn. 136 (Gil. 102), 2 Am. Rep. 109; *Carlin v. Paul*, 11 Mo. 32, 47 Am. Dec. 139; *Wolf v. Brass*, 72 Tex. 133; *Lindsay v. Jones*, 21 Nev. 72; *Cox v. James*, 45 N. Y. 557, Finch's Cas. 812; *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968; *Ott v. Kreiter*, 110 Pa. St. 370; *Garstang v. City of Davenport*, 90 Iowa, 359. That the conveyance have this effect of vesting an easement by estoppel in the grantee, the land so described as a street must, of course, belong to the grantor at the time. *Cole v. Hadley*, 162 Mass. 579; *Dorman v. Bates Mfg. Co.*, 82 Me. 438.

<sup>170</sup> *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Child v. Chappell*, 9 N. Y. 246; *Dill v. Board of Education of City of Camden*, 47 N. J. Eq. 421; *Chapin v. Brown*, 15 R. L. 579; *Bartlett v. City of Ban-*

If one sells land to which there is apparently appurtenant an easement on other land, which is, however, not legally existent because the land so apparently subject belongs to a third person, who has made no grant of an easement, and subsequently the vendor acquires this latter land, he is estopped to deny, it has been decided, the existence of such apparent easement.<sup>171</sup>

### III. RIGHTS OF USER.

The extent and mode of user of easements created by express grant are to be determined by a construction of the grant, and, of those created by prescription, by the character of the user during the prescriptive period.

A change in the dominant tenement cannot increase the user of the easement unless this is authorized by the grant of the easement.

The obligation to keep the servient tenement in condition for the exercise of the easement is upon the owner of the dominant tenement.

The owner of the servient tenement may make any use thereof not interfering with the exercise of the easement. For any interference with such exercise, he is liable in damages.

#### § 321. Easements created by grant.

The mode in which an easement may be exercised is, in the case of an easement created by an express grant, determined by construction of the grant.<sup>172</sup> The circumstances, however, under which the grant was made, are to be consid-

gor, 67 Me. 460; *Maywood Co. v. Village of Maywood*, 118 Ill. 61; *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606.

<sup>171</sup> *Jarnigan v. Mairs*, 1 Humph. (Tenn.) 473; *Swedish-American Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 83 Minn. 377.

<sup>172</sup> *Goddard, Easements*, 349; *Whitehead v. Parks*, 2 Hurl. & N. 370; *Williams v. James*, L. R. 2 C. P. 577, 2 Gray's Cas. 256; *Moore v. Fletcher*, 16 Me. 63, 33 Am. Dec. 683; *Dunn v. English*, 23 N. J. Law, 126; *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294.

ered in determining the construction of the grant.<sup>173</sup> So it is generally a question of construction whether the easement is limited by the use made of the dominant tenement at the time of the grant, or whether the burden of the easement may be increased with any increase or change of use of the dominant tenement.<sup>174</sup>

— Rights of way.

A right of way appurtenant to a particular tenement, as being used for the purpose of access to and egress from such tenement, cannot be used by the owner of such tenement for the purpose of reaching other land.<sup>175</sup> He may, however, after going to the dominant tenement by the right of way, pass to a place beyond, if he did not have this in mind when going to the dominant tenement, the question being of his *bona fides* in making use of the way.<sup>176</sup>

<sup>173</sup> Wood v. Saunders, 44 Law J. Ch. 514, 2 Gray's Cas. 226; Cheswell v. Chapman, 38 N. H. 14, 75 Am. Dec. 158; Rowell v. Doggett, 148 Mass. 483; Herman v. Roberts, 119 N. Y. 37, 16 Am. St. Rep. 800; Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506, 2 Gray's Cas. 289; Cooper v. Louanstein, 37 N. J. Eq. 284; White v. Eagle & Phenix Hotel Co., 68 N. H. 38; Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 364.

<sup>174</sup> See post, § 323.

<sup>175</sup> Howell v. King, 1 Mod. 190, 2 Gray's Cas. 233; Colchester v. Roberts, 4 Mees. & W. 769, 2 Gray's Cas. 243; French v. Marstin, 32 N. H. 316, Finch's Cas. 823; Davenport v. Lamson, 21 Pick. (Mass.) 72; Shroder v. Brenneman, 23 Pa. St. 348; Albert v. Thomas, 73 Md. 181; Davenport v. Lamson, 21 Pick. (Mass.) 72; Greene v. Canny, 137 Mass. 64; Hoosier Stone Co. v. Malott, 130 Ind. 21; Louisville, N. A. & C. Ry. Co. v. Malott, 135 Ind. 113; Reise v. Enos, 76 Wis. 624; Springer v. McIntyre, 9 W. Va. 196.

So it was held that one could not bring materials to the dominant tenement by a right of way appertaining thereto, and, after leaving them there a short time, carry them to a point beyond, to be used in the construction of buildings. Skull v. Glenister, 16 C. B. (N. S.) 81.

<sup>176</sup> Williams v. James, L. R. 2 C. P. 577, 2 Gray's Cas. 556; French v. Marstin, 32 N. H. 316, Finch's Cas. 823.

The use of a right of way for access to a highway stands on a  
(719)

A right of way may be general, as capable of use for all purposes, or may be limited to use by foot passengers only, or horses only, or particular species of vehicles, or for the transportation of certain classes of articles. So one may have a right of way for carriages, without the right of driving cattle along the way, or of using it for the transportation of farm products;<sup>177</sup> or he may have a way for agricultural purposes, without any right to transport thereover coal taken from the dominant tenement.<sup>178</sup>

In the case of the grant of a right of way in general terms, the question of the general or limited character of the right is to be determined "with reference to the circumstances of the dominant tenement, as being open land, or land covered with houses and buildings, and also with reference to the nature of the servient way, as being constructed or adapted for foot passengers only, or for horses and carriages and other kinds of traffic."<sup>179</sup>

If the location and limits of the right of way are not defined in the grant, a reasonably convenient and suitable way is intended, and the right cannot be exercised over the whole of the land.<sup>180</sup>

different basis, and the owner of the dominant tenement may go therefrom to the highway, though he intends thereafter to go from the highway to a point beyond, since this is the obvious purpose of a right of way to a highway. *Colchester v. Roberts*, 4 Mees. & W. 769, 2 Gray's Cas. 243.

<sup>177</sup> *Ballard v. Dyson*, 1 Taunt. 279, 2 Gray's Cas. 235; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Perry v. Snow*, 165 Mass. 23; *Myers v. Dunn*, 49 Conn. 71.

<sup>178</sup> *Cowling v. Higginson*, 4 Mees. & W. 245, 2 Gray's Cas. 240.

<sup>179</sup> 2 Leake, 205, citing *United Land Co. v. Great Eastern Ry. Co.*, 10 Ch. App. 590, and *Cannon v. Villars*, 8 Ch. Div. 420. See, also, *Perry v. Snow*, 165 Mass. 23; *Rowell v. Doggett*, 148 Mass. 43; *Long v. Gill*, 80 Ala. 408.

<sup>180</sup> *Gardner v. Webster*, 64 N. H. 520; *Johnson v. Kinnicutt*, 3 Cush. (Mass.) 153; *Long v. Gill*, 80 Ala. 408. See *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864; *Colt v. Redfield*, 59 Conn. 427.



The person entitled to use a private way cannot deviate therefrom on the land outside of the way because the way is impassable, unless, perhaps, when there is an obligation upon the servient owner to repair the way,<sup>181</sup> or when the latter has caused the obstruction of the way.<sup>182</sup>

— Ways of necessity.

The user permissible in the case of a way of necessity is a question in regard to which there is some difference of opinion. Since such a way is based on the theory of an implied grant at the time of the severance of the tenements, it might, it would seem, be limited, as regards extent of user, by the purposes for which the land was used at the time of such severance, and some decisions adopt this view.<sup>183</sup> On the other hand, there are decisions that the implied grant is of a way not only sufficient for the use then made of the land, but for any possible future uses.<sup>184</sup> The question might, it would seem, be treated as a question of the intention of the parties to the original severance of the two tenements, to be determined with reference to the circumstances of each particular case.

The implied grant of a way of necessity does not involve a right to travel over any and every part of the servient tenement, but the owner of the latter may, it seems, assign a way

<sup>181</sup> *Taylor v. Whitehead*, 2 Doug. 745, 2 Gray's Cas. 234.

<sup>182</sup> *Selby v. Nettlefold*, 9 Ch. App. 111; *Farnum v. Platt*, 8 Pick. (Mass.) 339; *Kent v. Judkins*, 53 Me. 162; *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176; *Jarsdadt v. Smith*, 51 Wis. 96. Contra, *Williams v. Safford*, 7 Barb. (N. Y.) 309; *Holmes v. Seely*, 19 Wend. (N. Y.) 507, *Finch's Cas.* 817.

<sup>183</sup> *Corporation of London v. Riggs*, 18 Ch. Div. 798, 2 Gray's Cas. 271. See *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572.

<sup>184</sup> *Myers v. Dunn*, 49 Conn. 71; *Whittier v. Winkley*, 62 N. H. 338; *Camp v. Whitman*, 51 N. J. Eq. 467.

reasonably convenient for both parties, and, if he fails so to do, the person entitled to the way may select it.<sup>185</sup>

**§ 322. Easements created by prescription.**

In the case of easements by prescription, the mode of user is determined by the extent of user during the prescriptive period, on which the right is founded.<sup>186</sup> Accordingly, the prescriptive right to divert or pollute water gives the right to divert or pollute it to the extent to which the diversion or pollution extended during the whole of such period, and no further;<sup>187</sup> and one who claims the right to overflow another's land by virtue of prescription cannot overflow it to a greater extent than he was accustomed to do it during the prescriptive period.<sup>188</sup>

Whether the exercise of a right of passage for certain purposes only across land during the statutory period will give

<sup>185</sup> *Gale*, Easements, 162; *Holmes v. Seely*, 19 Wend. (N. Y.) 507, Finch's Cas. 817; *Jenne v. Piper*, 69 Vt. 497; *Ritchey v. Welsh*, 149 Ind. 214; *Russell v. Jackson*, 2 Pick. (Mass.) 574.

<sup>186</sup> *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Prentice v. Gelger*, 74 N. Y. 341; *Arbuckle v. Ward*, 29 Vt. 43; *Middlesex Co. v. City of Lowell*, 149 Mass. 509; *Postlethwaite v. Payne*, 8 Ind. 104; *Barry v. Edlavitch*, 84 Md. 95.

<sup>187</sup> *Crossley v. Lightowler*, 2 Ch. App. 478; *Middlesex Co. v. City of Lowell*, 149 Mass. 509; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656.

<sup>188</sup> *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262; *Sabine v. Johnson*, 35 Wis. 185; *Tucker v. Salem Flouring Mills Co.*, 13 Or. 28; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

By a few decisions, the extent of the easement of flowage is determined by the height of the dam during the period of prescription, and consequently, if the dam be made more effective by repairs, so as to increase the height of the water, without any increase in the height of the dam, the owner of the land flowed cannot complain of the resulting increase in the extent or constancy of the flowage. *Cowell v. Thayer*, 5 Metc. (Mass.) 253, 38 Am. Dec. 400; *Voter v. Hobbs*, 69 Me. 19. See *Gehman v. Erdman*, 105 Pa. St. 371; *McGeorge v. Hoffman*, 133 Pa. St. 381.

a right of way for all purposes is a question of some difficulty.

If the adverse user on which the prescriptive claim to a way is based was for one particular purpose only, as in the case of a way used for foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes.<sup>189</sup> But the existence of a general right of way for all purposes may be inferred by the jury from evidence of the use of the way for any purposes for which it could be required by the owner of the dominant tenement, though it was used by him for some of these purposes for a period less than that of prescription.<sup>190</sup>

In the case of a right of way to certain land by prescription, as in that of one by grant, the way cannot be used for the purpose of going to or from other land beyond.<sup>191</sup>

### § 323. Change in dominant tenement.

Generally speaking, the owner of an easement cannot, on an alteration of the dominant tenement, or a change in the use thereof, cast a greater burden on the servient tenement by extending the use of the easement to correspond with his increased necessities.<sup>192</sup> Accordingly, it has been held that one having a right of drainage through adjacent land for a

<sup>189</sup> *Bradburn v. Morris*, 3 Ch. Div. 812; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519; *Wimbledon & Putney Commons Conservators v. Dixon*, 1 Ch. Div. 362, 2 Gray's Cas. 259.

<sup>190</sup> *Dare v. Heathcote*, 25 Law J. Exch. 245, 2 Gray's Cas. 255; *Cowling v. Higgenson*, 4 Mees. & W. 245, 2 Gray's Cas. 240; *Bal-lard v. Dyson*, 1 Taunt. 279, 2 Gray's Cas. 235; *Wimbledon & Putney Commons Conservators v. Dixon*, 1 Ch. Div. 362, 2 Gray's Cas. 259; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

<sup>191</sup> *Williams v. James*, L. R. 2 C. P. 577, 2 Gray's Cas. 256. See ante, notes 175, 176.

<sup>192</sup> *Goddard*, Easements, 356; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

private house cannot exercise the right of drainage upon changing the house into a sanitarium.<sup>193</sup>

Likewise, in the case of a right of way based upon prescriptive user, the right extends no further than a reasonable use for the purposes of the land in the condition in which it was while the user on which the right is based took place, and consequently a prescriptive right to a way in connection with a field would generally give no right to a way for the purpose of erecting or reaching a factory or dwellings on the land.<sup>194</sup>

A grant of an easement may, however, be construed as intended to convey an easement which shall appertain to the dominant tenement, in spite of any changes therein, and in such case the right to its exercise will not be affected by any such change.<sup>195</sup> It is partly, perhaps, on this principle, that it is generally recognized that, upon the division of the dominant tenement by conveyances to different persons, each of such grantees has the right to use the easement as it was before used by the owner of the entire tenement, without reference to whether this increases the burden on the servient tenement.<sup>196</sup>

<sup>193</sup> *Wood v. Saunders*, 10 Ch. App. 582, 2 Gray's Cas. 226. So it was held that, where there was a grant of a way to a loft, and the space or opening under the loft then used as a wood house, the way no longer existed after the open space had been built over and changed into a dwelling house. *Allan v. Gomme*, 11 Adol. & El. 759, 2 Gray's Cas. 246. This decision was, however, questioned by Parke, B., in *Henning v. Burnet*, 8 Exch. 187.

<sup>194</sup> *Wimbledon & Putney Commons Conservators v. Dixon*, 1 Ch. Div. 362, 2 Gray's Cas. 259; *Williams v. James*, L. R. 2 C. P. 577, 5 Gray's Cas. 256; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

<sup>195</sup> *Newcomen v. Coulson*, 5 Ch. Div. 133, 2 Gray's Cas. 267; *United Land Co. v. Great Eastern Ry. Co.*, 10 Ch. App. 586; *Abbott v. Butler*, 59 N. H. 317; *Frazier v. Berry*, 4 R. I. 440; post, § 323.

<sup>196</sup> *Whitney v. Lee*, 1 Allen (Mass.) 198, 79 Am. Dec. 727; *Brosart v. Corlett*, 27 Iowa, 288; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn. 136 (Gil. 102), 2 Am. Rep. 109; *Forbes v. Com.*, 173 (724)

### § 324. Repairs and alterations.

The owner of the easement may enter on the servient tenement, and there do anything necessary for the proper user of the easement.<sup>197</sup> Thus, one having a right of way may prepare the land for use as such, according to the nature of the way,—that is, according as it may be a foot way, a horse way, or a way for all teams and carriages.<sup>198</sup> He may likewise enter on the servient tenement in order to make any repairs necessary to the exercise of the easement, and may make use of the servient tenement for this purpose to a reasonable extent;<sup>199</sup> and he may even prevent the construction of a building necessary to the beneficial use of the land, if the building would prevent the making of repairs.<sup>200</sup>

In the absence of an express stipulation or prescriptive obligation to that effect, there is no requirement that the owner of the servient tenement keep it in proper condition for the exercise of the easement, though he must not actively obstruct its exercise.<sup>201</sup>

Mass. 289; *Watson v. Bioren*, 1 Serg. & R. (Pa.) 227; *Gunson v. Healy*, 100 Pa. St. 42; *Newcomen v. Coulson*, 5 Ch. Div. 133, 2 Gray's Cas. 267.

<sup>197</sup> *Newcomen v. Coulson*, 5 Ch. Div. 133, 2 Gray's Cas. 267; *Burris v. People's Ditch Co.*, 104 Cal. 248; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *White v. Eagle & Phenix Hotel Co.*, 68 N. H. 38; *Freeman v. Sayre*, 48 N. J. Law, 37.

<sup>198</sup> *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 2 Gray's Cas. 276; *Newcomen v. Coulson*, 5 Ch. Div. 133, 2 Gray's Cas. 267.

<sup>199</sup> *Goddard, Easements*, 362; *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Prescott v. White*, 21 Pick. (Mass.) 341, 2 Gray's Cas. 318; *Pico v. Colimas*, 32 Cal. 578; *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303; *McMillan v. Cronin*, 75 N. Y. 474; *Thompson v. Uglow*, 4 Or. 369; *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219; *Walker v. Pierce*, 38 Vt. 94, *Finch's Cas.* 822.

<sup>200</sup> *Goodhart v. Hyett*, 25 Ch. Div. 182.

<sup>201</sup> *Goddard, Easements*, 21, 374; *Gale, Easements*, 451 et seq.; *Gillis v. Nelson*, 16 La. Ann. 275; *Doane v. Badger*, 12 Mass. 65; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Walker v. Pierce*, 33 Vt. 94; *Ballard v. Butler*, 30 Me. 94.

The fact that the owner of a building has a right of support from an adjoining building does not entitle him to compel the owner of the latter to keep it in repair so as to furnish sufficient support,<sup>202</sup> nor can the owner of an upper floor compel the repair of the lower floor by the owner thereof.<sup>203</sup>

— Party walls.

The easement to use a wall for party-wall purposes includes the right to increase the height of the wall in order to erect a higher building, if this does not unduly burden the wall, or in any way injure the adjoining proprietor.<sup>204</sup> The addition thus made is, it seems, a party wall, subject to the same rights in favor of each party as the original wall.<sup>205</sup> Such right to increase the height does not exist if the adjoining owners are tenants in common of the wall.<sup>206</sup>

<sup>202</sup> *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716, 2 Gray's Cas. 321.

<sup>203</sup> *Gale, Easements*, 453; *Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1089; *Colebeck v. Girdlers Co.*, 1 Q. B. Div. 234. But see dictum in *Graves v. Berdan*, 26 N. Y. 498.

The upper tenant cannot compel the lower tenant to repair, or aid in repairing, the roof. *Ottumwa Lodge v. Lewis*, 24 Iowa, 67, 11 Am. Rep. 135; *Loring v. Bacon*, 4 Mass. 575, 2 Gray's Cas. 312.

<sup>204</sup> *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, 2 Gray's Cas. 223, *Finch's Cas.* 834; *Tate v. Fratt*, 112 Cal. 613; *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627. That he can raise the wall to the extent that it is on his own land, see *Andrae v. Haseltine*, 58 Wis. 395, 46 Am. Rep. 635; *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60. In one case it has been held that he may raise a party wall resting entirely on the land of the adjacent owner. *Tate v. Fratt*, 112 Cal. 613.

<sup>205</sup> *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60; *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462; *Allen v. Evans*, 161 Mass. 485. See *Field v. Leiter*, 118 Ill. 17.

It has been held in one case that, upon using the addition to the wall, the other proprietor is bound to contribute part of its cost. *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598. Contra *Allen v. Evans*, 161 Mass. 485; *Walker v. Stetson*, 162 Mass. 86.

<sup>206</sup> *Watson v. Gray*, 14 Ch. Div. 192, 2 Gray's Cas. 214.

One having the right to use a wall as a party wall may tear it down and erect another one stronger or more suitable for his purpose, provided he take precautions to save the adjoining proprietor from all injury,<sup>207</sup> and, if this is done by him for his own purposes, because he needs a stronger or higher wall, he must reimburse the adjoining proprietor for any pecuniary loss involved therein, and insure him against injury therefrom.<sup>208</sup> If the wall is in a ruinous or unsafe condition, one proprietor may repair it or replace it by a new wall, and he is not liable for the cost of protecting the adjoining property during the prosecution of the work, or for any loss necessarily incident thereto, as of business or rent,<sup>209</sup> though he is liable for any injury caused by negligence in the doing of the work.<sup>210</sup>

There is at least one decision to the effect that, if the party wall becomes unsafe or ruinous, it may be rebuilt by one of the adjoining owners, and the other will be compelled to pay part of the cost.<sup>211</sup>

One who owns a longitudinal strip only in a division wall, with a right to use the strip belonging to the adjoining owner

<sup>207</sup> *Eno v. Del Vecchio*, 4 Duer (N. Y.) 53, 6 Duer, 17. See *Cubitt v. Porter*, 8 Barn. & C. 257, 2 Gray's Cas. 208; *Standard Bank v. Stokes*, 9 Ch. Div. 68, as to his rights when wall is owned in common.

<sup>208</sup> *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, 2 Gray's Cas. 228, *Finch's Cas.* 834; *Eno v. Del Vecchio*, 6 Duer (N. Y.) 17; *Putzel v. Drovers' & M. Nat. Bank*, 78 Md. 349. See *Fowler v. Saks*, 18 D. C. 570; *Negus v. Becker*, 143 N. Y. 303, 42 Am. St. Rep. 724; *Standard Bank of British South America v. Stokes*, 9 Ch. Div. 68.

<sup>209</sup> *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Maypole v. Forsyth*, 44 Ill. App. 494; *Crawshaw v. Sumner*, 56 Mo. 517; *Moore v. Rayner*, 58 Md. 411; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491.

<sup>210</sup> *Negus v. Becker*, 143 N. Y. 303; *Crawshaw v. Sumner*, 56 Mo. 517; *Briggs v. Kloss*, 5 Ind. App. 129.

<sup>211</sup> *Campbell v. Mesler*, 4 Johns. Ch. (N. Y.) 334, 2 Gray's Cas. 314. See *Sanders v. Martin*, 2 Lea (Tenn.) 213.

for the support of his building, has no right to make windows or other openings through the wall.<sup>212</sup>

§ 325. Interference with user.

Any act which interferes with the proper exercise of the easement, whether done by the owner of the servient tenement, or by a third person, is a "disturbance" or "obstruction" of the easement, for which an action will lie. A disturbance of the easement is usually by the owner of the servient tenement, and not by a third person, and what constitutes a disturbance by him may be best defined by stating what acts he may do without being guilty of a disturbance.

The owner of the servient tenement may make any use thereof which does not affect the exercise of the easement. Accordingly, one whose land is subject to a right of way may take profits, such as herbage and the like, from the ground on which the way is located,<sup>213</sup> and may even place an arch over the line of a right of way, and erect a building thereon, provided the space left under the arch is sufficient for the

<sup>212</sup> *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60; *Bartley v. Spaulding*, 21 D. C. 47; *Sullivan v. Graffort*, 35 Iowa, 531; *Normille v. Gill*, 159 Mass. 427; *Harber v. Evans*, 101 Mo. 661, 20 Am. St. Rep. 646; *Milne's Appeal*, 81 Pa. St. 54; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627; *Traute v. White*, 46 N. J. Eq. 437.

An easement to open windows—that is, of light and air—may, however, be granted or created by prescription. *Grimley v. Davidson*, 35 Ill. App. 31, 133 Ill. 116; *Weigmann v. Jones*, 163 Pa. St. 330; *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60. So there may be an easement involving the right to open flues in the wall. *Ingals v. Plamondon*, 75 Ill. 118. In New York it has been held that this latter right might be based even on custom. *Hammann v. Jordan*, 129 N. Y. 61.

<sup>213</sup> *Chandler v. Goodridge*, 23 Me. 78; *Greenmount Cemetery Co.'s Appeals (Pa.)* 4 Atl. 528; *Moffitt v. Lytle*, 165 Pa. St. 173; *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Harvey v. Crane*, 85 Mich. 316; *Koenigs v. Jung*, 73 Wis. 173.



uses for which the way was granted, and the way is not so darkened thereby as to be unfit for use.<sup>214</sup>

The landowner may even maintain a fence across the way, unless this is expressly forbidden, or is inconsistent with the purposes for which the way was granted, and he is not necessarily bound to place a swinging gate in the fence, rather than removable bars, these questions as to the facilities to be allowed for passage being questions of fact to be determined by a consideration of what is necessary for the reasonable enjoyment of the easement.<sup>215</sup>

An action for the disturbance of an easement should be in

<sup>214</sup> *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 2 Gray's Cas. 276; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Sutton v. Groll*, 42 N. J. Eq. 213; *Hollins v. Demorest*, 129 N. Y. 676. The fact that the way has been definitely located by the acts of the parties does not affect the right to arch it. *Gerrish v. Shattuck*, 132 Mass. 235, 2 Gray's Cas. 293.

For cases in which the terms and circumstances of the grant of the way were such as to preclude any erections over the way, at any height from the ground, see *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285; *Brooks v. Reynolds*, 106 Mass. 31; *Attorney General v. Williams*, 140 Mass. 329, 2 Gray's Cas. 296.

<sup>215</sup> *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275, 2 Gray's Cas. 286; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506, 2 Gray's Cas. 289; *Garland v. Furber*, 47 N. H. 304; *Bean v. Coleman*, 44 N. H. 539, 544; *Green v. Goff*, 153 Ill. 534; *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 21, 48 Am. Dec. 409; *Phillips v. Dressler*, 122 Ind. 414, 17 Am. St. Rep. 375; *Short v. Devine*, 146 Mass. 119; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764; *Hartman v. Fick*, 167 Pa. St. 13, 46 Am. St. Rep. 658. Compare *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Patton v. Western Carolina Educational Co.*, 101 N. C. 408.

Where the way is acquired by prescription, the right to maintain gates is, it has been held, determined by the consideration whether they were maintained during the prescriptive period. *Shivers v. Shivers*, 32 N. J. Eq. 578, affirmed 35 N. J. Eq. 562; *Fankboner v. Corder*, 127 Ind. 164; *Frazier v. Myers*, 132 Ind. 71. Contra, *Ames v. Shaw*, 82 Me. 279.

case.<sup>216</sup> Ejectment does not lie, <sup>217</sup> not trespass *quare clausum fregit*.<sup>218</sup> A court of equity will usually enjoin the obstruction of an easement, if the circumstances are such that an action for damages would not furnish adequate reparation.<sup>219</sup> The person entitled to the exercise of the easement may also remove or "abate" the obstruction, if he can do so without any breach of the peace.<sup>220</sup>

In view of the incorporeal character of a pew, the remedy for interference with the pew holder's right would seem properly to be an action on the case.<sup>221</sup> In a number of cases in this country, however, it is held that trespass *quare clausum fregit* or ejectment will lie.<sup>222</sup>

<sup>216</sup> *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Osborne v. Butcher*, 26 N. J. Law, 308; *Shroder v. Brenneeman*, 23 Pa. St. 348; *Martin v. Bliss*, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52.

<sup>217</sup> *Adams, Ejectment*, c. 2; *Parker v. West Coast Packing Co.*, 17 Or. 510; *Hancock v. McAvoy*, 151 Pa. St. 460, 31 Am. St. Rep. 774; *Child v. Chappell*, 9 N. Y. 246; *Roberts v. Trujillo*, 3 N. M. 87; *Fritsche v. Fritsche*, 77 Wis. 270.

<sup>218</sup> *Chitty, Pleading* (7th Ed.) 147, 159; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Morgan v. Boyes*, 65 Me. 124.

<sup>219</sup> *Wheeler v. Bedford*, 54 Conn. 244 (town common); *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Webber v. Gage*, 39 N. H. 182; *Hacke's Appeal*, 101 Pa. St. 245; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Schaidt v. Blaul*, 66 Md. 141; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800. But see *Rhea v. Forsyth*, 37 Pa. St. 503, 78 Am. Dec. 441; *McBryde v. Sayre*, 36 Ala. 458.

<sup>220</sup> *Quintard v. Bishop*, 29 Conn. 366; *Sargent v. Hubbard*, 102 Mass. 380; *McCord v. High*, 24 Iowa, 336; *Joyce v. Conlin*, 72 Wis. 607; *Morgan v. Boyes*, 65 Me. 124.

<sup>221</sup> See *Stocks v. Booth*, 1 Term R. 431; *Bryan v. Whistler*, 8 Barn. & C. 294; *Perrin v. Granger*, 33 Vt. 101; *Trustees of the Third Presbyterian Congregation v. Andruss*, 21 N. J. Law, 325; *Daniel v. Wood*, 1 Pick. (Mass.) 102, 11 Am. Dec. 151.

<sup>222</sup> *Jackson v. Rounseville*, 5 Metc. (Mass.) 137; *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653; *Howe v. Stevens*, 47 Vt. 262; *Shaw v. Beveridge*, 3 Hill (N. Y.) 26, 38 Am. Dec. 616; *First Baptist Church v. Witherell*, 3 Paige (N. Y.) 296, 24 Am. Dec. 223. These cases seem to be based on the theory that a pew is "real" (730)

A tenant of land under a lease may bring an action for disturbance of an easement appurtenant to the land, as involving an injury to his possession.<sup>223</sup> The reversioner also may sue if his interest has been injured by the disturbance,<sup>224</sup> but the decisions are by no means clear as to what constitutes injury to the reversion. The locking of a gate across a way may, it has been held, cause such injury, and whether it does so in a particular case is a question of fact;<sup>225</sup> and there has been a like holding in an action by a reversioner on account of an interference with the easement of light.<sup>226</sup> If there is a continuation of the interference or obstruction, two or more successive actions may be brought by the reversioner.<sup>227</sup> The reversioner cannot generally sue on account of a single act of obstruction, not permanent in its nature, since this is not calculated to injure the inheritance.<sup>228</sup>

#### IV. EXTINCTION OF EASEMENTS.

An easement may be extinguished by:

- (1) A cessation of the purpose for which the easement was created.
- (2) A change in the dominant tenement involving an in-

estate," and that these forms of action always lie for "real estate." On this theory, trespass quare clausum fregit or ejectment would lie for any easement or right of profit, since they are all "real estate," except when the interest is merely for years.

<sup>223</sup> Gale, Easements, 571; *Hamilton v. Dennison*, 56 Conn. 359; *Avery v. New York Cent. & H. R. R. Co.*, 7 N. Y. Supp. 341; *Noyes v. Hemphill*, 58 N. H. 536.

<sup>224</sup> *Jesser v. Gifford*, 4 Burrow, 2141, 2 Gray's Cas. 300; *Bell v. Midland Ry. Co.*, 10 C. B. (N. S.) 287; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Richardson v. Bigelow*, 15 Gray (Mass.) 154; *Brown v. Bowen*, 30 N. Y. 519, 36 Am. Dec. 406.

<sup>225</sup> *Kidgill v. Moore*, 9 C. B. 364, 2 Gray's Cas. 301.

<sup>226</sup> *Metropolitan Ass'n v. Petch*, 5 C. B. (N. S.) 504.

<sup>227</sup> *Shadwell v. Hutchinson*, 4 Car. & P. 333, 3 Gray's Cas. 301.

<sup>228</sup> *Hopwood v. Schofield*, 2 Moody & R. 34; *Baxter v. Taylor*, 4 Barn. & Adol. 72; *Tucker v. Newman*, 11 Adol. & E. 43. See *Kimball v. McIntosh*, 134 Mass. 262.

creased use of the easement not contemplated in its creation.

- (3) The vesting in one person of a fee-simple title to both the dominant and servient tenements.
- (4) An express release by the person entitled to the easement.
- (5) Abandonment or implied release of the easement.
- (6) Acts by the owner of the land, adverse to the exercise of the easement, continued for the prescriptive period.
- (7) A license by the dominant to the servient owner to obstruct the easement, followed by expenditures on the strength of the license.
- (8) A conveyance of the servient tenement to one without notice of the easement.

§ 326. Cessation of purpose of easement.

Where an easement is granted for a particular purpose, or arises by prescription by an exercise of the right for such a purpose, upon the cessation of that purpose the easement itself necessarily comes to an end.<sup>229</sup> So, a way of necessity ceases with the necessity on which it is based, as when the person in whose favor it exists acquires land over which he has an outlet to a highway,<sup>230</sup> and the right to maintain, on adjoining land, a staircase leading to one's building, is terminated by the destruction of the building.<sup>231</sup>

<sup>229</sup> *National Guaranteed Manure Co. v. Donald*, 4 Hurl. & N. 8; *Central Wharf & Wet Dock Corp. v. Proprietors of India Wharf*, 123 Mass. 567; *Bangs v. Potter*, 135 Mass. 245; *Hahn v. Baker Lodge*, No. 47, 21 Or. 30, 28 Am. St. Rep. 723; *Day v. Walden*, 46 Mich. 575; *Linkenhoker v. Graybill*, 80 Va. 835; *Wels v. Meyer*, 55 Ark. 18.

<sup>230</sup> *Holmes v. Goring*, 2 Bing. 76, 3 Gray's Cas. 342; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Oliver v. Hook*, 47 Md. 301; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Carey v. Rae*, 58 Cal. 159; *Palmer v. Palmer*, 150 N. Y. 139; *Oswald v. Wolf*, 129 Ill. 200; *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 260.

<sup>231</sup> *Shirley v. Crabb*, 138 Ind. 200, 46 Am. St. Rep. 376; *Hahn v. (732)*

Likewise, the easement of using a wall, or a part thereof, belonging to another, as a party wall, ceases, it has been decided, upon the destruction, by fire or other accident, of the wall and the buildings separated thereby,<sup>232</sup> and also by the destruction of the buildings, though the wall remains standing.<sup>233</sup>

§ 327. Change in dominant tenement.

An alteration in the character of the dominant tenement, which necessarily involves a substantial change or increase in the user of the easement, will terminate or extinguish the easement unless the easement was, in its creation, intended to appertain to the dominant tenement throughout any changes in the latter.<sup>234</sup> Thus, a right of way has been regarded as extinguished in a particular case owing to a change in the use of the dominant tenement.<sup>235</sup>

Generally, however, the principle that a change in the dominant tenement will extinguish the easement is not applied with any degree of strictness, the easement being regarded as intended to appertain to such tenement, whatever changes may take place therein, as in the case of a right of way, which is frequently regarded as still existing, though the

*Baker Lodge*, No. 47, 21 Or. 30, 23 Am. St. Rep. 723. *Contra*, *Douglas v. Coonley* (N. Y.) 51 N. E. 233.

<sup>232</sup> *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480, 2 Gray's Cas. 216; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Antomarchi's Ex'r v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Duncan v. Rodecker*, 90 Wis. 1.

<sup>233</sup> *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Odd Fellows' Ass'n v. Hegele*, 24 Or. 16; *Heartt v. Kruger*, 121 N. Y. 336, 18 Am. St. Rep. 329; *Moore v. Shoemaker*, 10 App. D. C. 6; *Douglas v. Coonley*, 156 N. Y. 531.

<sup>234</sup> *Goddard, Easements*, 529; *Harvey v. Walters*, L. R. 3 C. P. 162, 2 Gray's Cas. 372.

<sup>235</sup> *Allan v. Gomme*, 11 Adol. & E. 759, 2 Gray's Cas. 246.

buildings on the dominant tenement have been destroyed, or the use thereof entirely altered.<sup>236</sup>

### § 328. Unity of title.

An easement is extinguished if the titles to both the dominant and servient tenements become vested in fee in the same person, since in such case the user corresponding to the easement is exercised over one's own land, rather than over that of another, and is a mere ordinary incident of the right of ownership.<sup>237</sup>

If, however, the unity of title will necessarily continue for a limited time only, as when the person entitled has an estate merely for life or years in one of the tenements, the easement is not extinguished, but merely suspended, and is revived upon the termination of such estate.<sup>238</sup> Likewise, each tenement must be owned in severalty, and the fact that the interest in the dominant or servient tenement is fractional and undivided will prevent the extinguishment.<sup>239</sup> Moreover, the ownership of both tenements must be beneficial, and, if one of the tenements is held in trust,<sup>240</sup> or the legal title merely is vested in the owner of the other tenement,<sup>241</sup> there is no extinguishment.

<sup>236</sup> *Bangs v. Parker*, 71 Me. 458; *Chew v. Cook*, 39 N. J. Eq. 396; *Newcomen v. Coulson*, 5 Ch. Div. 133, 2 Gray's Cas. 267; *United Land Co. v. Great Eastern Ry. Co.*, 10 Ch. App. 586. See ante, § 323.

<sup>237</sup> *Bright v. Walker*, 1 Crompt. M. & R. 211, 219; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Morgan v. Meuth*, 60 Mich. 238; *Plimpton v. Converse*, 42 Vt. 712; *Capron v. Greenway*, 74 Md. 289.

<sup>238</sup> *James v. Plant*, 4 Adol. & E. 749; *Thomas v. Thomas*, 2 Crompt. M. & R. 34, 2 Gray's Cas. 354; *Pearce v. McClenaghan*, 5 Rich. Law (S. C.) 178, 55 Am. Dec. 710. See *Petition of Bull*, 15 R. I. 534.

<sup>239</sup> *Dority v. Dunning*, 78 Me. 381; *Atlanta Mills v. Mason*, 120 Mass. 244.

<sup>240</sup> *Ecclesiastical Com'rs for England v. Kino*, 14 Ch. Div. 213; *Pearce v. McClenaghan*, 5 Rich. Law (S. C.) 178, 55 Am. Dec. 710.

<sup>241</sup> *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744.

## § 329. Express release.

An easement may be extinguished by an express release thereof made by the owner of the dominant tenement to the owner of the servient tenement,<sup>242</sup> and such an express release must, at common law, like any other release, be under seal.<sup>243</sup>

## § 330. Abandonment or implied release.

There are many cases to the effect that an easement is extinguished by "abandonment" thereof, by which is meant that a nonuser thereof, together with other circumstances, may, as showing an intention to make no further use of it, terminate the easement.<sup>244</sup> The real principle involved in these cases seems to be that the existence of an express release of the easement may be inferred from circumstances.<sup>245</sup> The question whether there has been such an abandonment is to be determined in each case by the facts thereof, and is generally a question for the jury.<sup>246</sup>

<sup>242</sup> Goddard, Easements, 537; Gale, Easements, 483; Richards v. Attleborough Branch R. Co., 158 Mass. 120; Flaten v. Moorhead, 58 Minn. 324; McAllister v. Decane, 76 N. C. 57.

<sup>243</sup> Co. Litt. 264b; Gale, Easements, 482.

<sup>244</sup> Moore v. Rawson, 3 Barn. & C. 332, 2 Gray's Cas. 347; Snell v. Levitt, 110 N. Y. 595, Finch's Cas. 814; Canny v. Andrews, 123 Mass. 155, 2 Gray's Cas. 387; King v. Murphy, 140 Mass. 254; Jones v. Van Bochove, 103 Mich. 98; Louisville & N. R. Co. v. Covington, 2 Bush (Ky.) 526; Fitzpatrick v. Boston & M. R. Co., 84 Mo. 33; Willey v. Norfolk Southern R. Co., 96 N. C. 408; Monaghan v. Memphis Fair & Exposition Co., 95 Tenn. 108; Stein v. Dahm, 96 Ala. 481.

<sup>245</sup> See Lovell v. Smith, 3 C. B. (N. S.) 120, 137; Doe d. Putland v. Hilder, 2 Barn. & Ald. 782; Browne v. Trustees of Methodist Episcopal Church, 37 Md. 108; Winham v. McGuire, 51 Ga. 578; Suydam v. Dunton, 84 Hun (N. Y.) 506; Goddard, Easements, 537; 3 Kent, Comm. 448.

<sup>246</sup> King v. Murphy, 140 Mass. 254; Polson v. Ingram, 22 S. C. 541; Vogler v. Getas, 51 Md. 407; Holmes v. Jones, 30 Ga. 659. See Snell

Nonuser in itself does not terminate an easement acquired by grant,<sup>247</sup> and, as above stated, is, at most, merely evidence from which an abandonment or release may be inferred. The fact that the nonuser continues for the prescriptive period is immaterial,<sup>248</sup> in the absence of any adverse acts on the part of the owner of the land.<sup>249</sup> There are *dicta* to the effect that an easement acquired by prescription, as distinguished from one acquired by express grant, may be extinguished by nonuser alone,<sup>250</sup> though in but one case, apparently,<sup>251</sup> is there a direct decision to this effect, and such a distinction has been doubted, apparently with some reason.<sup>252</sup>

v. Levitt, 110 N. Y. 595, Finch's Cas. 814; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463.

<sup>247</sup> Moore v. Rawson, 3 Barn. & C. 332, 2 Gray's Cas. 347; Dana v. Valentine, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61; Bannon v. Angier, 2 Allen (Mass.) 128; Butterfield v. Reed, 160 Mass. 361, Finch's Cas. 816; Jones v. Van Bochove, 103 Mich. 98; Willey v. Norfolk Southern R. Co., 96 N. C. 408; Bombaugh v. Miller, 82 Pa. St. 203; Hayford v. Spokesfield, 100 Mass. 491; Ford v. Harria, 95 Ga. 97; Dill v. School Board of Camden, 47 N. J. Eq. 421; McCue v. Ballingham Bay Water Co., 5 Wash. 156.

<sup>248</sup> Ward v. Ward, 7 Exch. 838, 2 Gray's Cas. 370; Pratt v. Sweetser, 68 Me. 344, 2 Gray's Cas. 389; King v. Murphy, 140 Mass. 354; Butterfield v. Reed, 160 Mass. 361, Finch's Cas. 816; Lindeman v. Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219; Polson v. Ingram, 23 S. C. 541; Welsh v. Taylor, 134 N. Y. 450; Wheeler v. Wilder, 61 N. H. 2; Day v. Walden, 46 Mich. 575; Edgerton v. McMullan, 55 Kan. 90.

<sup>249</sup> See post, § 331.

<sup>250</sup> Hayford v. Spokesfield, 100 Mass. 491; Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305; Smyles v. Hastings, 22 N. Y. 217; Pope v. O'Hara, 48 N. Y. 446; Kuecken v. Volta, 110 Ill. 284; Nitzell v. Paschall, 3 Rawle (Pa.) 76; Monaghan v. Memphis Fair & Exposition Co., 95 Tenn. 108. See Curran v. City of Louisville, 83 Ky. 628; Willey v. Norfolk Southern R. Co., 96 N. C. 408.

<sup>251</sup> Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631, is a direct decision to this effect.

<sup>252</sup> See Veghte v. Raritan Water Power Co., 19 N. J. Eq. 142; Pratt v. Sweetser, 68 Me. 344, 2 Gray's Cas. 389; Angell, Water Courses (7th Ed.) § 252, note; 3 Kent, Comm. 450, note by Mr. Justice (786)



According to a few decisions, an easement cannot be extinguished by abandonment or implied release, unless there has been a failure to use the easement for a period equal to that necessary for the creation of an easement by prescription;<sup>253</sup> but this view is generally repudiated.<sup>254</sup>

§ 331. Adverse user of land.

An easement may be extinguished by the user of the servient tenement in a manner adverse to the exercise of the easement, for the period required to give title to land by adverse possession,<sup>255</sup>—a subject hereafter discussed.<sup>256</sup> The mere fact, however, that the servient owner uses the land without reference to the existence of the easement, does not render his user adverse, since this may exist merely as a consequence of the nonuser of the easement. He must in some way actively interfere with the use of the easement, so as

Holmes. The distinction is not recognized in England. See Gale, Easements, 527. In *Hale v. Oldroyd*, 14 Mees. & W. 789; *Ward v. Ward*, 7 Exch. 838, 3 Gray's Cas. 370; *Lovell v. Smith*, 3 C. B. (N. S.) 120,—all cases of prescriptive easements,—nonuser for the statutory period was not regarded as in itself extinguishing the right, no reference being made to any such distinction as that referred to above.

<sup>253</sup> *Cox v. Forrest*, 60 Md. 74; *Wilder v. City of St. Paul*, 12 Minn. 192 (Gil. 116); *Corning v. Gould*, 16 Wend. (N. Y.) 531.

<sup>254</sup> *Steere v. Tiffany*, 13 R. I. 568, 2 Gray's Cas. 400; *Reg. v. Chorley*, 12 Q. B. 515; *Louisville & N. R. Co. v. Covington*, 2 Bush (Ky.) 526; *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33; *Canny v. Andrews*, 123 Mass. 155, 2 Gray's Cas. 387; *Moore v. Rawson*, 3 Barn. & C. 332, 2 Gray's Cas. 347.

<sup>255</sup> *Dill v. School Board of Camden*, 47 N. J. Eq. 421; *Woodruff v. Paddock*, 130 N. Y. 618; *State v. Suttle*, 115 N. C. 784; *Smith v. Langewald*, 140 Mass. 205; *Spackman v. Steidel*, 88 Pa. St. 453; *Bentley v. Root*, 19 R. I. 205; *Bowen v. Team*, 6 Rich. Law (S. C.) 298, 60 Am. Dec. 127; *Louisville & N. R. Co. v. Quinn*, 94 Ky. 310; *City of Galveston v. Williams*, 69 Tex. 449.

<sup>256</sup> See post, §§ 436-444.

to give the owner of the dominant tenement a right of action against him for disturbance of the easement.<sup>287</sup>

### § 332. Executed license.

While, as before stated, in the majority of jurisdictions, a license is revocable even though the licensee has made improvements or incurred other expenditures on the faith of the license,<sup>288</sup> a different view is taken when the license is to do something on the licensee's land, the effect of which is to prevent the exercise of an easement in such land previously existing in favor of the licensor, and, in such a case, the license, if followed by improvements obstructive of the easement, not being revocable, extinguishes the easement.<sup>289</sup> Accordingly, if one entitled to an easement of light over another's land gives a license to the owner of the servient tenement to erect a building thereon preventing the passage of light, and the building is erected accordingly, the license is

<sup>287</sup> *State v. Suttle*, 115 N. C. 784; *Butterfield v. Reed*, 160 Mass. 361, *Finch's Cas.* 816; *Edgerton v. McMullan*, 55 Kan. 90; *Lindsay v. Lindeman*, 69 Pa. St. 93, 8 Am. Rep. 219; *Day v. Walden*, 46 Mich. 575.

<sup>288</sup> See ante, § 304.

<sup>289</sup> *Winter v. Brockwell*, 3 East, 308, 2 Gray's Cas. 340, as explained in *Hawkins v. Shippam*, 5 Barn. & C. 221; *Liggins v. Inge*, 7 Bing. 682, 2 Gray's Cas. 351; *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314; *Cartwright v. Maplesden*, 53 N. Y. 622; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Vogler v. Geiss*, 51 Md. 407. See *Stein v. Dahm*, 96 Ala. 481. But see *Peck v. Loyd*, 38 Conn. 566. "The authorities \* \* \* show that the rule, sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but to licenses which, if given by deed, would extinguish or modify an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which, if held valid, would create, and licenses which extinguish or modify, an easement." *Metcalf, J.*, in *Morse v. Copeland*, 2 Gray (Mass.) 306, 3 Gray's Cas. 383.

irrevocable, and the easement is extinguished;<sup>260</sup> and, if one entitled to flow another's land gives such other a license to erect an embankment preventing such flow, and the embankment is erected, the easement of flowage is extinguished.<sup>261</sup>

§ 333. In favor of innocent purchaser.

An easement is, in effect, as a general rule, extinguished as to a purchaser of the servient tenement if he purchases without notice, either by record or by the open and visible exercise of the easement on the land, of the existence of the easement.<sup>262</sup>

<sup>260</sup> *Winter v. Brockwell*, 3 East, 308, 3 Gray's Cas. 340. The principle has been held to be applicable in respect to the so-called easements of light, air, and access in the owner of land abutting on a highway. *White v. Manhattan Ry. Co.*, 139 N. Y. 19, *Finch's Cas.* 795. See post, § 365.

<sup>261</sup> *Morse v. Copeland*, 2 Gray (Mass.) 302.

<sup>262</sup> *Armor v. Pye*, 25 Kan. 731; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Taylor v. Millard*, 118 N. Y. 244, affirming 42 Hun, 363; *Rives v. Hickey*, 1 MacArthur (D. C.) 83; *Rome Gaslight Co. v. Meyerhardt*, 61 Ga. 287; *Pentland v. Keep*, 41 Wis. 490; *Taggart v. Warner*, 83 Wis. 1. See *Wissler v. Hershey*, 23 Pa. St. 333; *McCann v. Day*, 57 Ill. 101; *Ellis v. Bassett*, 123 Ind. 118, 25 Am. St. Rep. 421.

## CHAPTER XIII.

### PROFITS A PRENDRE.

- § 334. General considerations.
- 335. Rights of common.
- 336. Rights in gross and appurtenant.
- 337. Rights of pasture.
- 338. Mineral rights.
- 339. Miscellaneous rights.
- 340. The acquisition of rights.
- 341. Apportionment and extinction.

A profit a prendre is a right to take from another's land a part of the soil, or of the products of the soil. Such a right is sometimes termed a "right of common," when it is not exclusive of the right of other persons to share in such profits.

A right of profit a prendre may be either appurtenant to land or in gross.

Rights of profit a prendre are acquired by grant or prescription, and are extinguished by a release of the right, by unity of title to the right of profit and the servient tenement, or by a change of title increasing the burden of the servient tenement.

- § 334. General considerations.

As instances of *profits a prendre* may be mentioned rights to take from another's land wood,<sup>1</sup> or herbage,<sup>2</sup> or coal or other minerals, the latter right being, no doubt, at the present day, the most important class of such rights.<sup>3</sup> The right to take water from a source of supply on another's land has

<sup>1</sup> Reg. v. Chamberlaine, 9 Adol. & M. 444.

<sup>2</sup> Co. Litt. 4b, 122a.

<sup>3</sup> See post, § 338.

been regarded, not as a *profit a prendre*, but as an easement, on the theory that water is not, under such conditions, the subject of ownership.<sup>4</sup>

A right of *profit a prendre* involves a right to do such things on the land in which the right exists as are reasonably necessary for the exercise of the right. Thus, one to whom is given the right to take timber from land may enter on the land to do so,<sup>5</sup> and one given a right to mine may cut through the soil for that purpose, and erect necessary mining machinery.<sup>6</sup>

§ 335. Rights of common.

The term "common" is frequently applied in England, especially by the older writers, to a right of profit of this character, as when they speak of common of pasture, of estovers, of turbary, of piscary (fishing), or of digging for coals, minerals, and the like.<sup>7</sup> The word "common," applied in this connection, refers to an interest in the profits which is "common," either as between the owner of the profit and the owner of the land, or as between the owner of the right to the profit and other owners of like rights in the same land.<sup>8</sup> Consequently, the word is properly applied to any *profit a prendre* which is not exclusive of like rights in either the owner of the land or in a third person. A right of profit, on

<sup>4</sup> *Race v. Ward*, 4 El. & Bl. 702, 2 Gray's Cas. 10; *Manning v. Wasdale*, 5 Adol. & E. 758. But in *Metcalf v. Nelson*, 8 S. D. 87, it was decided that water in a spring is property, and, as such, an action lies for its wrongful appropriation.

<sup>5</sup> *Liford's Case*, 11 Coke, 52a; 2 Leake, 349.

<sup>6</sup> *Cardigan v. Armitage*, 2 Barn. & C. 197; *Dand v. Kingscote*, 6 Mees. & W. 174; *Williams v. Gibson*, 84 Ala. 228, 5 Am. St. Rep. 368; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Wardell v. Watson*, 93 Mo. 107.

<sup>7</sup> Co. Litt. 122a; 2 Bl. Comm. 32, 34; *Williams, Rights of Common*, passim.

<sup>8</sup> Co. Litt. 122a; 2 Pollock & Maitland, *Hist. Eng. Law*, 144; 2 Leake, 332.

the other hand, which is exclusive of any rights in either the landowner or in a third person to take similar profits from that particular land, is usually referred to in the English books as a "several" right, as in the case of a several right of fishery or of pasture.<sup>9</sup>

§ 336. Rights in gross and appurtenant.

Rights to take profits from another's land may exist in gross,—that is, they may be held by one independently of his ownership of other land, the rule in this respect differing from that usually regarded as applying to easements, unattended with a right of profit.<sup>10</sup> They may, however, be appurtenant to other land, the land to which the right appertains being then the "dominant tenement," and the land from which the profits are taken being the "servient tenement."<sup>11</sup> A right of profit, in order that it may be appurtenant to other land, and pass therewith, must be such as to be in some way connected with the enjoyment of the right of property in the dominant tenement, and must be limited by the needs of the latter. Consequently one cannot claim as appurtenant to land owned by him a right to take all the wood which may grow on other land, and dispose of it as he pleases,<sup>12</sup> or a right to take turf or seaweed from other land, without regard to the requirements of his own tenement.<sup>13</sup>

<sup>9</sup> Co. Litt. 122a; Williams, Rights of Common, 12, 18-30, 259-265.

<sup>10</sup> *Welcome v. Upton*, 6 Mees. & W. 536; *Shuttleworth v. Le Fleming*, 19 C. B. (N. S.) 687; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597; *Youghiogheny River Coal Co. v. Pierce*, 153 Pa. St. 74; *Cadwalader v. Bailey*, 17 R. I. 495; Williams, Rights of Common, 184, 195, 203, 207.

<sup>11</sup> *Grubb v. Grubb*, 74 Pa. St. 25; *Phillips v. Rhodes*, 7 Metc. (Mass.) 322; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21. And see cases in notes following.

<sup>12</sup> *Bailey v. Stephens*, 12 C. B. (N. S.) 91, 2 Gray's Cas. 14.

<sup>13</sup> *Valentine v. Penny, Noy*, 145; *Hall v. Lawrence*, 2 R. I. 218, 2 (742)

Since the right of profit appurtenant is thus limited and ad-measured by the uses of the dominant tenement, it follows that such profit cannot be separated from the latter by a grant to a third person without the tenement.<sup>14</sup>

§ 337. Rights of pasture.

The most important of the rights of *profit a prendre*, historically considered, is the right to pasture cattle on another's land, generally referred to as "common of pasture." Under the feudal system, the right existed in favor of the tenants of the manor as regards the waste land of the manor,—that is, the land not allotted to tenants or reserved by the lord as demesne land.<sup>15</sup>

Common of pasture involves the placing of the cattle on the land to eat the herbage, in this differing from a right to

Gray's Cas. 21. In *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652, it was held that a right to cut ice on land, and to store it in an ice house on other land, might be appurtenant to the land on which the ice house was situated.

<sup>14</sup> *Drury v. Kent*, Cro. Jac. 14, 2 Gray's Cas. 6; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21.

<sup>15</sup> This right in the tenants of the manor to take profits from the waste land probably existed, before the introduction of feudalism into England, as a right in the inhabitants of the town or "vill" to utilize the lands which belonged to the community as a whole. After the introduction of feudalism and of the manorial idea, these community lands came to be regarded as belonging to the lord, and consequently the right to take profits therefrom was regarded as a right to profits a prendre in another's land. The community lands of the town or vill were themselves a survival of the "mark" system, which existed in all Aryan communities. Digby, *Hist. Real Prop.* (5th Ed.) 192; Williams, *Rights of Common*, 37 et seq.; Maine, *Village Communities*, passim; 4 Kent, Comm. 441, note by Hon. O. W. Holmes. In this country, traces of the mark system are to be found in the system of "commons" or "common lands" which existed in New England and also in the Spanish and French settlements. See post, § 366.

take herbage from another's land by cutting and transporting it.<sup>16</sup>

Common of pasture might, at common law, be "appendant," "appurtenant," "in gross," or "because of vicinage." Common appendant existed, as before suggested, in favor of each holder of arable land in a manor, as appertaining to such land, and involved the right to pasture, on the waste land of the manor, his "commonable" cattle. It could not be created after the statute of *Quia Emptores*, since a grant by the lord of the manor thereafter took the land granted out of the manor as regards tenure,<sup>17</sup> and cannot, of course, exist in this country. Common "because of vicinage" was a local custom of intercommoning,—that is, for cattle to stray from one common to another adjacent common, without creating any liability for trespass.<sup>18</sup> It was based on custom, and has never existed in this country.<sup>19</sup> Common of pasture "appurtenant" and "in gross" are rights of pasture annexed to a dominant tenement, or belonging to a person and his heirs, the terms being applied as in other cases of *profits a prendre*,<sup>20</sup> and these may exist in this country.

### § 338. Mineral rights.

A person may have a right to take minerals from another's

<sup>16</sup> *De la Warr v. Miles*, 17 Ch. Div. 535; *Potter v. North*, 1 Sand. 353a, note; Williams, *Rights of Common*, 21.

<sup>17</sup> 2 Leake, 337, citing 2 Co. Inst. 25.

<sup>18</sup> Co. Litt. 122a; 2 Bl. Comm. 33.

<sup>19</sup> A right of common, sometimes, perhaps, termed "common of vicinage," has been occasionally asserted in jurisdictions where the owner of cattle is not bound to prevent them from trespassing on unfenced land belonging to others (see *Davis v. Gurley*, 44 Ga. 582), but the right to allow one's cattle to roam over unfenced lands belongs, in those jurisdictions, to everybody, and, as clearly decided, constitutes in no sense a right of common of pasture (*Harrell v. Hannum*, 56 Ga. 508). See *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Thomas v. Marshfield*, 13 Pick. (Mass.) 240.

<sup>20</sup> Co. Litt. 122a; 2 Bl. Comm. 33.



land in the nature of a *profit a prendre*.<sup>21</sup> Such right to take minerals from another's land must be carefully distinguished from an estate in a portion of the soil under the ground containing the minerals, which, as previously stated, may be separated, for purposes of ownership, from the surface of the ground.<sup>22</sup> A grant of the right to take minerals from another's land is not exclusive of the right of the owner of the land also to take them, unless it is so expressed.<sup>23</sup> A right to take oil or gas from land in which the person so entitled has no right of ownership is likewise, though not always expressly so stated, a right of *profit a prendre*.<sup>24</sup>

### § 339. Miscellaneous rights.

Common of turbary is the right of digging turf on another's land, and common of piscary is the right of fishing on the land of another, or, rather, in water on his land.<sup>25</sup> Common of estovers is the right of taking necessary wood from another's land for use as firewood, or in repairs on a house or farm.<sup>26</sup>

<sup>21</sup> *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 738; *Muskett v. Hill*, 5 Bing. N. C. 694; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Smith v. Cooley*, 65 Cal. 46; *Baker v. Hart*, 123 N. Y. 470; *Clement v. Youngman*, 40 Pa. St. 341; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 34 Am. St. Rep. 645.

<sup>22</sup> *Wilkinson v. Proud*, 11 Mees. & W. 33, 2 Gray's Cas. 8; *Caldwell v. Fulton*, 31 Pa. St. 475, *Finch's Cas.* 102; *Baker v. Hart*, 123 N. Y. 470; *Smith v. Cooley*, 65 Cal. 46. See ante, § 219.

<sup>23</sup> *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Masot v. Moses*, 3 Rich. (S. C.) 168; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Silsby v. Trotter*, 29 N. J. Eq. 228; *Grubb v. Bayard*, 2 Wall. Jr. 81, *Fed. Cas. No.* 5,849; *Funk v. Haldeman*, 53 Pa. St. 229; *Mountjoy's Case*, Co. Litt. 164b.

<sup>24</sup> See *Brown v. Spilman*, 155 U. S. 665; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173; *Duffield v. Rosenzweig*, 144 Pa. St. 520.

<sup>25</sup> Co. Litt. 122a; 2 Bl. Comm. 34; *Smith v. Kemp*, 2 Salk. 637.

<sup>26</sup> 2 Bl. Comm. 35; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, *Finch's Cas.* 475. The right to take estovers from another's

## § 340. The acquisition of rights.

A *profit a prendre* may, like an easement, be acquired by either grant or prescription. Since the grant of such a right involves a transfer of an interest in land, it must be created by writing, and a seal is, it seems, necessary to the validity of the grant.<sup>27</sup> An attempted grant of a *profit a prendre*, if invalid as being merely oral, or, it would seem, as wanting a seal, creates a license merely, which may be revoked at any time, except in those states in which an executed license is regarded as irrevocable.<sup>28</sup>

Frequently the term "license" is applied to all rights to take minerals, although created by instruments sufficient for the conveyance of an incorporeal interest in land, and intended to have such an effect, the term being in fact used merely to distinguish such a grant of a right to mine from a grant of the minerals in place.<sup>29</sup> The term "license," when so used, however, is not appropriate to describe the right of the person entitled, since to the license to dig for the minerals is joined the right to take them away when dug, and he consequently has a *profit a prendre*, without any of the incidents

land must be distinguished from the exclusive right of a tenant for life or years to take them from his own land, which has been previously considered. See, ante, § 249, and 2 Bl. Comm. 35, Chitty's note.

<sup>27</sup> *Somerset v. Fogwell*, 5 Barn. & C. 875, 2 Gray's Cas. 230; *Taylor v. Millard*, 118 N. Y. 244; *Kamphouse v. Gaffner*, 73 Ill. 453; *Boone v. Stover*, 66 Mo. 430; *McBee v. Loftis*, 1 Strob. Eq. (S. C.) 90.

<sup>28</sup> *Williams v. Morrison* (C. C.) 32 Fed. 177; *Wheeler v. West*, 71 Cal. 126; *Kamphouse v. Gaffner*, 73 Ill. 453; *Desloge v. Pearce*, 38 Mo. 588; *Huff v. McCauley*, 53 Pa. St. 206, *Finch's Cas.* 77. See ante, § 304.

<sup>29</sup> See *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 322; *Kamphouse v. Gaffner*, 73 Ill. 453; *Neumoyer v. Andreas*, 57 Pa. St. 446; *Boone v. Stover*, 66 Mo. 430; *Silsby v. Trotter*, 29 N. J. Eq. 228; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Bainbridge, Mines* (5th Ed.) 280 et seq.; *MacSwinney, Mines*, c. 12.

of a mere license.<sup>80</sup> A written instrument may, however, be construed, not as granting a right to take minerals, but merely a right to search and make tests for them, and, in such a case, the grantee named has a mere "license" properly so termed.<sup>81</sup>

A *profit a prendre* may also, like an easement, be created by words of exception or reservation.<sup>82</sup>

§ 341. Apportionment and extinction.

A right of profit in gross cannot be assigned in portions to different persons, so that each of the assignees may work it separately, but all the assignees must work it in common; this being on the theory that otherwise the land would be injured as a result of the taking of profits therefrom by numerous persons.<sup>83</sup> Some rights of common appurtenant, such as those of estovers, are not apportionable on the severance of the dominant tenement by the conveyance of a part thereof, since this would increase the amount of profits to be taken, and, consequently, as neither of the persons between whom the land is divided is entitled to the profits, the right thereto is entirely extinguished by such a conveyance.<sup>84</sup> But where a right of common is admeasurable according to the area of

<sup>80</sup> 2 Leake, 53, 329; MacSwinney, Mines (2d Ed.) 260; Barringer & Adams, Mines, 54, 67; Sutherland v. Heathcote [1892] 1 Ch. 475, 483; Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241.

<sup>81</sup> Mendenhall v. Klineck, 51 N. Y. 246; Cahoon v. Bayaud, 123 N. Y. 298; Hodgson v. Perkins, 84 Va. 706; Dark v. Johnston, 55 Pa. St. 164.

<sup>82</sup> Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Wardell v. Watson, 93 Mo. 107; Alden's Appeal, 93 Pa. St. 182; Pierce v. Keator, 70 N. Y. 419.

<sup>83</sup> Mountjoy's Case, Co. Litt. 164b; Chetham v. Williamson, 4 East, 469; Funk v. Haldeman, 53 Pa. St. 229, 244; Harlow v. Lake Superior Iron Co., 36 Mich. 105, 121.

<sup>84</sup> Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 532; Finch's Cas. 475; Livingston v. Ketchum, 1 Barb. (N. Y.) 592; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21; Ball v. Ohio & P. R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

the dominant tenement, the common may be apportioned to the several parts of the dominant tenement upon its severance, the burden on the servient tenement not being increased thereby. Such is the case where there is a right to pasture such cattle as may be kept on the dominant tenement, or to take such herbage as may be used thereon, and the alienee of a part of the dominant tenement is entitled to a right of common proportioned to the extent of his grant.<sup>35</sup> A right of *profit a prendre* is extinguished by a release of the right to the owner of the servient tenement.<sup>36</sup> If the titles to the dominant and servient tenements become united in one person, he having an equal estate in both, the right of common or profit is extinguished, since a man cannot have a right of profit in his own land.<sup>37</sup> And the same result no doubt follows if the owner of a right of profit in gross acquires a fee simple estate in the servient tenement.

Even though a right of profit or common is apportionable, if separate parts of the land subject thereto are held by different tenants, the right is extinguished in case the owner of the dominant tenement releases a part of such land from the burden of the profit,<sup>38</sup> or if the dominant tenement and a part of the servient land become the property of one man,<sup>39</sup> since, otherwise, the burden upon the other parts would be increased.

<sup>35</sup> Co. Litt. 122a; Tyrringham's Case, 4 Coke, 37a, 2 Gray's Cas. 4; Wild's Case, 8 Coke, 78b; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, Finch's Cas. 475.

<sup>36</sup> Litt. § 480; Co. Litt. 280a; 2 Leake, 355.

<sup>37</sup> Tyrringham's Case, 4 Coke, 38a; Bradshaw v. Eyre, Cro. Ells. 570, 3 Gray's Cas. 465; Rex v. Inhabitants of Hermitage, Carth. 239; Saundey's v. Oliff, Moore, 467, 3 Gray's Cas. 465; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21.

<sup>38</sup> Rotherham v. Green, Cro. Ells. 593; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21; Johnson v. Barnes, L. R. 7 C. P. 592, 600.

<sup>39</sup> Kimpton v. Bellamy, 1 Leon. 48; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 237; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, 2 Gray's Cas. 21; Bell v. Ohio & P. R. Co., 25 Pa. St. 161, 64 Am. Dec. 637.

## CHAPTER XIV.

### COVENANTS RUNNING WITH THE LAND.

- § 342. General considerations.
- 343. The running of benefits.
- 344. The running of burdens.
- 345. Privity of estate.
- 346. The nature of the covenant.
- 347. Party-wall agreements.

The benefit of a covenant as to the use of land will usually pass to a transferee of the land. So, the burden or obligation of such a covenant, made, upon the conveyance of land, by the grantor or grantee, will in some, but not in all, jurisdictions, pass to and bind a subsequent transferee of the land affected thereby. The benefit or burden of a covenant will likewise pass to the grantee of an easement.

#### § 342. General considerations.

Covenants with the owner of land, which are calculated to render its enjoyment more beneficial, may in some, if not all, cases, be enforced by a subsequent owner of the land; and, on the other hand, covenants made by the owner of land, restricting in some mode the freedom of its enjoyment, may, by some authorities, be enforced against a subsequent owner of the land. Covenants the benefit or burden of which may thus pass to subsequent owners of the land are said to "run with the land." Rights of action thereon in favor of or against transferees of the land are strictly *in personam*, and not *in rem*; but as incidents of the land, following it into the hands of subsequent owners, they are somewhat similar in effect to proprietary rights in another's land such as have  
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been previously discussed, and accordingly call for consideration in this connection.

That covenants run in favor of or against the owner of an estate for life or for years, or of the reversion expectant on such estate, is determined, or at least confirmed, by the provisions of the statute of 32 Hen. VIII. c. 34. The terms and effect of this statute having been already considered,<sup>1</sup> the running of covenants made by or with the owner of land in fee simple will alone be here discussed.

These questions of the assignment of contractual benefits or liabilities by the transfer of land have always been considered in connection with "covenants," strictly so called,—that is, contracts under seal; it being assumed, apparently without any judicial determination of the question, that a contract not under seal could not run with the land. The reason for this no doubt lies in the fact that formerly all written instruments were under seal; and even at the present day, owing to the necessity which exists in most jurisdictions that conveyances of land be under seal,<sup>2</sup> and to the fact that agreements in regard to the use or enjoyment of land are rarely found except in such conveyances, questions as to the running of agreements not under seal are not likely to arise.<sup>3</sup>

In the case of a deed poll,—that is, an instrument sealed by one only of the parties thereto,—a stipulation therein on the part of the person not sealing it is, by the weight of authority, regarded as the covenant of such person by reason of his acceptance of the conveyance,<sup>4</sup> though there are well-con-

<sup>1</sup> Ante, § 49.

<sup>2</sup> Post, § 403.

<sup>3</sup> That a contract not under seal will not run with the land, see *Martin v. Drinan*, 128 Mass. 515; *Kennedy v. Owen*, 136 Mass. 199; *Poage v. Wabash, St. L. & P. Ry. Co.*, 24 Mo. App. 199. But see *Burbank v. Pillsbury*, 48 N. H. 476.

<sup>4</sup> Co. Litt. 230b, Butler's note; Sheppard's Touchstone, 177; *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Hagerty v. Lee*, (750)

sidered opinions to the contrary.<sup>5</sup> In order to create a covenant, neither the word "covenant," nor any other particular word, is necessary,<sup>6</sup> and words of condition are frequently, as before stated, construed as words of covenant.<sup>7</sup> Moreover, words of covenant have been sometimes construed as creating, not a covenant, but an easement,<sup>8</sup> or a charge on the land in the nature of a lien.<sup>9</sup>

### § 343. The running of benefits.

That the right to sue upon a covenant relating to land will pass to subsequent owners of the land, claiming under the covenantee, is generally conceded.<sup>10</sup> Such a covenant is usu-

54 N. J. Law, 580; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Burnett v. Lynch*, 5 Barn. & C. 596; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154 (semble); *Poage v. Wabash, St. L. & P. Ry. Co.*, 24 Mo. App. 199; *Maynard v. Moore*, 76 N. C. 153 (semble); *Hickey v. Lake Shore & M. S. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545. And see cases cited in *Sims, Covenants*, 190-194.

<sup>5</sup> *Platt, Covenants*, 10; *Maine v. Cumston*, 98 Mass. 317, 3 Gray's Cas. 459; *Parish v. Whitney*, 3 Gray (Mass.) 516; *Martin v. Drinan*, 123 Mass. 515; *Kennedy v. Owen*, 136 Mass. 199; *Maule v. Weaver*, 7 Pa. St. 329; *Hinsdale v. Humphrey*, 15 Conn. 431; *Trustees v. Spencer*, 7 Ohio, 493; *Johnston v. Muzsey*, 45 Vt. 419, 12 Am. Rep. 214.

<sup>6</sup> *Platt, Covenants*, 28; *Hartung v. Witte*, 59 Wis. 285; *Midgett v. Brooks*, 34 N. C. 145, 55 Am. Dec. 405; *Taylor v. Preston*, 79 Pa. St. 436; *Trull v. Eastman*, 3 Metc. (Mass.) 121; *Electric City Land & Improvement Co. v. West Ridge Coal Co.*, 187 Pa. St. 500.

<sup>7</sup> See ante, § 68.

<sup>8</sup> See ante, § 315.

<sup>9</sup> *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689; *Martin v. Martin*, 44 Kan. 295; *Goudy v. Goudy*, *Wright* (Ohio) 410.

<sup>10</sup> *Pollock, Contracts* (6th Ed.) 224; *Sims, Covenants*, 136; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Raby v. Reeves*, 113 N. C. 688; *Peden v. Chicago, R. I. & P. Ry. Co.*, 73 Iowa, 328, 5 Am. St. Rep. 680; *National Union Bank at Dover v. Segur*, 39 N. J. Law, 172, 3 Gray's Cas. 463; *Gaines' Adm'r v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; *St. Louis, I. M. & S. Ry. Co. v. O'Baugh*, 49 Ark. 418.

ally made by the grantor or grantee of land as an incident of the conveyance,—that is, by one who has some relation to the title. The question has, however, occasionally arisen whether one who is neither a grantor nor grantee of the land may make a covenant with the owner thereof, the benefit of which will pass to a subsequent owner of the land,—that is, whether the benefit of a covenant may run, though there is no “privity of estate” between the covenantor and covenantee. The authorities are about equally divided upon the question.<sup>11</sup>

#### § 344. The running of burdens.

In England it is apparently the law that the burden of a covenant by the owner of land in fee simple, made with one other than his lessee, will not run so as to be enforceable against a transferee of the land.<sup>12</sup> In this country, on the other hand, there are a number of decisions to the effect that covenants by the owner of land will bind transferees of the land,<sup>13</sup>

<sup>11</sup> That the benefit will pass with the land in such case, see Pollock, *Contracts* (6th Ed.) 224, note; Holmes, *The Common Law*, 405; *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Dickinson v. Hoomes' Adm'r*, 8 Grat. (Va.) 353 (dictum); *Gaines' Adm'r v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Rawle, *Covenants*, § 202, note. The contrary view is taken in *Sims, Covenants Running with the Land*, 196; *Sugden, Vendors* (14th Ed.) 581 et seq.; *Mygatt v. Coe*, 124 N. Y. 212, 147 N. Y. 456; *Lyon v. Parker*, 45 Ma. 474, 3 Gray's Cas. 457; *Hurd v. Curtis*, 19 Pick. (Mass.) 459 (dictum). *Packenham's Case*, Y. B. 42 Edw. III. 3, pl. 14 (translated in 2 Gray's Cas. 439), is cited on both sides of the discussion,—a not unnatural result of the obscurity of the report.

<sup>12</sup> Pollock, *Contracts* (6th Ed.) 225; 1 Smith, *Lead. Cas. Eq.* (10th Ed.) 75-85. See *Brewster v. Kildgill*, 12 Mod. 166; *Brewster v. Kitchin*, 1 Ld. Raym. 317; *Keppel v. Bailey*, 2 Mylne & K. 517; *Austerberry v. Corporation of Oldham*, 29 Ch. Div. 750, 3 Gray's Cas. 441, note.

<sup>13</sup> *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Robbins v. Webb*, 68 Ala. 393; *Gilmer v. Mobile & M. Ry. Co.*, 79 Ala. 569; *Hottell v. Farmers' Protective Ass'n*, 25 Colo. 67; *Dorsey v. St. Louis, A. & (752)*



though in a few states the English view appears to have been adopted.<sup>14</sup> The fact that the burden of a covenant passes to the transferee should not, it would seem, relieve the original covenantor from liability thereon, the same principle be-

T. H. R. Co., 58 Ill. 65; *Fitch v. Johnson*, 104 Ill. 111; *Conduitt v. Ross*, 102 Ind. 166, 2 Gray's Cas. 474; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *De Logny's Heirs v. Mercer*, 43 La. Ann. 205 (semble); *Sutton v. Head*, 86 Ky. 156; *Hickey v. Lake Shore & M. S. Ry. Co.*, 51 Ohio St. 40 (dictum); *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 236; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48 (dictum); *Pittsburg, C. & St. L. Ry. Co. v. Bosworth*, 46 Ohio St. 81 (dictum); *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400 (dictum); *Dey v. Prentice*, 90 Hun (N. Y.) 27; *Dexter v. Beard*, 130 N. Y. 549; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *St. Andrew's Church's Appeals*, 67 Pa. St. 512; *Electric City Land & Improvement Co. v. West Ridge Coal Co.*, 187 Pa. St. 500; *Landell v. Hamilton*, 175 Pa. St. 327; *Wooliscroft v. Norton*, 15 Wis. 198; *Crawford v. Witherbee*, 77 Wis. 419. See, also, the decisions in notes 25-29, *infra*, to the effect that the burden will run when the covenant is made in connection with the grant of an easement.

<sup>14</sup> *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537 (dictum); *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; *Costigan v. Pennsylvania R. Co.*, 54 N. J. Law, 233; *Lynn v. Mount Savage Iron Co.*, 34 Md. 603 (semble).

In Massachusetts, apart from the cases of landlord and tenant, the burden of a covenant will not run with the land, as a general rule, unless "the covenant either creates a servitude or a restriction in the nature of a servitude in favor of a neighboring parcel, or else is in some way incident to and inseparable from such a servitude; or, if attached to the dominant estate, appears to be the *quid pro quo* for the easement enjoyed." *Holmes, C. J.*, in *Lincoln v. Burrage*, 177 Mass. 378. Compare *Norcross v. James*, 140 Mass. 188, 2 Gray's Cas. 511, *Morse v. Aldrich*, 19 Pick. (Mass.) 449, 2 Gray's Cas. 446, and *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156, 11 Am. Rep. 335, 2 Gray's Cas. 328, which seem to favor the running of the burden. The later decisions in this state upon this subject, especially those in which the opinion of the court is delivered by *Holmes, C. J.*, are generally in accord with the views expounded by that learned jurist in his work on *The Common Law*, pp. 392-406.

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ing applicable as in the case of landlord and tenant.<sup>15</sup> A different view has, however, occasionally been taken.<sup>16</sup>

§ 345. Privity of estate.

In order that the burden of a covenant run with the land, there must be, it is generally stated, a "privity of estate" between the covenantor and covenantee.<sup>17</sup> This expression, as used in connection with covenants running with estates in fee simple, refers apparently to the relation between the grantor and grantee of such an estate at the time of the conveyance. In other words, in order that there be such privity of estate that the burden of a covenant may run, the covenant must be entered into at the time of the making of a conveyance by the covenantee to the covenantor, or *vice versa*.<sup>18</sup> Privity exists accordingly, it seems, in the case of

<sup>15</sup> See ante, § 46.

<sup>16</sup> *Carr v. Lowry's Adm'x*, 27 Pa. St. 257; *Hickey v. Lake Shore & M. S. Ry. Co.*, 51 Ohio St. 40.

<sup>17</sup> *Cole v. Hughes*, 54 N. Y. 444, 2 Gray's Cas. 465; *Nye v. Hoyle*, 120 N. Y. 195; *Lyon v. Parker*, 45 Me. 474, 2 Gray's Cas. 457; *Sharp v. Cheatham*, 88 Mo. 498; *Town of Middletown v. Newport Hospital*, 16 R. I. 319; *Spence v. Mobile & M. Ry. Co.*, 79 Ala. 576; *Wheeler v. Schad*, 7 Nev. 204; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Hurd v. Curtis*, 19 Pick. (Mass.) 459, 2 Gray's Cas. 449; *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156, 11 Am. Rep. 335, 2 Gray's Cas. 328; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Webb v. Russell*, 3 Term R. 402.

<sup>18</sup> *Gilmer v. Mobile & M. Ry. Co.*, 79 Ala. 569; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *Harsha v. Reid*, 45 N. Y. 415; *Lawrence v. Whitney*, 115 N. Y. 410; *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Binbank v. Pillsbury*, 48 N. H. 475; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373; *Conduitt v. Ross*, 102 Ind. 166, 2 Gray's Cas. 474; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254 (semble); *Smith v. Kelley*, 56 Me. 64.

In *Norcross v. James*, 140 Mass. 188, 2 Gray's Cas. 511, it is said by Holmes, J., in delivering the opinion of the court, that the statement that there must be "privity of estate between the covenantor and the covenantee, only means that the covenant must impose such a  
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a covenant by a grantor to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him will be bound;<sup>19</sup> and it also exists in the more ordinary case of a covenant by the grantee of land as to things to be done by him on the land conveyed, so that his subsequent transferees will be bound thereby. On the other hand, an agreement by various mill owners as to the use of water will not bind their assigns, since there is no privity between them.<sup>20</sup> And a covenant made after a conveyance, though between the parties

burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant." This statement, however true in Massachusetts, where a covenant runs with the land, according to the later cases, apparently, only when an easement or quasi easement is created, is not supported by the decisions in other states, as cited above, nor, perhaps, by the earlier decisions in that state.

<sup>19</sup> *Fitch v. Johnson*, 104 Ill. 111; *Scott v. Burton*, 2 Ashm. (Pa.) 324; *Crawford v. Witherbee*, 77 Wis. 419; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 2 Gray's Cas. 328; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48,—the last three cases, however, involving covenants by the grantor to fence, which may be regarded as the grant of an easement.

It is to be observed that the burden of the covenant does not necessarily pass with the land in connection with which the privity arises; that is, in the case referred to in the text, the privity arises in connection with the land first conveyed, while the burden of the covenant runs with that last conveyed. See *Brewer v. Marshall*, 18 N. J. Eq. 327, 19 N. J. Eq. 537; *Waterbury v. Head*, 12 N. Y. St. Rep. 361; *Clark v. Devos*, 124 N. Y. 120, as explained in *Dexter v. Beard*, 130 N. Y. 549.

<sup>20</sup> *Hurd v. Curtis*, 19 Pick. (Mass.) 459, 2 Gray's Cas. 449; *Lawrence v. Whitney*, 115 N. Y. 410. In Pennsylvania it is held that the requirement of privity is subject to exceptions, and that consequently covenants by owners of separate tracts of riparian land as to the use of the water power will bind their assignees. *Horn v. Miller*, 136 Pa. St. 640. To the same effect, see *Weill v. Baldwin*, 64 Cal. 476, with which, however, *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, does not appear to be in accord.

thereto, has been held not to be supported by such privity of estate that the burden will run.<sup>21</sup>

— Grant of easement.

The requirement of privity of estate is satisfied if the covenant accompanies a grant by the owner of land of a mere easement therein, he retaining the land.<sup>22</sup> Accordingly, it has been held that the burden of a covenant made upon the grant of a water privilege,<sup>23</sup> or upon the grant of a railroad right of way,<sup>24</sup> will bind subsequent transferees of the land or of the easement.<sup>25</sup>

<sup>21</sup> *Inhabitants of Plymouth v. Carver*, 16 Pick. (Mass.) 183; *Smith v. Kelley*, 56 Me. 64; *Wheeler v. Schad*, 7 Nev. 204. But if the covenant and conveyance are parts of the same transaction, the fact that they are in separate instruments is immaterial. *Sims, Covenants*, 198; *Hills v. Miller*, 3 Paige (N. Y.) 254; *Robbins v. Webb*, 68 Ala. 393 (semble).

<sup>22</sup> *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156, 11 Am. Rep. 335, 2 Gray's Cas. 328; *Morse v. Aldrich*, 19 Pick. (Mass.) 449, 2 Gray's Cas. 446; *Lincoln v. Burrage*, 177 Mass. 378; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Fitch v. Johnson*, 104 Ill. 111; *Gilmer v. Mobile & M. Ry. Co.*, 79 Ala. 569.

<sup>23</sup> *Nye v. Hoyle*, 120 N. Y. 195; *Fitch v. Johnson*, 104 Ill. 111; *Norfleet v. Cromwell*, 64 N. C. 1; *Noonan v. Orton*, 4 Wis. 235.

<sup>24</sup> *St. Louis, I. M. & S. Ry. Co. v. O'Baugh*, 49 Ark. 418; *Lydick v. Baltimore & O. R. Co.*, 17 W. Va. 427; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Dorsey v. St. Louis, A. & T. H. R. Co.*, 58 Ill. 65; *Peden v. Chicago, R. I. & P. Ry. Co.*, 73 Iowa, 328; *Sims, Covenants*, 201.

<sup>25</sup> *Peden v. Chicago, R. I. & P. Ry. Co.*, 73 Iowa, 328; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Dorsey v. St. Louis, A. & T. H. R. Co.*, 58 Ill. 65; *Lydick v. Baltimore & O. R. Co.*, 17 W. Va. 427; *Fitch v. Johnson*, 104 Ill. 111. So the benefit may pass with a subsequent grant of the water power. *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393.

A covenant created in connection with an easement has been held to run, even though not entered into till after the grant of the easement. *Morse v. Aldrich*, 19 Pick. (Mass.) 449, 2 Gray's Cas. 446.

## § 346. The nature of the covenant.

The nature of covenants which can be regarded as concerning the land to such an extent as to run therewith was considered in connection with the running of covenants as between landlord and tenant.<sup>26</sup> It has been held that a covenant to give free transportation to the covenantee,<sup>27</sup> or by the vendor to pay taxes on the land sold,<sup>28</sup> is of such a personal nature as not to run. Nor will the burden run if the covenant was intended to cover acts on the part of the covenantor alone.<sup>29</sup> And, generally, covenants which are intended merely to restrain competition in trade do not, it would seem, concern the land so that the benefit or burden thereof will pass.<sup>30</sup>

Among the covenants which have been most frequently considered as passing with the grant of a fee-simple estate are those to repair a dam or canal,<sup>31</sup> and to fence or to repair a fence.<sup>32</sup>

<sup>26</sup> See ante, § 49.

<sup>27</sup> *Morse v. Garner*, 1 Strob. (S. C.) 514, 47 Am. Dec. 565; *Dickey v. Kansas City & I. R. T. Ry. Co.*, 122 Mo. 223; *Duddick v. St. Louis, K. & N. W. Ry. Co.*, 116 Mo. 25, 38 Am. St. Rep. 570. So, in the case of a covenant by the grantee of an easement to give its transportation business to the grantor, a ferry company, it was held that the covenant would not run, since it did not affect the enjoyment of the easement, or of the land in which the easement was granted, but was purely for the benefit of the owner of the ferry. *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83.

<sup>28</sup> *Graber v. Duncan*, 79 Ind. 565.

<sup>29</sup> *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652. So, the benefit will not run if the covenant was intended only for the benefit of the covenantee. *Maryland Coal Co. v. Cumberland & P. R. Co.*, 41 Md. 343.

<sup>30</sup> *Taylor v. Owen*, 2 Blackf. (Ind.) 301; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 461. And see post, § 349. Contra, *Robbins v. Webb*, 68 Ala. 393; *National Union Bank at Dover v. Segur*, 39 N. J. Law, 173, 2 Gray's Cas. 468.

<sup>31</sup> *Nye v. Hoyle*, 120 N. Y. 195; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689; *Nordflet v.*

## § 347. Party-wall agreements—(1) Running of the burden.

Agreements between owners of adjoining pieces of land that, in case of the erection of a party wall upon the division line, a part on each tract, the other will, if he subsequently use such wall, pay his share of the cost, have been quite frequently before the courts, and have generally been held to bind a subsequent transferee of either owner for a part of the cost upon his user of such a wall previously erected by the owner of the other property,<sup>33</sup> though there are some states in which such liability on the part of the transferee is denied.<sup>34</sup> In some cases it has been held that the

Cromwell, 64 N. C. 1; Wooliscroft v. Norton, 15 Wis. 198; Carr v. Lowry's Adm'x, 27 Pa. St. 257; Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230.

<sup>33</sup> Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156, 2 Gray's Cas. 328; Lake Erie & W. Ry. Co. v. Priest, 131 Ind. 413; Dorsey v. St. Louis, A. & T. H. R. Co., 58 Ill. 65; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; Midland Ry. Co. v. Fisher, 125 Ind. 19, 21 Am. St. Rep. 189; Huston v. Cincinnati & Z. R. Co., 21 Ohio St. 236; Countryman v. Deck, 13 Abb. N. C. (N. Y.) 110; Dey v. Prentice, 90 Hun (N. Y.) 27; Hickey v. Lake Shore & M. S. Ry. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550.

In Hartung v. Witte, 59 Wis. 285, and Gulf, C. & S. F. Ry. Co. v. Smith, 72 Tex. 132, it was held that a covenant to build a fence, as concerning a thing not in esse, did not run, in the absence of the word "assigns." See ante, § 49.

<sup>34</sup> Conduitt v. Ross, 102 Ind. 166, 2 Gray's Cas. 474; Savage v. Mason, 3 Cush. (Mass.) 500, 2 Gray's Cas. 453; Richardson v. Tobey, 121 Mass. 457; Standish v. Lawrence, 111 Mass. 111, 2 Gray's Cas. 461; King v. Wight, 155 Mass. 444; Mackin v. Haven, 187 Ill. 480; Tomblin v. Fish, 18 Ill. App. 439; Roche v. Ullman, 104 Ill. 11; Gibson v. Holden, 115 Ill. 199; Pillsbury v. Morris, 54 Minn. 492; National Life Ins. Co. of Montpelier v. Lee, 75 Minn. 157; Hall v. Geyer, 14 Ohio Cir. Ct. R. 229, 7 Ohio Dec. 436; Garmire v. Willy, 36 Neb. 340.

<sup>35</sup> Sharp v. Cheatham, 88 Mo. 498; Nalle v. Paggi (Tex.) 9 S. W. 205.

In New York it is held that the covenant to pay part of the cost does not run with the land unless an intention to that effect is (758)

covenant creates an equitable easement or charge upon the land, which binds a purchaser with notice.<sup>25</sup>

These decisions sustaining the liability of the subsequent transferees of one parcel of land for part of the cost of the wall may, it seems, be most properly based on the theory that the covenant runs by reason of the privity of estate created by the grant to one owner of the easement of entering and building on the other's land,<sup>26</sup> or of the cross easements of support created by the agreement.<sup>27</sup>

In England, where the burden of a covenant does not run with the land, the liability of a subsequent purchaser of one tract to reimburse the owner of the other has been based on the theory of a contract by him to that effect implied from his user of the wall.<sup>28</sup>

clearly shown, and it seems that such an intention will more readily be presumed when the agreement is general, without reference to any present intention of building a wall, than when there is a specific agreement that, if the party named build the wall, the other party shall pay part of the cost thereof upon using it. *Sebbald v. Mulholland*, 155 N. Y. 455, explaining *Mott v. Oppenheimer*, 135 N. Y. 372; *Cole v. Hughes*, 54 N. Y. 444, 2 Gray's Cas. 465; *Scott v. McMillan*, 76 N. Y. 141.

<sup>25</sup> *Stehr v. Raben*, 33 Neb. 437; *Sharp v. Cheatham*, 38 Mo. 498; *Parsons v. Baltimore Building & Loan Ass'n*, 44 W. Va. 335, 67 Am. St. Rep. 769. See, as to such equitable easements, post, c. 15.

<sup>26</sup> *Conduitt v. Ross*, 102 Ind. 166, 2 Gray's Cas. 474; *King v. Wight*, 155 Mass. 444.

<sup>27</sup> *Roche v. Ullman*, 104 Ill. 1; *King v. Wight*, 155 Mass. 444.

In order that the transferee of the land be able to recover upon such an agreement, the latter must, it has been held in Massachusetts, be under the seal of the other party, as otherwise he would acquire, not an easement, but a mere license to build on the other land, and no privity would exist to support the running of the covenant. *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60, 2 Gray's Cas. 463. But even if the agreement is not under seal, the transferee of one tract, by accepting a conveyance binding him to pay a part of the cost of the wall, becomes liable accordingly. *Maine v. Cumston*, 98 Mass. 317, 2 Gray's Cas. 459.

<sup>28</sup> *Irving v. Turnbull* [1900] 2 Q. B. 129. See the criticisms of this case in 14 Harv. Law Rev. 297, 1 Columbia Law Rev. 257.

Although an agreement of this character exists, the builder of the wall, or the person to whom he transfers the land, is regarded as retaining the ownership of the whole wall until the other landowner reimburses him, and, accordingly, he is alone liable for injuries resulting from defects in the wall.<sup>39</sup>

Such an agreement is, it seems, *prima facie* construed as providing for reimbursement by the person alone who uses the wall for the construction of a building; and consequently the original covenantor, if he does not use the wall, is not liable on his covenant,<sup>40</sup> nor is a transferee of the land after it has been built on by his grantor so liable.<sup>41</sup>

— (2) Running of the benefit.

The right to compensation under the agreement for the use of the wall is by some cases considered to appertain to the land, and to pass to a transferee of the proprietor who built the wall,<sup>42</sup> while by others it is regarded as personal to such proprietor, so as not to pass to his transferee.<sup>43</sup> The right

<sup>39</sup> *Mickel v. York*, 175 Ill. 62; *Gorham v. Gross*, 125 Mass. 232; *Glover v. Mersman*, 4 Mo. App. 90; *Mason's Appeal*, 70 Pa. St. 26; *Goldschmid v. Starring*, 5 Mackey (D. C.) 582; *Sullivan v. Graf-fort*, 35 Iowa, 531.

<sup>40</sup> *Standish v. Lawrence*, 111 Mass. 111, 2 Gray's Cas. 461; *Jordan v. Kraft*, 33 Neb. 844.

<sup>41</sup> *Pfeiffer v. Matthews*, 161 Mass. 487.

<sup>42</sup> *Savage v. Mason*, 3 Cush. (Mass.) 500, 2 Gray's Cas. 453; *King v. Wight*, 155 Mass. 444; *Kimm v. Griffin*, 67 Minn. 25, 64 Am. St. Rep. 385; *Eberly v. Behrend*, 20 D. C. 215; *Platt v. Eggleston*, 20 Ohio St. 414. See the remarks by Holmes, C. J., in *Lincoln v. Bur-age*, 177 Mass. 378, adverse to the view that, while the burden of such a covenant runs with the land, the benefit thereof can be regarded as "in gross" or personal to the covenantee.

<sup>43</sup> *Cole v. Hughes*, 54 N. Y. 444, 2 Gray's Cas. 465; *Parsons v. Baltimore Building & Loan Ass'n*, 44 W. Va. 335, 67 Am. St. Rep. 769; *Bloch v. Isham*, 28 Ind. 37; *Crater v. McCormick*, 4 Colo. 197; *Lea's Appeal*, 9 Pa. St. 504; *Todd v. Stokes*, 10 Pa. St. 155. In New York it seems, however, by a later case, that the right to compen-  
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to compensation has been considered to be personal to the builder, not passing with the land, when the ownership of half the wall, by the express terms of the agreement, vests immediately on its construction, contrary to the general rule, in the owner of the other land, though he cannot use it till he pays his share.<sup>44</sup>

sation passes with the land if the covenant can be regarded as intended to "run with the land." *Mott v. Oppenheimer*, 135 N. Y. 312.

The party building the wall may, it has been held, upon the grant of his parcel, reserve the right to the compensation for the wall, instead of allowing it to pass with the land. *Conduitt v. Ross*, 102 Ind. 166, 2 Gray's Cas. 474; *Pillsbury v. Morris*, 54 Minn. 492.

<sup>44</sup> *Gibson v. Holden*, 115 Ill. 199; *McChesney v. Davis*, 86 Ill. App. 380. See *Pillsbury v. Morris*, 54 Minn. 492; *Tomblin v. Fish*, 18 Ill. App. 439; *Mickel v. York*, 175 Ill. 62.

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## **CHAPTER XV.**

### **RESTRICTIONS ENFORCEABLE IN EQUITY.**

- § 348. General considerations.**
- 349. Character of agreement.**
- 350. Notice.**
- 351. Persons entitled to enforce restriction.**
- 352. Purchasers under common plan.**
- 353. Defenses to enforcement.**

In some jurisdictions an agreement by the owner of land that he will not use it in a certain way will be enforced in equity, by injunction, against one purchasing or occupying the land with notice of the agreement, without reference to the doctrine of covenants running with the land. This principle is most frequently applied in favor of and against purchasers of neighboring lots, which are laid off and sold by a common vendor, subject to uniform restrictions as to their future improvement and use.

#### **§ 348. General considerations.**

Even in some of the jurisdictions where, as in England, the burden of a covenant does not run with the land, an agreement as to the use of land may, under certain circumstances, affect a subsequent purchaser of the land who takes with notice of the agreement, equity in such case enjoining a use of the land in violation of such agreement. As stated in the leading case on the subject,<sup>1</sup> "the question is not whether the

<sup>1</sup> *Tulk v. Moxhay*, 2 Phillips, 774, 2 Gray's Cas. 478. See, to the same effect, *Luker v. Dennis*, 7 Ch. Div. 227; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Tallmadge v. East River Bank*, 36 N. Y. 105, 2 Gray's Cas. 497; *Hayes v. Waverly & P. Ry.* (762)

covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." The person thus affected by the agreement as to the use of the land may be a purchaser, a lessee,<sup>2</sup> or even, it has been decided, a mere occupant of the land.<sup>3</sup> There is some difficulty in explaining this doctrine so far as it involves an enforcement in equity of rights which are denied at law,<sup>4</sup> and in some cases in this country the right to relief in equity in such a case seems to be based, not on the English theory of relief against a purchaser with notice, but on the theory that, by the covenant, an easement is created.<sup>5</sup> This latter theory is, however, itself unsatisfactory in some respects, and is in-

Co., 51 N. J. Eq. 345; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Town of Middletown v. Newport Hospital*, 16 R. I. 319; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363; *St. Andrew's Lutheran Church's Appeal*, 67 Pa. St. 512; *Frye v. Partridge*, 82 Ill. 267; *Hutchinson v. Ulrich*, 145 Ill. 336; *Peabody Heights Co. of Baltimore v. Willson*, 82 Md. 186; *Newbold v. Peabody Heights Co. of Baltimore*, 70 Md. 493; *McMahon v. Williams*, 79 Ala. 288; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816; *Hills v. Miller*, 3 Paige (N. Y.) 254, 24 Am. Dec. 218.

<sup>2</sup> *Wilson v. Hart*, 1 Ch. App. 463; *Spicer v. Martin*, 14 App. Cas. 13; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

<sup>3</sup> *Mander v. Falcke* [1891] 2 Ch. 554.

<sup>4</sup> The theoretical difficulties of the doctrine are well presented in *Sims, Covenants*, c. 11.

<sup>5</sup> *McMahon v. Williams*, 79 Ala. 288; *Tinker v. Forbes*, 136 Ill. 221; *Herrick v. Marshall*, 66 Me. 435; *Hogan v. Barry*, 143 Mass. 538; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481; *Beals v. Case*, 138 Mass. 188; *Peck v. Conway*, 119 Mass. 546; *Brown v. O'Brien*, 168 Mass. 484; *Chase v. Walker*, 167 Mass. 293; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Green v. Creighton*, 7 R. I. 9; *Tinker v. Forbes*, 136 Ill. 221; *Hutchinson v. Ulrich*, 145 Ill. 336; *Clark v. McGee*, 159 Ill. 518; *Muzzarelli v. Hulshizer*, 163 Pa. St. 648; *Fuller v. Arms*, 45 Vt. 400.

sufficient to explain all the cases in which relief has thus been granted against an assignee of the land.<sup>6</sup>

§ 349. Character of agreement.

In England, an agreement will thus be enforced in equity against a subsequent purchaser or occupant only when it is restrictive of the use of the land, and not when it calls for the performance of some positive act by the occupant thereof.<sup>7</sup> In this country, occasionally, an agreement not restrictive in its nature has thus been enforced.<sup>8</sup> In the great majority of cases, however, the agreement enforced has been restrictive. Thus, agreements not to use land for building,<sup>9</sup> or for a particular business,<sup>10</sup> or for other than residence pur-

\* The covenants thus enforced against an assignee of the covenantor are, as hereafter stated, usually restrictions upon the character or location of the building to be erected, or business to be maintained, on the land, and such covenants are, in some of the cases last cited, said to create easements of light, air, and prospect. They are, however, sometimes enforced when their violation could hardly involve any interference with light, air, or prospect, as in the case of a deviation of a few inches from a building line. If easements are created by stipulations of this character, they may no doubt be enforced at law, though this does not appear to have been attempted, and, as easements constituting rights in rem, they could be enforced at law, even against the original covenantor, only by an action on the case or its equivalent, and not by an action of contract.

<sup>7</sup> *Haywood v. Brunswick Permanent Benefit Building Soc.*, 8 Q. B. Div. 403, 2 Gray's Cas. 493; *Austerberry v. Corporation of Oldham*, 29 Ch. Div. 750; *London & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 5 Gray's Cas. 579. See *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329.

<sup>8</sup> *Carson v. Percy*, 57 Miss. 97; *Stehr v. Raben*, 33 Neb. 457; *Gould v. Partridge*, 52 App. Div. (N. Y.) 40; *Sharp v. Cheatham*, 88 Mo. 498. See *Whittenton v. Staples*, 164 Mass. 319.

<sup>9</sup> *Tulk v. Moxhay*, 2 Phillips, 774, 2 Gray's Cas. 478; *Wood v. Cooper* [1894] 3 Ch. 671; *Peck v. Conway*, 119 Mass. 546, 2 Gray's Cas. 508; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400.

<sup>10</sup> *McMahon v. Williams*, 79 Ala. 288; *Post v. Well*, 115 N. Y. 461.

poses,<sup>11</sup> are thus enforceable, as are agreements not to build within a certain distance of the street,<sup>12</sup> or to erect no building of less than a certain cost,<sup>13</sup> or of a style of construction other than that named.<sup>14</sup>

According to a few decisions, the agreement, even though restrictive, in order to be thus enforced against a subsequent purchaser, must "touch and concern" the land in favor of whose owner the agreement is made, by tending to the physical advantage of such land, it being insufficient that it increases its value indirectly by preventing the use of the adjoining property for a competing business.<sup>15</sup> In England and New York, however, a different view apparently prevails.<sup>16</sup>

The right to thus enforce an agreement against a subsequent purchaser on equitable principles, is, at least in some jurisdictions, independent of the mode or incidents of its execution. It need not be a covenant,—that is, an agreement under seal,—and it is sufficient if it be oral, or merely

<sup>12</sup> Am. St. Rep. 809; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363; *Stines v. Dorman*, 25 Ohio St. 580.

<sup>11</sup> *German v. Chapman*, 7 Ch. Div. 271; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440.

<sup>13</sup> *Manners v. Johnson*, 1 Ch. Div. 673; *Linzee v. Mixer*, 101 Mass. 512; *Sanborn v. Rice*, 129 Mass. 387; *Ogontz Land & Improvement Co. v. Johnson*, 168 Pa. St. 178; *Coles v. Sims*, 5 De Gex, M. & G. 1.

<sup>14</sup> *Bowes v. Law*, L. R. 9 Eq. 636; *Page v. Murray*, 46 N. J. Eq. 325; *Blakemore v. Stanley*, 159 Mass. 6.

<sup>15</sup> *Keening v. Ayling*, 126 Mass. 404; *Landell v. Hamilton*, 177 Pa. St. 23; *Clark v. Martin*, 49 Pa. St. 289.

<sup>16</sup> *Norcross v. James*, 140 Mass. 188, 2 Gray's Cas. 511; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537; *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461; *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600.

<sup>17</sup> *Luker v. Dennis*, 7 Ch. Div. 227; *Catt v. Tourle*, 4 Ch. App. 654; *Hodge v. Sloan*, 107 N. Y. 244.

inferred from certain representations made upon the sale of land.<sup>17</sup>

§ 350. Notice.

The notice to a purchaser necessary to render the agreement enforceable against him in equity, as above stated, may be either actual or constructive.<sup>18</sup> He is, it seems, charged with notice of anything showing or imposing such a restriction, which may be contained in a conveyance in the chain of title under which he claims.<sup>19</sup> But he is not, it has been decided, chargeable with notice of a general plan by the uniformity of construction of buildings upon other lots sold.<sup>20</sup>

§ 351. Persons entitled to enforce restriction.

The purchaser of a tract can enforce an agreement restrictive of the use of another tract, made with the former owner of both tracts, only if the agreement was originally intended to inure to the benefit of any such purchaser, or, in other words, was intended to benefit the land, rather than the promisee personally.<sup>21</sup> Consequently, a vendee of a tract of land, seek-

<sup>17</sup> *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q. B. Div. 261, 16 Q. B. Div. 778; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 364, 71 Am. Dec. 715, 718; *Tallmadge v. East River Bank*, 26 N. Y. 105, 2 Gray's Cas. 497.

That the agreement need not be between parties to a conveyance, see *Lewis v. Gollner*, 129 N. Y. 227; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440.

<sup>18</sup> *Wilson v. Hart*, 1 Ch. App. 463; *Spicer v. Martin*, 14 App. Cas. 12.

<sup>19</sup> *Peck v. Conway*, 119 Mass. 546, 2 Gray's Cas. 503; *Poage v. Wabash, St. L. & P. Ry. Co.*, 24 Mo. App. 199; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Duncan v. Central Passenger Ry. Co.*, 35 Ky. 525. See *Norfleet v. Cromwell*, 64 N. C. 1.

<sup>20</sup> *Bradley v. Walker*, 138 N. Y. 291, overruling dictum in *Tallmadge v. East River Bank*, 26 N. Y. 105, 111.

<sup>21</sup> *Keates v. Lyon*, 4 Ch. App. 218, 2 Gray's Cas. 480; *Renals v. Cowlishaw*, 9 Ch. Div. 125, 11 Ch. Div. 366, 2 Gray's Cas. 439; *Mac* (766)

ing to enforce such an agreement against a vendee from the same person of an adjoining tract, must show that the agreement was so intended, and this he may do by evidence as to the situation and condition of the property, and the surrounding circumstances.<sup>23</sup> An intention that purchasers shall enjoy the benefit of the agreement is, it seems, invariably presumed from the fact that the lots purchased were laid off for sale as building lots, with no intention on the part of the purchaser so laying them off to retain any portion of the property for his own enjoyment.<sup>23</sup>

According to the English cases, the restriction must have actually entered into the subsequent purchase,—that is, the purchaser must, as it were, have purchased the right to take advantage of the agreement.<sup>24</sup>

§ 352. Purchasers under common plan.

The question of the enforcement of these rights in equity has most frequently arisen in connection with agreements entered into in furtherance of some general scheme of improvement devised by the owner of land upon its division into

ter v. Hansard, 4 Ch. Div. 718; De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329; Sharp v. Ropes, 110 Mass. 381, 2 Gray's Cas. 504; Jewell v. Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744; Skinner v. Shepard, 130 Mass. 180; Beals v. Case, 133 Mass. 138; Badger v. Boardman, 16 Gray (Mass.) 559; Clapp v. Wilder, 176 Mass. 332; Lowell Sav. Institute v. City of Lowell, 153 Mass. 530; Equitable Life Assur. Soc. v. Brennan, 148 N. Y. 661.

<sup>23</sup> Nottingham Patent Brick & Tile Co. v. Butler, 15 Q. B. Div. 361, 16 Q. B. Div. 778; Spicer v. Martin, 14 App. Cas. 12; Collins v. Castle, 36 Ch. Div. 243; Hano v. Bigelow, 155 Mass. 341; Tobey v. Moore, 130 Mass. 448; Peck v. Conway, 119 Mass. 546; Peabody Heights Co. v. Willson, 82 Md. 186; Coughlin v. Barker, 46 Mo. App. 54.

<sup>24</sup> Nottingham Patent Brick & Tile Co. v. Butler, 16 Q. B. Div. 778; Spicer v. Martin, 14 App. Cas. 12; Collins v. Castle, 36 Ch. Div. 243; Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632. See Sharp v. Ropes, 110 Mass. 381, 2 Gray's Cas. 504.

<sup>25</sup> Renals v. Cowlshaw, 9 Ch. Div. 125, 11 Ch. Div. 866, 2 Gray's Cas. 489; Spicer v. Martin, 14 App. Cas. 12.

building lots, it being intended that all purchasers of such lots shall improve them, in accordance with such plan, for the common benefit of all. In such a case, the purchaser of any one lot might properly be allowed in equity to enforce a restrictive agreement entered into by a prior purchaser of another lot, as being an assignee of the common vendor, and as intended to be benefited thereby. But when the person seeking to enforce the agreement is one who purchased before, and not after, the purchase by the person against whom it is sought to enforce it, different considerations intervene. Though he might properly enforce the agreement made with his vendor before his purchase, he cannot be regarded as an assignee of the right to enforce an agreement made after his purchase. His right, therefore, to enforce a restriction upon the use of the land, must be based, not upon the agreement made by the subsequent purchaser, but rather upon the theory that each purchaser buying a lot with notice of a general plan of improvement impliedly assents thereto, and may therefore be compelled to comply therewith at the suit of the owner of any other lot, without reference to the order in which the lots may have been sold.<sup>25</sup> In Massachusetts the enforcement of these restrictions upon the use of land in favor of one other than the original vendor of the land are exclusively cases in which a general building plan or uniform mode of use or improvement has been established and made a part of the particular conveyances or sales, either by express agreement or by representation or suggestion.<sup>26</sup> But

<sup>25</sup> *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329; *Winfield v. Henning*, 21 N. J. Eq. 188, 2 Gray's Cas. 502; *Tallmadge v. East River Bank*, 26 N. Y. 105, 2 Gray's Cas. 497; *Barron v. Richard*, 8 Paige (N. Y.) 351; *Spicer v. Martin*, 14 App. Cas. 12; *MacKenzie v. Childers*, 43 Ch. Div. 265; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632. See article by Edward O. Keasbey, Esq., in 6 Harv. Law Rev. 280.

<sup>26</sup> *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632;



in other jurisdictions an agreement by a vendee of land is regarded as binding, in favor of the vendee, of other land without reference to the fact that it was or was not in pursuance of a general plan.<sup>27</sup>

§ 353. Defenses to enforcement.

If the original plan of improvement has been abandoned, or the character of the neighborhood has been changed so as to defeat the purpose of the covenant or agreement, it will not be enforced;<sup>28</sup> nor will the agreement be enforced if the party seeking its enforcement has been guilty of laches or acquiescence in defendant's violation of the agreement.<sup>29</sup> But the fact that the person entitled to enforce the agreement has ac-

*Linzee v. Mixer*, 101 Mass. 512; *Tobey v. Moore*, 130 Mass. 448; *Sanborn v. Rice*, 122 Mass. 387; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Sharp v. Ropes*, 110 Mass. 381; *Hills v. Metzenroth*, 173 Mass. 423.

<sup>27</sup> *Clark v. Martin*, 49 Pa. St. 289; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Hayes v. Waverly & P. Ry. Co.*, 51 N. J. Eq. 345; *McMahon v. Williams*, 79 Ala. 288. See *Peck v. Conway*, 119 Mass. 546, 2 Gray's Cas. 508.

<sup>28</sup> *Bedford v. Trustees of British Museum*, 2 Mylne & K. 552; *Peck v. Matthews*, L. R. 3 Eq. 515; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Duncan v. Central Passenger Ry. Co.*, 85 Ky. 525; *Ammerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584; *Page v. Murray*, 46 N. J. Eq. 325; *Coughlin v. Barker*, 46 Mo. App. 54; *Moore v. Murphy*, 89 Hun (N. Y.) 175; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476. See *Landell v. Hamilton*, 175 Pa. St. 327, 177 Pa. St. 23.

<sup>29</sup> *Sayers v. Collyer*, 28 Ch. Div. 103; *Knight v. Simmonds* [1896] 2 Ch. 294; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Linzee v. Mixer*, 101 Mass. 512; *Payson v. Burnham*, 141 Mass. 547.

So it was held that, if the owner of a lot had, by building a wall rendered a restriction upon the height of buildings on the next lot partially valueless to his lot, he could not enforce the restriction so as to prevent the construction of buildings no higher than the wall. *Landell v. Hamilton*, 177 Pa. St. 23.

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quiesced in its violation on isolated parts of the land sold will not prevent its enforcement by him or his assigns with respect to other parts.<sup>80</sup>

If the agreement was intended for the benefit of neighboring land and the owners thereof, the original promisee cannot, in derogation of the rights of his vendee, waive the agreement in favor of a vendee of another part of the land.<sup>81</sup>

<sup>80</sup> *German v. Chapman*, 7 Ch. Div. 271; *Knight v. Simmonds* [1896] 2 Ch. 294; *Linzee v. Mixer*, 101 Mass. 512.

<sup>81</sup> *Spicer v. Martin*, 14 App. Cas. 12; *Coudert v. Sayre*, 46 N. J. Eq. 286. And see *Landell v. Hamilton*, 177 Pa. St. 22.

## **CHAPTER XVI.**

### **RENTS.**

- § 354. The nature of rent.**
- 355. Things from which rent may issue.**
- 356. Classes of rents.**
- 357. Rents as real or personal property.**
- 358. Place and time of payment.**
- 359. Mode of reservation.**
- 360. Transfer of rights and liabilities.**
- 361. Apportionment as to time.**
- 362. Apportionment as to amount.**
- 363. Extinction or suspension of rent.**
- 364. Remedies for nonpayment.**

Rent is a tribute of a certain amount, regarded as issuing out of land, as part of its actual or possible profits, and rendered periodically by the owner of an estate therein, as a compensation for his use and enjoyment of the land, or as a charge on the land.

A rent service is a rent reserved upon a transfer of land creating a relation of tenure, the ordinary example at the present day being a lease for years, leaving a reversion in the lessor. A rent charge is created by a grant of a rent by the owner of land.

The right to rent, or to a proportional part thereof, usually passes to an assignee of the reversion, or of a part of the reversion, or it may be transferred without the reversion. The liability for rent is transferred by a transfer of the leasehold, but the lessor remains liable upon his covenant to pay rent.

Rent does not accrue from day to day, and consequently, in case of change of title to the reversion between two rent days, the rent is not apportioned.

The rent, or liability therefor, may be extinguished or sus-

pended by release, exclusion or eviction of the tenant from the premises, in some states by destruction of the buildings on the premises, or by the termination of the leasehold interest. It may be partially extinguished or suspended by a partial release, a partial eviction by title paramount, or a partial termination of the leasehold interest.

The landlord's remedies in case of nonpayment of rent are: (1) The action of debt; (2) an action on the covenant to pay rent; (3) an action for use and occupation; (4) re-entry for breach of a condition to pay rent; (5) distress, or its statutory substitutes; (6) the enforcement of the statutory landlord's lien, or the statutory remedy of attachment; (7) enforcement in equity, in some cases, of the application of the profits of the land in payment of the rent.

### § 354. The nature of rent.

The word "rent" is derived from "render," and the name thus emphasizes the distinction between rent, which is actually rendered or paid by the tenant, and a *profit à prendre*, which is taken by the person entitled thereto, without the active intervention of the tenant.<sup>1</sup> The term is used with some indefiniteness to describe both the right to the successive periodical payments or "renders," and also what may be periodically due or payable,—that is, it may refer to either the right to periodical compensation or to the compensation itself.<sup>2</sup>

Rent is generally stated to be a "profit issuing out of the land,"<sup>3</sup> but this does not mean that the actual product of the soil must be delivered as rent. The use of the term "profit" refers rather, it would seem, to the underlying theory of rent,—that it, like other feudal services, is something owed by

<sup>1</sup> 2 Leake, 373; Co. Litt. 142a.

<sup>2</sup> See 2 Minor, Institutes, 82. Thus it may be said that the owner of a "rent" is entitled to prompt payment of the "rent." Here the word "rent" is evidently used in two distinct senses.

<sup>3</sup> 1 Taylor, Landl. & Ten. § 369; 1 Woodfall, Landl. & Ten. 376; 2 Leake, 372.

the land itself,<sup>4</sup> and consequently is necessarily payable out of the profits of the land.<sup>5</sup> Rent is, in fact, usually reserved or made payable in money, but the tribute to be rendered may, by the terms of the reservation, take almost any form, as, for instance, the delivery of a horse,<sup>6</sup> or of a certain amount of grain or cotton,<sup>7</sup> or the payment of taxes,<sup>8</sup> the furnishing of board or support,<sup>9</sup> or the performance of manual services on or off the land.<sup>10</sup>

Rent cannot, it is said, consist of part of the annual products of the soil (*fructus naturales*), since these are part of the land itself, which can be the subject of an exception only, and not of a reservation.<sup>11</sup> So, while it is sometimes stated that a portion of the minerals in the land may be reserved as rent,<sup>12</sup> the proper view of those cases in which the grantor or lessor reserves to himself a share of the ore which may be removed from the land granted or leased is that an exception from the grant is thereby created, although it be in form a stipulation for rent.<sup>13</sup>

<sup>4</sup> See ante, § 7.

<sup>5</sup> Compare 2 Pollock & Maitland, *Hist. Eng. Law*, 123.

<sup>6</sup> Co. Litt. 142a.

<sup>7</sup> Co. Litt. 142a; *Townsend v. Isenberger*, 45 Iowa, 670; *Boyd v. McCombs*, 4 Pa. St. 146; *McDougal v. Sanders*, 75 Ga. 140. Frequently, in this country, under contracts for the cultivation of land on shares, rent consists of a portion of the crop raised. See ante, § 230.

<sup>8</sup> *Roberts v. Sims*, 64 Miss. 597.

<sup>9</sup> *Baker v. Adams*, 5 Cush. (Mass.) 99; *Shouse v. Krusor*, 24 Mo. App. 279.

<sup>10</sup> Co. Litt. 96a, 96b; *Doe d. Edney v. Benham*, 7 Q. B. 976; *Van Rensselaer v. Jewett*, 2 N. Y. 141.

<sup>11</sup> Co. Litt. 142a; *Sheppard's Touchstone* (Preston's Ed.) 80; *Moulton v. Robinson*, 27 N. H. 550. But see ante, § 230.

<sup>12</sup> *Buckley v. Kenyon*, 10 East, 139; *Rex v. Pomfret*, 5 Maule & S. 139; *Reg. v. Westbrook*, 10 Q. B. 178.

<sup>13</sup> See *Gowan v. Christie*, L. R. 2 H. L. Sc. 273, 284, per Lord (773)

The amount of the rent must be certain, or capable of reduction to a certainty,<sup>14</sup> but it is sufficient if the ascertainment of the amount can be made before the time for payment of the rent.<sup>15</sup>

§ 355. Things from which rent may issue.

A rent can be reserved only out of lands or things constituting in law a part thereof, and cannot be reserved out of incorporeal things; the reason, as given in the books, being that it must be reserved out of something whereunto the lessor may have recourse in order to distrain.<sup>16</sup> On this principle, it is held that, where land is leased, together with incorporeal rights as incident thereto, the rent is to be regarded as issuing entirely out of the land, for the purpose of enforcing the remedy for nonpayment.<sup>17</sup> Since rent cannot issue out of chattels, in the case of a lease of land together with chattels, the whole rent is considered as issuing from the land alone for most purposes,<sup>18</sup> and there may be a distress on the

*Cairns; Coltness Iron Co. v. Black*, 6 App. Cas. 315, 325, per Lord Blackburn; *Fairchild v. Fairchild* (Pa.) 9 Atl. 255; *Duff's Appeal*, 21 Wkly. Notes Cas. (Pa.) 491. See ante, § 222.

<sup>14</sup> *Gilbert, Rents*, § 9; 1 *Woodfall, Landl. & Ten.* 375.

<sup>15</sup> *Co. Litt.* 96a; *Selby v. Greaves*, L. R. 3 C. P. 594; *Walsh v. Lonsdale*, 21 Ch. Div. 9; *McFarlane v. Williams*, 107 Ill. 33; *Dutcher v. Culver*, 24 Minn. 584.

<sup>16</sup> *Co. Litt.* 47a, 142a; *Gilbert, Rents*, 20; *Raby v. Reeves*, 112 N. C. 688.

<sup>17</sup> *Buszard v. Capel*, 8 Barn. & C. 141, 2 Gray's Cas. 688. So, in *Winslow v. Henry*, 5 Hill (N. Y.) 481, where there was a demise of a room with a right to use a passage communicating therewith, it was held that the passage was not a part of the premises demised, so as to justify a distress on goods found therein.

<sup>18</sup> *Farewell v. Dickenson*, 6 Barn. & C. 251, 2 Gray's Cas. 688.

In *Mickle v. Miles*, 31 Pa. St. 20, and *Vetter's Appeal*, 99 Pa. St. 52, it was said that rent may issue, not only from lands and tenements, but also from the personal property necessary for their enjoyment, but by this the court evidently meant merely that rent

land for the whole rent,<sup>19</sup> and an eviction from the land will entirely suspend the liability for rent, without reference to the continuance of the right to use the chattels.<sup>20</sup> Whether the loss of the use and enjoyment of chattels thus leased with land will relieve the tenant from liability for a proportional part of the rent is doubtful.<sup>21</sup>

On the same principle, that the rent issues entirely out of the land, it has been decided that the executor of the lessor, though entitled to the chattels, has no right to a portion of rent reserved on a lease of land and chattels.<sup>22</sup> In another state, however, it has been held that the grantee of the reversion in the land only is not entitled to the whole rent reserved, if the title to the chattels remains in the lessor;<sup>23</sup> and it has been suggested that, if the chattels and the land pass into the hands of different persons, the rent should be apportioned between them.<sup>24</sup>

### § 356. Classes of rents.

The classification of rents at common law was based primarily upon the distinction between a rent which was reserved upon the conveyance or lease of land, as a compensa-

does not cease to be rent because reserved upon a lease of land which also includes chattels.

<sup>19</sup> *Newman v. Anderton*, 3 Bos. & P. (N. R.) 224, 2 Gray's Cas. 681; *Mickle v. Miles*, 31 Pa. St. 20.

<sup>20</sup> *Gilbert*, Rents, 175; 1 Woodfall, Landl. & Ten. 402; *Ernett v. Cole*, Cro. Eliz. 255; *Cadogan v. Kennett*, Cowp. 432.

<sup>21</sup> In *Newton v. Wilson*, 3 Hen. & M. (Va.) 470, it was decided that the tenant should be relieved in such case from a proportionate part of the rent. To the same effect, *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277. *Gilbert*, Rents, 187, favors a contrary view, as do, apparently, by implication, the authorities cited in the last preceding note.

<sup>22</sup> *Armstrong v. Cummings*, 58 How. Pr. (N. Y.) 332; *Fay v. Halloran*, 35 Barb. (N. Y.) 295.

<sup>23</sup> *Buffum v. Deane*, 4 Gray (Mass.) 335.

<sup>24</sup> *Salmon v. Matthews*, 8 Mees. & W. 827.

tion to the grantor or lessor, and a rent which was granted by the owner of land to another person, without any transfer of the land, being merely a right to a periodical payment secured on the land.

In the former case, before the Statute of *Quia Emptores*, since the conveyance of the land created a relation of tenure, even in the case of the conveyance of an estate in fee simple, the payment of the rent reserved was regarded as one of the services incident to that relation.<sup>25</sup> Accordingly, a rent reserved upon the making of a feoffment, whereby the relation of tenure was created, was known as a "rent service."<sup>26</sup>

Upon a failure to perform this feudal service of paying rent, the lord was, as in the case of default in any other of the feudal services, entitled to enforce its performance by the seizure of chattels upon the land, this being known as the remedy of "distress."<sup>27</sup> This right of distress was a distinctive feature of the particular class of rents known as "rents service."

The right of distress was an incident of the right of lordship, the "seignory," or, when the tenure was for an estate less than a fee simple, of the reversion remaining in the lord, and consequently, if the lord granted the seignory or reversion while retaining the rent, or granted the rent while retaining the seignory or reversion, the rent could no longer be enforced by distress, and was accordingly thereafter termed a "rent seck" or "dry rent."<sup>28</sup>

In the case of a rent created by the grant of a rent by the owner of land, of which he retained the ownership, no relation of tenure was created, and consequently there was no remedy by way of distress for the enforcement of the obliga-

<sup>25</sup> See ante, § 7.

<sup>26</sup> Litt. § 122; Gilbert, Rents, 9.

<sup>27</sup> Litt. §§ 213, 216. See post, § 364.

<sup>28</sup> Litt. §§ 218, 225-228; *Den d. Farley v. Craig*, 15 N. J. Law, 192



tion. A rent so created was accordingly another form of "rent seck." A right of distress might, however, be expressly given in the grant, in which case the rent was known as a "rent charge."<sup>29</sup> Rents charge, thus created by a grant of a rent by the owner of land, he retaining the entire interest in the land, are quite common in England, they being sometimes granted by the purchaser of land as part of the consideration therefor, and also being utilized as a mode of providing for younger sons and others in family settlements. In this country, however, they are very infrequent. They are in effect merely annuities secured on land, and in some cases equity will enforce their payment by a sale of the land, as in the case of a mortgage or other lien.

After the Statute *Quia Emptores*, a conveyance of land in fee simple no longer had the effect of creating a relation of tenure between the feoffor and feoffee, but the feoffee merely became substituted in place of the feoffor. Consequently, a reservation of rent on such a conveyance thereafter made could not be regarded as a rent service, and was a rent seck, without the right of distress, unless this right was expressly given, so as to render it a rent charge.<sup>30</sup> Since, however, this statute did not apply in the case of a conveyance of an estate less than a fee, a rent service is, even at the present day, created by the reservation of rent upon the conveyance or lease by a tenant in fee of a less estate, either an estate tail, an estate for life, or one for years; and likewise when a tenant of an estate less than a fee conveys or leases for a

<sup>29</sup> Litt. §§ 218, 219; Co. Litt. 150b; 2 Pollock & Maitland, Hist. Eng. Law, 129.

<sup>30</sup> Litt. §§ 215-217; Co. Litt. 143b, Hargrave's note; Bradbury v. Wright, 2 Doug. 624; Van Rensselaer v. Chadwick, 22 N. Y. 32.

In Pennsylvania, a rent created by a reservation upon the conveyance of land in fee simple is a rent service, but this is owing to the fact that the statute *Quia Emptores* is not in force there. *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 336, Finch's Cas. 86.

period less than his own estate, so as to leave a reversion in him. Consequently, the rent reserved on the ordinary lease for years is a rent service, and is attended with the right of distress in jurisdictions where this has not been abolished.<sup>31</sup> Rent reserved on a tenancy at will is not properly a rent service, because there is no relation of tenure, but distress is allowed, at common law, as in the case of a rent service.<sup>32</sup>

§ 357. Rents as real or personal property.

A rent charge granted by the owner of land is real or personal property, according as the grantee is given a freehold estate therein, or an estate less than freehold.<sup>33</sup> A rent reserved upon the grant of a fee-simple estate in land is real property passing to the heir or devisee.<sup>34</sup>

A rent service incident to a reversion partakes of the nature of the reversion. Accordingly, it is more usually real property passing to the heir, as being reserved by a tenant in fee simple making a lease for years, though it is personally belonging to the executor or administrator, if reserved on a sublease by a tenant for years.<sup>35</sup> If, however, a rent reserved on a lease for years by a tenant in fee simple becomes

<sup>31</sup> Litt. §§ 214, 215; *Ehrman v. Mayer*, 57 Md. 621; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337, *Finch's Cas.* 86; *Den d. Farley v. Craig*, 15 N. J. Law, 192.

<sup>32</sup> Litt. § 72; *Co. Litt.* 57b.

<sup>33</sup> *Knolle's Case*, 1 Dyer, 5b; *Butt's Case*, 7 Coke, 23a; 1 *Woerner, Administration*, § 297.

<sup>34</sup> *Cobb v. Biddle*, 14 Pa. St. 444; *White's Estate*, 167 Pa. St. 204. As to the particular mode of descent of a rent charge created by the reservation of a rent on a grant in fee, see *Co. Litt.* 12b; 3 *Preston, Abstracts*, 54; *Van Rensselaer v. Hays*, 19 N. Y. 68, *Finch's Cas.* 81.

<sup>35</sup> 1 *Woerner, Administration*, § 300; *Sacheverell v. Froggatt*, 1 *Saund.* 367a, notes; *Stinson v. Stinson*, 38 Me. 593; *Dixon v. Nicolls*, 39 Ill. 372, 39 Am. Dec. 312; *Rubottom v. Morrow*, 24 Ind. 301, 37 Am. Dec. 324; *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932.

separated from the reversion,<sup>36</sup> it is equivalent to an estate for years merely in a rent charge, and passes to the personal representative of the owner, and not to the heir or devisee.<sup>37</sup>

Rent which has become due is personal property, and consequently, upon the death of the person entitled thereto, though still unpaid, it goes to his personal representative, and not to his heir or devisee.<sup>38</sup>

§ 358. Place and time of payment.

Rent is payable, in the absence of a stipulation otherwise, upon the demised premises.<sup>39</sup>

Rent payable in money on a particular day is, strictly speaking, not due till midnight of that day.<sup>40</sup> In order, however, for the landlord to enforce a forfeiture for nonpayment, or for the tenant to avoid such forfeiture, the latter must demand the rent, or the latter must pay it, before sunset of the day of payment.<sup>41</sup>

§ 359. Mode of reservation.

As a rent may be reserved on a conveyance in fee, so it may be reserved upon the transfer of the whole interest of a tenant for life or for years, a reversion in the transferrer being unnecessary.<sup>42</sup>

<sup>36</sup> See post, § 360.

<sup>37</sup> Knolle's Case, Dyer, 5b; Williams, Executors (9th Ed.) 727.

<sup>38</sup> 1 Woerner, Administration, § 300; Mills v. Merryman, 49 Me. 65; Haslage v. Krugh, 25 Pa. St. 97; Bealey v. Blake's Adm'r, 70 Mo. App. 229; Ball v. First Nat. Bank of Covington, 80 Ky. 501.

<sup>39</sup> Co. Litt. 201b, 202a; Boroughes' Case, 4 Coke, 72a; Walter v. Dewey, 16 Johns. (N. Y.) 222; Fordyce v. Hathorn, 57 Mo. 120. As to the necessity of a demand on the premises in order to enforce a condition of re-entry for nonpayment of rent, see ante, § 71.

<sup>40</sup> Cutting v. Derby, 2 W. Bl. 1077; Smith v. Shepard, 15 Pick. (Mass.) 147, 25 Am. Dec. 432; Hammond v. Thompson, 163 Mass. 531; Sherlock v. Thayer, 4 Mich. 355, 66 Am. Dec. 539.

<sup>41</sup> See ante, § 71.

<sup>42</sup> Newcomb v. Harvey, Carth. 161, 2 Gray's Cas. 673; Williams v.

"Rent," properly so called, cannot, upon the grant or demise of land, be reserved to a person other than the grantor or lessor of the land.<sup>43</sup>

§ 360. Transfer of rights and liabilities.

Upon the conveyance of a reversion to which a rent is incident, the rent also passes unless there is a stipulation to the contrary;<sup>44</sup> but the reversion may be conveyed without the rent, or the rent may be assigned without the reversion, the rent and the reversion being thereby separated.<sup>45</sup>

The liability for rent reserved on a lease for years passes to an assignee of the leasehold by reason of the "privity of estate" existing between him and the owner of the reversion, and an assignee of the reversion has also, on the same theory, a right to recover the rent. This question of the rights and liabilities of the transferees by reason of their privity of estate will be more conveniently considered in connection with the subject of the common-law action of "debt" as a remedy for nonpayment of rent.<sup>46</sup>

— Covenants to pay rent.

A lease usually contains a covenant on the part of the lessee to pay rent. Both the benefit and the burden of a

Hayward, 1 El. & El. 1040, 2 Gray's Cas. 700; *McMurphy v. Minot*, 4 N. H. 251, 2 Gray's Cas. 743.

<sup>43</sup> Litt. § 346; Co. Litt. 47a, 143b, 213b, Butler's note; *Oates v. Frith*, Hob. 130a; *Ege v. Ege*, 5 Watts (Pa.) 133; *Ryerson v. Quackenbush*, 26 N. J. Law, 286.

<sup>44</sup> *Walker's Case*, 3 Coke, 23, 2 Gray's Cas. 661; *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Dixon v. Niccolla*, 39 Ill. 373, 39 Am. Dec. 312; *Steed v. Hinson*, 76 Ala. 298. And see cases cited ante, § 47, note 247.

<sup>45</sup> Co. Litt. 143a, 151b; *Moffatt v. Smith*, 4 N. Y. 126, Finch's Cas. 749; *Beal v. Boston Car Spring Co.*, 125 Mass. 157, 23 Am. Rep. 216, 2 Gray's Cas. 787; *Crosby v. Loop*, 13 Ill. 625; *Damron v. American Light & Power Co.*, 91 Me. 334.

<sup>46</sup> See post, § 364.

covenant to pay rent, upon a demise leaving a reversion in the lessor, run with the land,<sup>47</sup> and consequently an action thereon may be brought by the assignee of the reversion<sup>48</sup> and against an assignee of the lessee.<sup>49</sup>

It has been decided in this country that, even upon the assignment of a rent reserved on a lease for years, apart from the reversion, the benefit of the lessee's covenant runs with the rent, so as to authorize suit by the assignee thereon.<sup>50</sup>

In case of the assignment of a part only of the reversion by the lessor, he and his assignee are each entitled to recover, on the lessee's covenant to pay rent, a proportional part of the rent.<sup>51</sup>

The liability on the covenant to pay rent has likewise been regarded as apportionable to such an extent as to render an assignee of a part of the leasehold subject to a proportional part thereof, and no more.<sup>52</sup> But the liability of the original lessee upon his covenant to pay rent, being of a purely contractual nature, is not affected by his transfer of the lease-

<sup>47</sup> See ante, § 49, note 260.

<sup>48</sup> *Thursby v. Plant*, 1 Saund. 240, 1 Lev. 259, 2 Gray's Cas. 671; *Midgleys v. Lovelace*, 12 Mod. 45; *Outtoun v. Dulin*, 72 Md. 536; 2 Taylor, Landl. & Ten. § 661.

<sup>49</sup> *Palmer v. Edwards*, 1 Doug. 187, note; *Steward v. Wolveridge*, 9 Bing. 60; *Donelson v. Polk*, 64 Md. 504; *Lee v. Payne*, 4 Mich. 106, 119; *Carley v. Lewis*, 24 Ind. 23; *Pingry v. Watkins*, 17 Vt. 379; *Bowdre v. Hampton*, 6 Rich. Law (S. C.) 208; *Salisbury v. Shirley*, 66 Cal. 225.

<sup>50</sup> *Willard v. Tillman*, 2 Hill (N. Y.) 274; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Patten v. Deshon*, 1 Gray (Mass.) 325. Contra, *Allen v. Wooley*, 1 Blackf. (Ind.) 148. See 1 Taylor, Landl. & Ten. § 261, note ad finem.

<sup>51</sup> *City of Swansea v. Thomas*, 10 Q. B. Div. 48; *Linton v. Hart*, 25 Pa. St. 193, 64 Am. Dec. 691; *Worthington v. Cooke*, 56 Md. 51; *Crosby v. Loop*, 13 Ill. 625; 2 Platt, Leases, 271.

<sup>52</sup> *Babcock v. Scoville*, 56 Ill. 461; *Harris v. Frank*, 52 Miss. 155; *St. Louis Public Schools v. Boatmen's Ins. & Trust Co.*, 5 Mo. App. 91 (semble).

hold interest, although his transferee also becomes liable thereon.<sup>53</sup>

— — Covenant to pay rent in fee.

The benefit of a covenant to pay rent reserved or granted in fee will, according to the English cases, it seems, not run with the rent, so as to be available to subsequent owners thereof, the theory being that a covenant will never run with an incorporeal thing.<sup>54</sup> In this country, on the other hand, it has been usually held that the benefit of the covenant will run with the rent,<sup>55</sup> this being in accord with the view held here that a covenant will run with an incorporeal thing.<sup>56</sup>

In this country, likewise, the burden of a covenant to pay a rent in fee is regarded as passing with the land, so as to render the grantee of the land personally liable thereon.<sup>57</sup>

<sup>53</sup> *Thursby v. Plant*, 1 Saund. 237, 1 Lev. 259, 2 Gray's Cas. 671; *Mills v. Auriol*, 1 H. Bl. 433; *Randall v. Rigby*, 4 Mees. & W. 124; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Crevelling v. De Hart*, 54 N. J. Law, 338; *Taylor v. De Bus*, 31 Ohio St. 468; *Dewey v. Dupuy*, 2 Watts & S. (Pa.) 553. But his liability in an action of debt for the rent no longer continues. See post, § 364.

<sup>54</sup> *Milnes v. Branch*, 5 Maule & S. 411, 2 Gray's Cas. 684; *Randall v. Rigby*, 4 Mees. & W. 120, 135.

<sup>55</sup> *Scott v. Lunt's Adm'r*, 7 Pet. (U. S.) 596; *Streaper v. Fisher*, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; *Trustees of St. Mary's Church v. Miles*, 1 Whart. (Pa.) 229; *Cook v. Brightly*, 46 Pa. St. 439; *Van Rensselaer v. Read*, 26 N. Y. 558, distinguishing *Devises of Van Rensselaer v. Executors of Platner*, 2 Johns. Cas. (N. Y.) 24. But see *Irish v. Johnston*, 11 Pa. St. 488, and the discussion of the question in notes to *Spencer's Case*, 1 Smith, Lead. Cas. Eq. 193.

<sup>56</sup> See ante, § 345.

<sup>57</sup> *Streaper v. Fisher*, 1 Rawle (Pa.) 155; *Herbaugh v. Zentmyer*, 2 Rawle (Pa.) 159; *Hannen v. Ewalt*, 18 Pa. St. 9; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Dennison*, 35 N. Y. 393. See 1 Taylor, Landl. & Ten. § 261, note. On the same principle, the burden of a covenant to pay a rent reserved upon the transfer of a life interest in land will bind a subsequent transferee of such interest. *McMurphy v. Minot*, 4 N. H. 251, 2 Gray's Cas. 743.

In England, it would seem, in view of the expressions adverse to the running of the burden of covenants on conveyances in fee,<sup>58</sup> that the grantee of the land would not be liable on the covenant.<sup>59</sup>

§ 361. Apportionment as to time.

At common law, rent is not regarded as accruing from day to day, like interest, but it becomes due only upon the day named for payment,<sup>60</sup> and consequently, if a tenant in fee, or a tenant for life with a power of leasing, after making a lease for years, die between two rent days, his executors are entitled to no part of the rent as against his heir or devisee, or as against the remainderman,<sup>61</sup> and, on a sale of land, the vendor has, in the absence of a special stipulation, no right to any part of the rent subsequently payable.<sup>62</sup> So in case a tenant is evicted by title paramount between rent days, the landlord cannot claim a portion of the rent as having accrued before the eviction,<sup>63</sup> nor can he do so when he himself ter-

<sup>58</sup> See ante, § 60.

<sup>59</sup> Holt, C. J., in *Brewster v. Kidgill*, 12 Mod. 166, 2 Gray's Cas. 674; *Copinger & Munro's Law of Rents*, 473-476. But that the burden does run, see *Sugden, Vendor & Purchaser* (13th Ed.) 483; *Harrison, Chief Rents*, 102.

<sup>60</sup> *Clun's Case*, 10 Coke, 127a; *Anderson v. Robbins*, 82 Me. 422; *Marshall v. Moseley*, 21 N. Y. 280; *Sohler v. Eldredge*, 103 Mass. 345, 351.

<sup>61</sup> *Bloodworth v. Stevens*, 51 Miss. 475. See cases cited ante, note 60.

So, when a life tenant with power to make leases, having made a lease, died on the day named for payment of the rent, since the rent was not legally due till the end of the day, the remainderman was entitled to the whole rent. *Rockingham v. Penrice*, 1 P. Wms. 177, 2 Gray's Cas. 716.

<sup>62</sup> *Hearne v. Lewis*, 78 Tex. 276; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.) 394.

<sup>63</sup> *Clun's Case*, 10 Coke, 127a; *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 270.

minates the lease before the rent is due.<sup>64</sup> On the same principle, at common law, if a tenant for life die after making a lease for years, his executor cannot recover the rent up to his death, nor can the reversioner or remainderman recover it, since he is entitled only to what becomes due during his time, and so the lessee escapes liability for rent from the last rent day.<sup>65</sup>

The rule forbidding apportionment of rent, so far as concerned a rent reserved on a lease by a tenant for life, terminating by his death, was changed by St. 11 Geo. II. c. 19, § 15, and a similar statute has been enacted in many of the states.<sup>66</sup> By a later English statute,<sup>67</sup> rents are to be considered as accruing from day to day, and as apportionable accordingly, and in some states there are general provisions of approximately similar effect, giving one entitled to a rent, or his personal representative, a proportional part thereof, calculated up to the day of his death or other termination of his interest.<sup>68</sup>

### § 362. Apportionment as to amount.

The owner of a rent, or of a reversion to which a rent is incident, may partition the rent by granting parts thereof, measured by amount, to different persons, as when one who has demised land for years, reserving a rent of a certain sum

<sup>64</sup> *Zule v. Zule*, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; *Nicholson v. Munigle*, 6 Allen (Mass.) 215, 219; *Robinson v. Deering*, 56 Me. 357. So it is held in Massachusetts that, in case of the termination by the landlord's act of a tenancy at will before the day for payment of the rent, no rent can be recovered. *Hammond v. Thompson*, 168 Mass. 531.

<sup>65</sup> *Jenner v. Morgan*, 1 P. Wms. 391, 2 Gray's Cas. 718; *Ex parte Smyth*, 1 Swanst. 337, notes; *Perry v. Aldrich*, 18 N. H. 343, 38 Am. Dec. 493; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424.

<sup>66</sup> 1 Stimson's Am. St. Law, § 2027 (B).

<sup>67</sup> "The Apportionment Act," 33 & 34 Vict. c. 35 (A. D. 1870).

<sup>68</sup> 1 Stimson's Am. St. Law, § 2027 (A).



yearly, grants to each of three persons the right to one-third of such yearly sum.<sup>69</sup> And so if the reversion to which a rent is incident is conveyed to or otherwise acquired by two or more persons, as when the owner of the reversion grants to each of them the reversion in a distinct part of the land, each is, in the absence of a stipulation to the contrary, entitled to so much of the rent as is proportioned to his share of the land.<sup>70</sup> And if the lessor grant the reversion of a part of the land, retaining the balance, he and his grantee are entitled to proportional shares of the rent.<sup>71</sup> In case of the conveyance of a part or of separate parts of the reversion, the tenant, unless he consents to the apportionment made by the parties to the conveyance, is entitled to have an apportionment, based upon the respective values of the different parts of the land, made by a jury, in order to determine his respective obligations to the owners of the reversion.<sup>72</sup>

The right to rent reserved on a lease for years is terminated by the union of the leasehold and the reversion in one person,<sup>73</sup> and, in case a union of title occurs as to a part only of the land, the rent is apportioned, and it is extinguished in an amount proportioned to the value of the land in which there is such unity of title, while still existent as regards the balance.<sup>74</sup>

<sup>69</sup> *Ards v. Watkin*, Cro. Eliz. 637, 651, 2 Gray's Cas. 667; *Rivis v. Watson*, 5 Mees. & W. 255; *Ryerson v. Quackenbush*, 26 N. J. Law, 236; *Farley v. Craig*, 11 N. J. Law, 262.

<sup>70</sup> *Moodle v. Garnance*, 3 Bulst. 153; *Ehrman v. Mayer*, 57 Md. 612; *Crosby v. Loop*, 13 Ill. 625.

<sup>71</sup> Co. Litt. 148a; *West v. Lassels*, Cro. Eliz. 851; *Linton v. Hart*, 25 Pa. St. 193, 64 Am. Dec. 691; *Worthington v. Cooke*, 56 Md. 51. See ante, § 360.

<sup>72</sup> *Billis v. Collins*, 5 Barn. & Ald. 376. And see *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357, 31 Am. Dec. 513.

<sup>73</sup> See post, § 363.

<sup>74</sup> Litt. § 222; Co. Litt. 148a; *Walker's Case*, 3 Coke, 22b, 2 Gray's Cas. 661; *Ehrman v. Mayer*, 57 Md. 612; *Peters v. Newkirk*, 6 Cow.

The right to and liability for rent are also partially extinguished if the tenant ceases to have possession of part of the premises owing to a re-entry by the landlord, under the terms of the lease, into a part of the land;<sup>75</sup> or in case the tenant is evicted from part of the land by title paramount, the landlord being entitled to so much of the rent as is proportioned to the part of which the tenant retains possession.<sup>76</sup>

A tenant cannot, without the consent of the owner of the rent, by any disposition of the land, or of a part thereof, apportion the rent so as to affect the right of such owner to collect the whole rent from any and every portion of the land, and, accordingly, an assignment by the lessee of the leasehold interest in a part of the premises does not affect the right to distrain on chattels on any part thereof, or to bring debt for the whole rent against the lessee,<sup>77</sup> and, as before stated, it does not affect his liability on his covenant to pay rent.<sup>78</sup>

A rent charge cannot, at common law, be apportioned, so as to exonerate part of the land, by act of a party, as distinct from act of the law; and consequently, if the ownership of the rent and of a portion of the land becomes vested in one

(N. Y.) 103; *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; *Leitch v. Boyington*, 84 Ill. 179; *Higgins v. California Petroleum & Asphalt Co.*, 109 Cal. 304. If, however, the rent consists of the delivery of an indivisible chattel, since it cannot be apportioned, it is extinguished. Litt. § 222; *Bruerton's Case*, 6 Coke, 1.

<sup>75</sup> *Walker's Case*, 3 Coke, 22b, 2 Gray's Cas. 661; *Collins v. Harding*, 13 Coke, 58.

<sup>76</sup> Co. Litt. 148b; *Gilbert, Rents*, 173; *Lawrence v. French*, 25 Wend. (N. Y.) 443, 2 Gray's Cas. 755; *Christopher v. Austin*, 11 N. Y. 216, 2 Cas. 762; *Fillebrown v. Hoar*, 124 Mass. 580; *Halligan v. ...*, 470, 74 Am. Dec. 108; *Seabrook v. ...*, 83 Pa. S.

<sup>77</sup> *... v. ...*, 3 Coke, 24a, 2 Gray's Cas. 661; *... v. Spitty*, 1 Bing. N. C. ...

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person,<sup>79</sup> or if the owner of the rent releases a part of the land therefrom,<sup>80</sup> the whole rent is extinguished. A rent charge may, however, be apportioned by agreement between the owners of the land and of the rent; this, in effect, constituting a new rent charge.<sup>81</sup>

On the theory that a contractual liability is not apportionable, the original lessee has been regarded as liable, on his covenant to pay rent, for the whole amount thereof, even, it seems, after his eviction from part of the premises by title paramount,<sup>82</sup> and even though his assignee has surrendered part of the premises to the landlord.<sup>83</sup> It does not seem that such a rule would usually be adopted in this country, in view of the wide extension of the principle of partial failure of consideration, and also of the freedom with which covenants are apportioned as regards the right of recovery thereon. Moreover, it would seem that the covenant might frequently be construed as one to pay the rent that may be due, rather than to pay the amount reserved, so as to make available, in an action on the covenant, all defenses which might be asserted in an action of debt.<sup>84</sup>

<sup>79</sup> Litt. § 222; Co. Litt. 147b, 148a; Gilbert, Rents, 154; Van Rensselaer v. Chadwick, 22 N. Y. 32; Ehrman v. Mayer, 57 Md. 612; Horner v. Dellinger (C. C.) 18 Fed. 495; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451. The whole rent is not, however, extinguished, if the owner of the rent acquires a part of the land by descent. Litt. § 224; Co. Litt. 194b.

<sup>80</sup> Co. Litt. 147b; Harrison, Chief Rents, 127; 18 Vin. Abr. 504. This is changed in England by 22 & 23 Vict. c. 35, § 10.

<sup>81</sup> Co. Litt. 147b; Van Rensselaer v. Chadwick, 22 N. Y. 32; Churton v. Lesing, 110 N. Y. 457.

<sup>82</sup> Lambard, 2 East, 575, 2 Gray's Cas. 679. Compare, *ibid.* v. Thomas, 10 Q. B. Div. 48.

<sup>83</sup> *ibid.* v. Morgan, 22 Q. B. Div. 74, and comments in & Ten. (16th Ed.) 324.

<sup>84</sup> Jones, 2 Ired. Eq. (N. C.) 350, 38 Am. Dec. 682, it was held that it would relieve in such case against an enforcement of the full amount.

## § 363. Extinction or suspension of rent—By release or merger.

A rent ceases to exist upon the making of a release of the rent by the owner of the rent to the owner of the land out of which it issues.<sup>85</sup> But if the owner of the rent, whether it be a rent service or a rent charge, release in terms a part only of the rent, the balance remains existent as a charge on the whole land.<sup>86</sup>

If the owner of a rent charge acquire the land out of which it issues for an estate equal to or greater than his estate or interest in the rent, or if the rent is acquired by the owner of such an estate in the land, the rent is merged in the land, and extinguished, while, if the estate in the land is less than the interest in the rent, the unity of ownership merely suspends the rent during the continuance of such estate in the land. Thus, a rent charge for life is extinguished if the owner acquire an estate for life or in fee, while it is merely suspended if he acquire an estate for years.<sup>87</sup>

At common law, as before explained, a rent service incident to a reversion less than a fee is extinguished by the merger of the reversion in the inheritance, as when a tenant for a term of years subleases for a less term, and his reversion passes to the owner of the reversion in fee, or he acquires such reversion.<sup>88</sup>

## — Withholding of possession.

If the lessor refuse to allow the lessee to have possession of part of the premises, though this is not an eviction, because

<sup>85</sup> Litt. §§ 479, 480; Co. Litt. 280a; *Howell v. Lewis*, 7 Car. & P. 566.

<sup>86</sup> Co. Litt. 148a; 2 Leake, 407; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337, *Finch's Cas.* 86.

<sup>87</sup> *Dixon v. Harrison*, Vaughan, 39; *Peto v. Pemberton*, Cro. Car. 101; *Freeman v. Edwards*, 2 Exch. 722.

<sup>88</sup> See ante, § 52(c).

not preceded by possession by the tenant, there can be no recovery of rent.<sup>89</sup> And even if the denial of possession is of only a part of the premises, there can be no recovery of rent unless the tenant waives full performance of the landlord's contract.<sup>90</sup> Nor can the lessor in such case recover upon a *quantum meruit* for the use and occupation of that part, possession of which is given.<sup>91</sup> When the lessor does not himself withhold possession of part of the premises, but the tenant's failure to obtain it is due to a previous lease, not under seal, made by the same lessor to another person, it has, in England, been decided that no rent is recoverable by the lessor, on the theory that the lease is void as to such part,<sup>92</sup> it being, on the other hand, considered that, if the second lease is under seal, as is necessary for the conveyance of a reversion, it is valid as a lease in possession of the land which the lessor had not previously leased, and as a lease of the reversion of the balance, subject to the previous lease.<sup>93</sup> It has, however, been held in this country that the fact that a part of the premises is in the occupation of a tenant under a previous lease by the same lessor will not prevent a recovery by the latter for use and occupation of the other part by the tenant under the second lease.<sup>94</sup>

<sup>89</sup> *McClurg v. Price*, 59 Pa. St. 420, 98 Am. Dec. 356, 2 Gray's Cas. 770. See *Trull v. Granger*, 8 N. Y. 115; *Garner v. Byard*, 23 Ga. 289, 68 Am. Dec. 527.

<sup>90</sup> *Holgate v. Kay*, 1 Car. & K. 341; *McClurg v. Price*, 59 Pa. St. 420, 98 Am. Dec. 356, 2 Gray's Cas. 770. See *Reed v. Reynolds*, 87 Conn. 469; *Tunis v. Grandy*, 22 Grat. (Va.) 109. Contra, apparently, in New York. See 1 McAdam, Landl. & Ten. 344.

<sup>91</sup> *McClurg v. Price*, 59 Pa. St. 420, 98 Am. Dec. 356, 2 Gray's Cas. 770; *Penny v. Fellner*, 6 Okl. 386.

<sup>92</sup> *Neale v. Mackenzie*, 1 Mees. & W. 747, 2 Gray's Cas. 727. See *Tunis v. Grandy*, 22 Grat. (Va.) 109, 132.

<sup>93</sup> *Ecclesiastical Com'rs of Ireland v. O'Connor*, 9 Ir. C. L. 242, 2 Gray's Cas. 736.

<sup>94</sup> *Lawrence v. French*, 25 Wend. (N. Y.) 443, 2 Gray's Cas. 756,

If the possession is withheld in part from the lessee by one having paramount title, the lessor may recover a proportional part of the rent only, as in the case of partial eviction under such title,<sup>95</sup> while, if it is wrongfully withheld by a third person, he may recover the whole rent, since he is not bound to put the lessee in possession.<sup>96</sup>

—Termination of leasehold interest.

If the estate or interest of the tenant is acquired by the owner of the immediate reversion,—the landlord,—it is merged in the reversion, and the rent service reserved upon the creation of the lesser estate is extinguished,<sup>97</sup> as is the case if the lesser estate is forfeited to the landlord for breach of condition.<sup>98</sup> A like result follows if the tenant acquire the reversion.<sup>99</sup>

*Tunis v. Grandy*, 22 Grat. (Va.) 109, 132. And see *Hatfield v. Fullerton*, 24 Ill. 278.

<sup>95</sup> *McLoughlin v. Craig*, 7 Ir. C. L. 117, 2 Gray's Cas. 734; *Doe d. Vaughan v. Meyler*, 3 Maule & S. 276; *Tunis v. Grandy*, 22 Grat. (Va.) 109, 132; *Holgate v. Kay*, 1 Car. & K. 341. Compare *Outtoun v. Dulin*, 72 Md. 536.

<sup>96</sup> *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Cozens v. Stevenson*, 5 Serg. & R. (Pa.) 421; *State University v. Joslyn*, 21 Vt. 52. But the lessor would be liable on his covenant for quiet enjoyment. See *Rawle, Covenants, Title*, § 138.

<sup>97</sup> *Terstegge v. First German Benevolent Soc.*, 92 Ind. 32, 47 Am. Rep. 135; *Pratt v. H. M. Richards Jewelry Co.*, 69 Pa. St. 53; *Kneeland v. Schmidt*, 78 Wis. 345; *Underhill v. Collins*, 132 N. Y. 269; *Amory v. Kannofoaky*, 117 Mass. 351, 19 Am. Rep. 416; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473.

But the rent is, at most, merely suspended, if the owner of the reversion acquire an underlease of the land. *Hodgkins v. Thornborough*, Poll. 142.

<sup>98</sup> *Jones v. Carter*, 15 Mees. & W. 718, 5 Gray's Cas. 33; *Oldershaw v. Holt*, 12 Adol. & El. 590; *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427. And see ante, § 98(e). The lease may, however, provide for continued liability on the part of the tenant in case of forfeiture. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; *Hall v. Gould*, 13 N. Y. 127.

<sup>99</sup> *Martin v. Searcy*, 3 Stew. (Ala.) 50, 20 Am. Dec. 64; *Leitch v.* (790)

— Taking land for public use.

Upon the taking of the whole of the leased land for public use under the power of eminent domain, the leasehold estate is terminated, and the obligation to pay rent terminates therewith.<sup>100</sup> But, by the weight of authority, his liability for rent is not affected by the fact that part of the land is so taken, it being presumed that compensation was made to him in the condemnation proceedings for such partial loss of the use of the property.<sup>101</sup>

— Destruction of buildings.

The obligation to pay rent is not terminated because the property has, without the tenant's fault, become uninhabitable or impossible of use;<sup>102</sup> and so it was decided in an early case that one was not relieved from liability therefor by the fact that an alien prince, with his army, expelled the tenant, since, "when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."<sup>103</sup> On this principle, it has been frequently decided that the liability for rent, in the absence of a statute to the contrary, continues even though the buildings on the leased land are totally destroyed by fire without the tenant's fault.<sup>104</sup>

Boyington, 84 Ill. 179; Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 235; Gunn v. Sinclair, 52 Mo. 327.

<sup>100</sup> See cases cited ante, § 52(1), note 351. *Contra*, Foote v. City of Cincinnati, 11 Ohio, 408, 38 Am. Dec. 737.

<sup>101</sup> See ante, § 51, note 304.

<sup>102</sup> 1 Taylor, Landl. & Ten. § 372; Niedelet v. Wales, 16 Mo. 214; Murray v. Albertson, 50 N. J. Law, 167, 7 Am. St. Rep. 787; Teller v. Boyle, 132 Pa. St. 56; Kramer v. Cook, 7 Gray (Mass.) 550.

<sup>103</sup> Paradine v. Jane, Aleyn, 26, 2 Gray's Cas. 713.

<sup>104</sup> Fawcett, Landl. & Ten. (2d Ed.) 207; 1 Taylor, Landl. & Ten. §§ 372, 375. See cases cited ante, § 52(1), note 353.

## § 364. Remedies for nonpayment—Action of debt.

When the person to whom rent was payable had a freehold interest in the rent, the nonpayment thereof on demand was considered, at common law, a disseisin of the rent, and consequently the real action of *novel disseisin* was the proper form of proceeding by which to recover it.<sup>116</sup> By statute, however, an exception to this rule was made in favor of the executors and administrators of tenants in fee of rents, who were authorized to sue in debt for arrears of rent due to their decedents.<sup>117</sup>

Since the abolition of real actions, it has, in England, been decided that an action of debt,<sup>118</sup> or its equivalent, will lie against the tenant in fee of land subject to a rent charge, on the theory that such an action did not lie at common law owing merely to the fact that the higher remedy by real action existed during the continuance of the freehold.<sup>119</sup>

<sup>116</sup> Litt. §§ 232-240.

<sup>117</sup> 22 Hen. VIII. c. 37 (A. D. 1540); Co. Litt. 162a; Harrison, Chief Rents, 180.

A tenant of land in fee simple who has leased for years has been held not to be a tenant in fee of the rent reserved on the lease for years, so that the statute will authorize an action of debt for the rent by his executors. *Prescott v. Boucher*, 3 Barn. & Adol. 849, 2 Gray's Cas. 690.

<sup>118</sup> Though the distinct forms of action known as "debt," "covenant," and "assumpsit" no longer exist in many states, they represent, as connected with the recovery of rent, distinctions of a substantive character in regard to the right and basis of recovery, and consequently, even in "code" states, a knowledge of the particular circumstances appropriate to the bringing of one rather than the other of these actions is most desirable, if not absolutely necessary.

<sup>119</sup> *Thomas v. Sylvester*, L. R. 3 Q. B. 368, 2 Gray's Cas. 704; *Christie v. Barker*, 53 Law J. Q. B. 537; *Searle v. Cooke*, 43 Ch. Div. 519. See *In re Herbage Rents* [1896] 2 Ch. 811.

The correctness of these decisions has, however, been questioned, on the ground that the duty of paying rent was, at common law, imposed on the land alone,—a "real obligation,"—and hence the mere abolition of real actions could not make it a personal obligation (794)



In the case of a rent for life, whether rent reserved on a lease for life or a rent charge granted for life, the tenant of the land was regarded as personally liable for the rent, and, while this personal liability could not be enforced during the existence of the life interest in the rent, because temporarily superseded by the existence of the "real" obligation on the part of the land, upon the termination of such real obligation by the termination of the life interest, the tenant's personal obligation then became enforceable by the owner of the rent, or his personal representatives.<sup>120</sup>

In the case of a rent reserved upon a lease for years, the right of the lessor to sue for arrears in an action of debt has always been recognized.<sup>121</sup>

Since the common-law action of debt is not founded upon a contract, but is rather a remedy for the recovery of a specific sum in the possession of the defendant belonging to the plaintiff, the tenant, in order to be liable therein, need not have contracted to pay the rent, but he is made liable as having taken the profits due by the land, and, consequently, mere privity of estate, as distinct from privity of contract, is sufficient to sustain the action. Accordingly, an assignee of the land, or of the particular estate therein which owes the rent, is liable in debt to the person entitled to the rent;<sup>122</sup> and an

tion. See the learned review of the subject by T. Cyprian Williams, Esq., 13 Law Quart. Rev. 288, and the references therein to Ognel's Case, 4 Coke, 48b.

<sup>120</sup> Ognel's Case, 4 Coke, 49a; Gilbert, Rents, 98; Co. Litt. 162a, Hargrave's note; 13 Law Quart. Rev. 291.

By statute (8 Anne, c. 14, § 4, A. D. 1709), the right was given to bring an action of debt for the recovery of a rent service reserved upon a lease for life, even during the lease, but it applied in no case where the relation of landlord and tenant did not exist. Webb v. Jiggs, 4 Maule & S. 113, 2 Gray's Cas. 682.

<sup>121</sup> Litt. §§ 58, 72; Co. Litt. 47b; 2 Pollock & Maitland, Hist. Eng. Law, 209; Gilbert, Rents, 93; Trapnall v. Merrick, 21 Ark. 503; Howland v. Coffin, 9 Pick. (Mass.) 52, 12 Pick. 125.

<sup>122</sup> Walker's Case, 3 Coke, 22a, 2 Gray's Cas. 661; Thursby v.

assignee of the reversion may recover therein against the lessee or an assignee of the lessee,<sup>123</sup> as may an assignee of the rent without the reversion.<sup>124</sup>

Debt will, moreover, lie against the original lessee, although the latter has assigned his lease, since the lessee cannot substitute another in his place without the landlord's assent. If, however, the landlord accept the lessee's assignee as tenant, he cannot thereafter bring debt against the original lessee.<sup>125</sup> If the lessee's interest in a part of the premises is assigned to another person, or in different parts to different persons, each of such assignees is liable in debt, by reason of privity of estate, for a proportional part of the rent.<sup>126</sup> The assignee of the reversion cannot bring debt against the original lessee after the latter's assignment of the term, since there is, in such case, neither privity of contract nor of estate.<sup>127</sup>

An action of debt, if brought by or against one not a party to the original lease, as in the case of an action by the as-

Plant, 1 Saund. 237, note (1); *Howland v. Coffin*, 9 Pick. (Mass.) 52, 12 Pick. 125; *McKeon v. Whitney*, 3 Denio (N. Y.) 452.

<sup>123</sup> *Walker's Case*, 3 Coke, 22a, 2 Gray's Cas. 661; *Thursby v. Plant*, 1 Saund. 237, 1 Lev. 259, 2 Gray's Cas. 671; *Howland v. Coffin*, 12 Pick. (Mass.) 125; *Patten v. Deshon*, 1 Gray (Mass.) 325; *Outton v. Dulin*, 72 Md. 536.

<sup>124</sup> *Williams v. Hayward*, 1 El. & El. 1040, 2 Gray's Cas. 700; *Allen v. Bryan*, 5 Barn. & C. 512; *Ryerson v. Quackenbush*, 26 N. J. Law, 236; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Kendall v. Carland*, 5 Cush. (Mass.) 74.

<sup>125</sup> *Walker's Case*, 3 Coke, 22a, 2 Gray's Cas. 661; *Marsh v. Brace*, Cro. Jac. 334, 2 Gray's Cas. 669; *Mills v. Auriol*, 1 H. Bl. 433, 440; *Wadham v. Marlowe*, 8 East, 314, note.

<sup>126</sup> *Gamon v. Vernon*, 2 Lev. 231; *Curtis v. Spitty*, 1 Bing. N. C. 760; *Harris v. Frank*, 52 Miss. 155; *St. Louis Public Schools v. Boatmen's Ins. & Trust Co.*, 5 Mo. App. 91. Compare *Damainville v. Mann*, 33 N. Y. 197.

<sup>127</sup> *Humble v. Glover*, Cro. Eliz. 323, 2 Gray's Cas. 666; *Walker's Case*, 3 Coke, 22a, 2 Gray's Cas. 667.

signee of the lessor or against the assignee of the lessee, being based on privity of estate, has always been regarded as a "local" action, which must be brought in the county where the land lies;<sup>128</sup> while, if brought against the original lessee by the lessor, being based on contract, it is "transitory," and may be brought where the lessee may be found, or where the contract was made.<sup>129</sup>

— Action of covenant.

On the lessee's covenant to pay the rent, usually contained in the lease, an action of covenant may be brought at common law,<sup>130</sup> and, in jurisdictions where such form of action is abolished, an equivalent action to enforce the tenant's liability on his covenant will lie.

An action by the lessor against the lessee on the covenant to pay rent is transitory, as being based purely on contract,<sup>131</sup> and the weight of authority is to the same effect as regards an action by the assignee of the lessor against the original lessee for years, on the theory that the privity of contract is transferred by the Statute 32 Hen. VIII. c. 34, to such assignee.<sup>132</sup> On the other hand, an action, whether by the

<sup>128</sup> 2 Taylor, Landl. & Ten. § 625; Bord v. Cudmore, Cro. Car. 183, 2 Gray's Cas. 669; Pine v. Leicester, Hob. 37, 2 Gray's Cas. 668; Stevenson v. Lambard, 2 East, 575, 2 Gray's Cas. 679; Whitaker v. Forbes, L. R. 10 C. P. 583; Bracket v. Alvord, 5 Cow. (N. Y.) 18.

<sup>129</sup> Wey v. Yally, 6 Mod. 194; Thursby v. Plant, 1 Wms. Saund. (Ed. 1871) 306-308; Bracket v. Alvord, 5 Cow. (N. Y.) 18; Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 502; Chitty, Pleading (7th Ed.) 232.

<sup>130</sup> Thursby v. Plant, 1 Saund. 237, 1 Lev. 259, 2 Gray's Cas. 671; Cross v. United States, 14 Wall. (U. S.) 479; Greenleaf v. Allen, 127 Mass. 248; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 164 Ill. 88; Russell v. Fabyan, 28 N. H. 543, 61 Am. Dec. 629; Taylor v. De Bus, 31 Ohio St. 468.

<sup>131</sup> Bulwer's Case, 7 Coke, 3a; Wey v. Yally, 6 Mod. 194; 1 Chitty, Pleading (7th Ed.) 232.

<sup>132</sup> Thursby v. Plant, 1 Saund. 237, 1 Lev. 259, and notes in 1

original lessor or his assignee, against the assignee of the lessee, is regarded as local, as being based on privity of estate.<sup>133</sup>

— Action for use and occupation.

*Assumpsit* for use and occupation will lie by force of St. 11 Geo. II. c. 19, § 14, or similar state statutes, in the case of a demise not under seal, or in the case of any permissive occupation, to recover a reasonable rent or remuneration for the use and occupation of the land.<sup>134</sup> This action will not lie, by the express terms of the statute, in case there was an agreement under seal to pay rent,<sup>135</sup> in which case covenant or debt must be brought.

The value of the use and occupation is presumptively determined by the value of the tenement and the length of the occupation.<sup>136</sup> If, however, there was an express promise to pay rent, this is received as evidence of such value.<sup>137</sup>

Wms. Saund. (Ed. 1871) 278, 307; 1 Chitty, Pleading (7th Ed.) 283.

<sup>133</sup> *Barker v. Damer*, Carth. 182; *Stevenson v. Lambard*, 2 East, 575, 2 Gray's Cas. 679; *Thursby v. Plant*, 1 Saund. 237; *Bowdre v. Hampton*, 6 Rich. Law (S. C.) 208. See *Salisbury v. Shirley*, 66 Cal. 223; *Bonetti v. Treat*, 91 Cal. 223; *Hintze v. Thomas*, 7 Md. 246, to the effect that the action is based on privity of estate.

<sup>134</sup> *Gibson v. Kirk*, 1 Q. B. 856, 2 Gray's Cas. 696; *Lloyd v. Hough*, 1 How. (U. S.) 158; *Goshorn v. Steward*, 15 W. Va. 657; *Dell v. Gardner*, 25 Ark. 134; *Codman v. Jenkins*, 14 Mass. 93; *Little v. Martin*, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; *Kline v. Jacobs*, 63 Pa. St. 57.

Before the passage of the statute mentioned, *assumpsit* to recover a sum certain would lie only in case there was an express promise to pay such sum, and *assumpsit* on a quantum meruit would not lie if there was a demise for a sum certain. See article by Prof. J. B. Ames in 2 Harv. Law Rev. 277.

<sup>135</sup> *Codman v. Jenkins*, 14 Mass. 93; *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Blume v. McClurken*, 10 Watts (Pa.) 330.

<sup>136</sup> *Gibson v. Kirk*, 1 Q. B. 850, 2 Gray's Cas. 696.

<sup>137</sup> *Tomlinson v. Day*, 2 Brod. & B. 680; *Crawford v. Jones*, 54 Ala. 459; *Pierce v. Pierce*, 25 Barb. (N. Y.) 242.

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*Assumpsit* will not lie against a disseisor, for whose wrongful occupation the landowner must have resort to his recovery of mesne profits, in connection with an action of ejectment.<sup>138</sup>

Debt for use and occupation will also lie, and the fact that there was a written demise for a rent certain will not prevent recovery in this form of action.<sup>139</sup>

— Re-entry by landlord.

The landlord is, by the express terms of the lease, frequently given the right to re-enter on the land, and thereby terminate the lessee's interest, in case of nonpayment of rent; such a stipulation rendering the tenant's estate one "on condition."<sup>140</sup> There is, moreover, by statute, in many states, a right in the landlord to re-enter for nonpayment of rent; this right existing independently of a provision in the lease giving a right of re-entry.<sup>141</sup>

— Distress.

As before stated, the remedy by distress existed at common law in the case of a rent service, unless the rent and the seignory or reversion became separated, and also in the case of a rent charge. In England the right of distress has been given by statute in the case of all rents, and consequently

<sup>138</sup> *Lloyd v. Hough*, 1 How. (U. S.) 153; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich. 554, 26 Am. Rep. 538; *Swift v. New Durham Lumber Co.*, 64 N. H. 53; *Preston v. Hawley*, 101 N. Y. 586; *Goddard v. Hall*, 55 Me. 579; *Weaver v. Jones*, 24 Ala. 420; *National Oil Refining Co. v. Bush*, 88 Pa. St. 335; *Inman v. Morris*, 63 Miss. 347.

<sup>139</sup> *Gibson v. Kirk*, 1 Q. B. 850, 2 Gray's Cas. 696; *Shine v. Dillon*, 1 Ir. R. C. L. 277; *Bayley v. Bradley*, 5 C. B. 396; *McKeon v. Whitney*, 3 Denio (N. Y.) 452.

<sup>140</sup> See ante, §§ 52(e), 66.

<sup>141</sup> 1 Stimson's Am. St. Law, § 2054. See *Parker v. Geary*, 57 Ark. 301; *Suchanek v. Smith*, 45 Minn. 26; *Dakota Hot Springs Co. v. Young*, 9 S. D. 577.

rents seek no longer exist there as a distinct class.<sup>142</sup> In this country the question whether this statute is in force in any particular state has been seldom passed upon,<sup>143</sup> this being a natural result of the infrequency of rents other than rents service reserved on leases for years. In some states, statutes have been adopted similar in effect to the English statute.<sup>144</sup>

The remedy by distress has not been favored in this country, it being often regarded as affording opportunity for injustice and oppression, and as unfairly discriminating in favor of a particular class of creditors. In some states it has been abolished by statute,<sup>145</sup> and in some the courts have refused to recognize it as an existing part of the law.<sup>146</sup> The landlord is, in some states, given a lien for rent on crops raised on the land, or on other property thereon, which is enforceable by proceedings somewhat similar to distress; and a statutory proceeding of "attachment" for rent has in some states been substituted for distress.<sup>147</sup> The remedy, under its common-law name, still exists in a number of states; but even in those states it is quite frequently modified by statutory provisions.<sup>148</sup>

Originally, the remedy by distress merely enabled the landlord to seize the chattels on the land, and hold them as a pledge for the payment of rent;<sup>149</sup> but by statute the land-

<sup>142</sup> 4 Geo. II. c. 28, § 5 (A. D. 1721).

<sup>143</sup> In Illinois, the English statute was, in a quite early decision, recognized as in force (*Penny v. Little*, 4 Ill. 301), while a different view was taken in New York (*Cornell v. Lamb*, 2 Cow. [N. Y.] 652).

<sup>144</sup> *Vechte v. Brownell*, 3 Paige (N. Y.) 212; *Mitchell v. Franklin*, 3 J. J. Marsh. (Ky.) 480; 2 Minor, Institutes, 37.

<sup>145</sup> 1 Stimson's Am. St. Law, § 2031.

<sup>146</sup> See *Harrison v. Ricks*, 71 N. C. 7; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684.

<sup>147</sup> See 18 Am. & Eng. Enc. Law, 430.

<sup>148</sup> 1 Stimson's Am. St. Law, § 2031; 2 Taylor, Landl. & Ten. §§ 188, 559.

<sup>149</sup> Co. Litt. 47; 3 Bl. Comm. 6-14.

lord was authorized to sell the goods levied upon, and to apply the proceeds on the rent,<sup>150</sup> the proceeding being thus changed from one to secure the rent to one to collect it. Furthermore, the seizure of the goods was formerly made by the landlord himself; but at the present day, in most, if not all, jurisdictions, the actual levy is made by an officer of the law.

To authorize a distress, the rent must be certain in amount, or capable of ascertainment before the time of distraining.<sup>151</sup>

— — Who may distrain.

At common law the executor or administrator of a deceased owner of a rent had no right to distrain for rent which belonged to him as having accrued in the lifetime of such owner, but by St. 32 Hen. VIII. c. 37, § 1, the right of distress was given to the executors and administrators of tenants in fee, fee tail, or for term of life.<sup>152</sup> This statute has been held to give no right of distraint to the executor of a tenant of land in fee who demised the land for years, reserving a rent,<sup>153</sup> and, on this construction of the statute, an executor or administrator has, in jurisdictions where there is no statute to the contrary, no right to collect by distress rent due by a tenant of his decedent under a lease for years.<sup>154</sup>

<sup>150</sup> 2 Wm. & Mary, c. 5 (A. D. 1690). See 3 Bl. Comm. 13, 14; 2 Taylor, Landl. & Ten. § 557.

<sup>151</sup> Co. Litt. 96a, 142a; *Daniel v. Gracie*, 6 Q. B. 145; *Hatfield v. Fullerton*, 24 Ill. 278; *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578; *Briscoe v. McElween*, 43 Miss. 556.

<sup>152</sup> Co. Litt. 162a.

<sup>153</sup> *Prescott v. Boucher*, 3 Barn. & Adol. 849, 2 Gray's Cas. 690. In *Bagwell v. Jamison*, 1 Cheves (S. C.) 249, the inability of an executor to distrain was based upon the ground that this statute was not in force in South Carolina.

<sup>154</sup> In England, the right is given to the executor or administrator by statute. 3 & 4 Wm. IV. c. 42, § 37.

A subtenant is entitled to the remedy of distress if he has a reversion, however small, as when a tenant for years leases for a less period.<sup>155</sup> But the transfer of a term for the whole period thereof, leaving no reversion in the assignor, constitutes an assignment, and not a sublease;<sup>156</sup> and consequently there is no right of distress unless this is expressly reserved.<sup>157</sup>

— — Time of distress.

An installment of rent must be overdue at the time of distraining, and consequently there can be no distress until the day after that on which the rent is payable.<sup>158</sup>

At common law a distress could not be made after the expiration of the tenancy upon which the rent was reserved; but it is provided in England by St. 8 Anne, c. 14, §§ 6, 7, which has been quite generally adopted or re-enacted in this country, that the distress may be made within six months after the end of the term, if the landlord's interest continues, and the tenant remains in possession.<sup>159</sup>

— — Chattels subject to distress.

All chattels on the demised premises are, generally speaking, liable to be distrained upon, and the fact that they belong to a person other than a party to the lease is immaterial.<sup>160</sup>

<sup>155</sup> 1 Woodfall, Landl. & Ten. 422; Wade v. Marsh, Latch, 211.

<sup>156</sup> See ante, § 48.

<sup>157</sup> ——— v. Cooper, 2 Will. 375, 2 Gray's Cas. 678; Parmenter v. Webber, 8 Taunt. 593, 2 Gray's Cas. 686; Prescott v. De Forest, 16 Johns. (N. Y.) 159.

<sup>158</sup> Johnson v. Owens, 2 Cranch, C. C. 160, Fed. Cas. No. 7,402; Fry v. Breckinridge, 7 B. Mon. (Ky.) 31; Fretton v. Karcher, 77 Pa. St. 423.

<sup>159</sup> 2 Taylor, Landl. & Ten. § 572; Werner v. Ropiequet, 44 Ill. 522; Bukup v. Valentine, 19 Wend. (N. Y.) 554; Lichtenthaler v. Thompson, 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 581.

<sup>160</sup> 1 Woodfall, Landl. & Ten. 435; Trieber v. Knabe, 12 Md. 491, 71 Am. Dec. 607; Kleber v. Ward, 88 Pa. St. 92.



In some states, however, by statute, a stranger's property is exempt from distress.<sup>161</sup> Things which are part of the freehold, as fixtures, cannot be distrained upon.<sup>162</sup>

Things which are not readily capable of identification, or are liable to be injured by keeping, are not subject to distress.<sup>163</sup> Things in a person's actual use or possession, such as a horse which he is riding, or a machine at which he is working, are also exempt, in order that a breach of the peace may not be caused by an attempt to distrain thereon.<sup>164</sup> Implements or utensils of one's trade or profession, such as the axe of a carpenter or the books of a scholar, are exempt, if there be other things on the premises sufficient in amount to satisfy the distress; and beasts used for working a farm, and sheep thereon, are in the same way conditionally exempt.<sup>165</sup>

Goods which are in the custody of the law, as when they have been levied upon under execution, are not distrainable.<sup>166</sup> But in England and in some states an execution levy cannot, by statute, be made till the landlord's rent is paid, or, which is in effect the same, he is given a lien for accrued rent, which takes precedence of an execution.<sup>167</sup>

<sup>161</sup> See *Hadden v. Knickerbocker*, 70 Ill. 677, 22 Am. Rep. 30; *Hoskins v. Paul*, 9 N. J. Law, 110; 2 Taylor, Landl. & Ten. § 583.

<sup>162</sup> Co. Litt. 47b; *Hellawell v. Eastwood*, 6 Exch. 295; *Turner v. Cameron*, L. R. 5 Q. B. 306; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323. But see *Furbush v. Chappell*, 105 Pa. St. 187, to the effect that fixtures removable by a tenant are distrainable, this being in accordance with the rule existing in that state that such removable fixtures are personalty. See ante, § 240.

<sup>163</sup> 3 Bl. Comm. 9; *Morley v. Pincombe*, 2 Exch. 101; *Bond v. Ward*, 7 Mass. 129, 5 Am. Dec. 28.

<sup>164</sup> Co. Litt. 47a; *Simpson v. Hartopp*, Willes, 512.

<sup>165</sup> Co. Litt. 47a; 3 Bl. Comm. 9; *Trieber v. Knabe*, 12 Md. 491, 71 Am. Dec. 607; *Davis v. Soledge*, 3 Hill (S. C.) 170, 30 Am. Dec. 360.

<sup>166</sup> 2 Taylor, Landl. & Ten. §§ 594, 595; 1 Woodfall, Landl. & Ten. 442; *Wharton v. Naylor*, 12 Q. B. 673.

<sup>167</sup> 8 Anne, c. 14, § 1 (A. D. 1709); *Arnitt v. Garnett*, 3 Barn. & Ald. 440; *Bowser v. Scott*, 8 Blackf. (Ind.) 86; *Craddock v. Riddles-*

The most important classes of exemption from distress are those in favor of trade and commerce, comprising generally those things belonging to a third person which are temporarily on the tenant's premises in the course of the latter's business, as when work is to be done on them, or they are there for sale or storage purposes.<sup>168</sup> On the same principle, the goods belonging to a lodger at an hotel or boarding house are not liable to distress for rent due by the keeper of the house.<sup>169</sup>

— Lien and attachment.

In a large number of states the landlord is given a lien for his rent upon all crops grown upon the demised premises, and in some upon personal property used on the premises.<sup>170</sup> This lien is usually enforced by an attachment proceeding, but it may be enforced in equity, as other liens, and in some states the statutes provide for its enforcement by distress.<sup>171</sup>

— Remedy in equity.

The extent to which equity will aid the landlord in obtaining payment of arrears of rent due is a matter as to which the cases furnish no definite rule, though there are numerous

barger, 2 Dana (Ky.) 205; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Grant's Appeal*, 44 Pa. St. 473; *Herron v. Gill*, 112 Ill. 247.

<sup>168</sup> Co. Litt. 47a; 1 Woodfall, Landl. & Ten. 440; *Beall v. Beck*, 3 Cranch, C. C. 666, Fed. Cas. No. 1,161; *Owen v. Boyle*, 22 Me. 47; *McCreery v. Claffin*, 37 Md. 435, 11 Am. Rep. 543; *Hoskins v. Paul*, 9 N. J. Law, 110, 17 Am. Dec. 455; *Brown v. Stackhouse*, 155 Pa. St. 532, 35 Am. St. Rep. 908.

<sup>169</sup> 1 Woodfall, Landl. & Ten. 442; *Beall v. Beck*, 3 Cranch, C. C. 666, Fed. Cas. No. 1,161; *Riddle v. Welden*, 5 Whart. (Pa.) 9.

<sup>170</sup> 1 Stimson's Am. St. Law, § 2034. See the exhaustive discussion of such statutory liens by B. B. Clark, Esq., in 18 Am. & Eng. Enc. Law (2d Ed.) 332 et seq.

<sup>171</sup> 18 Am. & Eng. Enc. Law, 343.

decisions in which such relief has been given, owing to inadequacy of the legal remedies.<sup>172</sup> The view has been forcibly presented that one entitled to rent may ask the aid of equity for the purpose of securing the application of the net income of the land to the payment of the rent whenever he is not able by distress (or the equivalent statutory proceeding) to fully satisfy his claim for rent, and he is not able to recover possession of the land as for breach of condition.<sup>173</sup>

<sup>172</sup> See 2 Taylor, Landl. & Ten. §§ 656-660; *Cocles v. Foley*, 1 Vern. 359; *Leeds v. Corporation of New Radnor*, 2 Brown, Ch. 338; *Champernoon v. Gubb*, 2 Vern. 382; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290; *Borcherling v. Katz*, 37 N. J. Eq. 150.

<sup>173</sup> See article by Prof. C. C. Langdell in 10 Harv. Law Rev. 71, in which the principles of the law of rent and the remedies therefor are most admirably summarized.

A court of equity will, in its discretion, order the sale of the land for the payment of arrears of a rent charge. *Cupit v. Jackson*, 13 Price, 731; *Hambre v. Hambro* [1894] 2 Ch. 564.

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payment of compensation under the power of eminent domain.

Statutory proceedings are usually, in the case of suburban highways, instituted by owners of land interested in procuring the establishment of the highway; and in cities, by the municipal authorities. All persons interested in the land over or through which the highway is to run are made parties to the proceeding; and it is the ordinary practice to determine, in one proceeding, the damages to be paid to the owners of the land utilized for the highway, and at the same time to apportion among the owners of the land to be benefited thereby the cost of the undertaking. The preliminary question whether the proposed highway is necessary for the public welfare may be determined by the legislature, or delegated to the local authorities, or left to be adjudicated by the tribunal which determines the question of damages.

The question whether, by proceedings of this character, the ownership or "fee" of the land is vested in the public, or merely a right of user, is to be determined by the terms of the statute; and unless this plainly contemplates that the "fee" shall be appropriated, it is generally held that the public acquires a right of user only.<sup>3</sup>

The dedication of land to the public for use as a highway, and the creation of highways by prescription, will be considered in another part of this work.<sup>4</sup>

#### — Rights of owner of land.

When the public has a right of passage merely, the owner of the land or "fee" therein may use it in any way not interfering with its use by the public for passage.<sup>5</sup> He is accord-

<sup>3</sup> 1 Lewis, Eminent Domain, § 278; Elliott, Roads & St. §§ 224, 227; 2 Dillon, Mun. Corp. § 589.

<sup>4</sup> See post, §§ 426-444, 452.

<sup>5</sup> Elliott, Roads & St. § 230; 15 Am. & Eng. Enc. Law (2d Ed.) (808)

ingly entitled to the trees<sup>6</sup> and herbage<sup>7</sup> within the highway limits, and also to the soil or minerals under the highway.<sup>8</sup> The municipal authorities may, however, remove trees, earth, or stone for the purpose of opening or improving the highway, and by some decisions they may utilize such materials for the purpose of repairing other parts of the highway.<sup>9</sup>

An owner of land abutting on a highway, the fee of which is in another person, cannot extend a bay window over the highway, since this is making use of the latter's land for a purpose not of a highway character;<sup>10</sup> and so one who goes on another's land, within the limits of a highway, for a purpose not properly incident to the highway use, may be criminally liable as a trespasser.<sup>11</sup>

416; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159, 2 Gray's Cas. 588; *Bloomfield Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, 2 Gray's Cas. 621; *Dally v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578.

<sup>6</sup> *City of Atlanta v. Holliday*, 96 Ga. 546; *Dally v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578; *Sanderson v. Haverstick*, 8 Pa. St. 294; *Baker v. Shephard*, 24 N. H. 208; *Tucker v. Eldred*, 6 R. I. 404; *Makepeace v. Worden*, 1 N. H. 16, 2 Gray's Cas. 591, Finch's Cas. 845.

<sup>7</sup> *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532; *Woodruff v. Neal*, 28 Conn. 165; 1 Lewis, *Eminent Domain*, § 132a.

<sup>8</sup> *Deaton v. Polk County*, 9 Iowa, 594; *West Covington v. Freking*, 8 Bush (Ky.) 121; *City of Aurora v. Fox*, 78 Ind. 1; *Higgins v. Reynolds*, 31 N. Y. 151; *Rich v. City of Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861; *Town of Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483.

<sup>9</sup> The various diverse decisions upon the question of the right to use such materials for repairs are collected in an article by the present writer, in 15 Am. & Eng. Enc. Law (2d Ed.) 417, 418.

<sup>10</sup> *Codman v. Evans*, 5 Allen (Mass.) 308, 81 Am. Dec. 748, 2 Gray's Cas. 595, Finch's Cas. 846. But an abutting owner may erect a gate which swings over the highway, this not being a permanent obstruction, and being an ordinary use of the highway. *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

<sup>11</sup> *Reg. v. Pratt*, 4 Bl. & Bl. 860, 2 Gray's Cas. 586. See *State v.*

The owner of the land may bring ejectment against one unlawfully inclosing or encroaching within the limits of the highway,<sup>12</sup> or trespass against one who uses the land for a purpose not within the scope of its use as a highway, or who injures the trees or herbage thereon.<sup>13</sup>

A city street is a highway, but a distinction is frequently suggested between such a highway and an ordinary rural highway; it being said that, while in the latter case the public have merely a right of passage, in the case of a city street there exists, besides this right of passage in individual members of the public, power in the municipal authorities to change the surface, to cut down trees, place sewers and pipes beneath the bed of the street, and in effect to exclude the owner of the land from any use thereof other than that of passage common to all individuals.<sup>14</sup> The cases, however, which assert such a distinction do not usually decide that a use can be made of a city street which cannot be made of a suburban

Davis, 80 N. C. 351, 2 Gray's Cas. 600; *Harrison v. Rutland* [1898] 1 Q. B. 142.

<sup>12</sup> *Goodtitle v. Alker*, 1 Burrow, 123; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513; *Thomas v. Hunt*, 134 Mo. 392; *Louisville, St. L. & T. Ry. Co. v. Liebfried*, 92 Ky. 407; *Proprietors of Locks & Canals on Merrimack River v. Nashua & L. R. Co.*, 104 Mass. 1. Contra, *Cincinnati v. White*, 6 Pet. (U. S.) 431, 3 Gray's Cas. 799.

<sup>13</sup> *Lade v. Shepherd*, 2 Strange, 1004, 2 Gray's Cas. 580; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513.

<sup>14</sup> See *Chesapeake & P. Telephone Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219; *Western Ry. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272; *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367; *Elliott, Roads & St.* § 397 et seq.

highway;<sup>15</sup> and the sounder view seems to be that a suburban highway, like a city street, is subject to all highway uses and improvements which may be necessary, among which are to be included its use for the supply of water, light, or drainage, when these are rendered necessary by the density of population, and that the fact that it is within the limits of a city is immaterial, except as this is usually coincident with the necessity for such use.<sup>16</sup>

— — Additional servitude.

When the ownership of the land is not acquired by the public, but merely a right of passage, if the land within the highway limits is afterwards used for a purpose, even though of a public nature, which is not within the scope of the highway use for which the land was dedicated or appropriated, it is considered that the land is subjected to an additional burden or "servitude," entitling the owner to compensation as for a new taking of property. So it has been held that the use of the highway for a steam railway, carrying freight as well as passengers, is not an ordinary highway use, and that the owner of the fee is consequently entitled to compensation therefor.<sup>17</sup> In New York a like view is taken as to

<sup>15</sup> "The only court in which it has been unequivocally adjudicated that a certain use was legitimate in the case of city streets, and not legitimate in the case of country highways, is that of Pennsylvania, in which it has been held that an electric passenger railway is a legitimate use of a city or village street, but not of a country road." 1 Lewis, Eminent Domain, § 91c.

<sup>16</sup> See *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 236; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; 1 Lewis, Eminent Domain, § 91c; *Pierce, Railroads*, 232.

<sup>17</sup> *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 2 Gray's Cas. 602; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Western Ry. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272; *Kucheman v. Chicago, C. & D. R. Co.*, 46

a street railway on which horses are used,<sup>18</sup> but the great weight of authority is to the effect that a passenger street railway operated on the surface of the ground is not an additional servitude.<sup>19</sup> In some states a telegraph or telephone line is regarded as an additional burden on the fee,<sup>20</sup> and in others a contrary view is taken.<sup>21</sup> The use of a street or highway for sewers,<sup>22</sup> gas pipes,<sup>23</sup> or water pipes<sup>24</sup> is a legiti-

Iowa, 366; Florida Southern Ry. Co. v. Brown, 23 Fla. 104; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Phipps v. Western Maryland R. Co., 66 Md. 319; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; White v. Northwestern North Carolina R. Co., 113 N. C. 610. Contra, Montgomery v. Santa Ana Westminster Ry. Co., 104 Cal. 186. See Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 522; Barrows v. City of Sycamore, 150 Ill. 538.

<sup>18</sup> Craig v. Rochester City & B. R. Co., 39 N. Y. 404, 2 Gray's Cas. 612.

<sup>19</sup> Birmingham Traction Co. v. Birmingham Ry. & Electric Co., 119 Ala. 137; Chicago, B. & Q. R. Co. v. West Chicago St. Ry. Co., 156 Ill. 255, 29 L. R. A. 485; Randall v. Jacksonville St. R. Co., 19 Fla. 409; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75; Hodges v. Baltimore Union Passenger Ry. Co., 53 Md. 603; Floyd County v. Rome St. R. Co., 77 Ga. 614; Texas & P. Ry. Co. v. Rose-dale St. Ry. Co., 64 Tex. 80; Elliott v. Fair Haven & W. R. Co., 32 Conn. 579; Attorney General v. Metropolitan R. Co., 125 Mass. 515; Finch v. Riverside & A. Ry. Co., 87 Cal. 597.

<sup>20</sup> Chesapeake & P. Telephone Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219; Western Union Telegraph Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908; Board of Trade Telegraph Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Eels v. American Telephone & Telegraph Co., 143 N. Y. 133; Stowers v. Postal Telegraph Cable Co., 63 Miss. 559, 24 Am. St. Rep. 290; Pacific Postal Telegraph Cable Co. v. Irvine, 49 Fed. 113.

<sup>21</sup> Pierce v. Drew, 136 Mass. 75, 2 Gray's Cas. 627; People v. Eaton, 100 Mich. 208; Julia Building Ass'n v. Bell Telephone Co., 38 Mo. 253, 57 Am. Rep. 398; Cater v. Northwestern Telephone Exchange Co., 60 Minn. 539; Hershfield v. Rocky Mountain Bell Telephone Co., 12 Mont. 102.

<sup>22</sup> Stoudinger v. City of Newark, 28 N. J. Eq. 137, 2 Gray's Cas. 625, affirmed 28 N. J. Eq. 446; City of Boston v. Richardson, 13 Allen (Mass.) 146; Cone v. City of Hartford, 23 Conn. 363; In r. (819)



mate use, for which the owner of the fee cannot recover compensation, unless it is not for the benefit of the community itself, or the members thereof, but is for the benefit of another municipality, or of individuals alone.<sup>25</sup> The maintenance of a market on a highway constitutes an additional servitude,<sup>26</sup> as does the erection of a stand pipe to supply water to the community;<sup>27</sup> but a well or cistern may be maintained in a street for the purpose of furnishing water for street sprinkling purposes, this being a street use.<sup>28</sup>

Some of the later cases are to the effect that the ownership of the "fee" does not involve rights of such practical value as to authorize compensation in case of an additional use of the surface of the land,<sup>29</sup> and the text books usually uphold this view,<sup>30</sup> which has gained strength with the development of the modern doctrine that the abutting owner is, as such, entitled to compensation for injuries to his rights of light,

*City of Yonkers*, 117 N. Y. 564; *Elster v. Springfield*, 49 Ohio St. 83; 1 *Lewis, Eminent Domain*, § 127.

<sup>25</sup> *Provost v. New Chester Water Co.*, 163 Pa. St. 275; *Wood v. National Water Works Co.*, 83 Kan. 590; *City of Quincy v. Bull*, 106 Ill. 337.

<sup>26</sup> *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367; *Pierce v. Drew*, 136 Mass. 75; *City of Quincy v. Bull*, 106 Ill. 337.

<sup>27</sup> *Bloomfield & R. Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, 2 *Gray's Cas.* 621; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; *Sterling's Appeal*, 111 Pa. St. 35; *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577.

<sup>28</sup> *State v. Laverack*, 34 N. J. Law, 201; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *Schopp v. City of St. Louis*, 117 Mo. 131.

<sup>29</sup> *Barrows v. City of Sycamore*, 150 Ill. 538.

<sup>30</sup> *West v. Bancroft*, 32 Vt. 367, 2 *Gray's Cas.* 611.

<sup>31</sup> *Theobald v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279; *McQuaid v. Portland & V. Ry. Co.*, 18 Or. 237; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610; *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Barney v. Keokuk*, 94 U. S. 324.

<sup>32</sup> 1 *Lewis, Eminent Domain*, § 911; *Randolph, Eminent Domain*, § 415; 2 *Dillon, Mun. Corp.* §§ 704, 704a.

air, and access caused by the additional use of the highway,—a doctrine which renders it unnecessary to base his right to compensation on his possible ownership of the fee.

— Rights of abutting owners.

The owner of land abutting on a highway has sometimes been regarded as having no right to compensation in case of a new use of the highway, unless he could recover compensation as owner of the "fee" in the highway, the result being to exclude any recovery by him if the fee is in the public.<sup>21</sup> The view is, however, quite usually taken, at the present day, that an abutting owner, as such, has rights of access to his premises by means of the highway, and also rights to enjoy light and air from the open space above the highway, which cannot be destroyed or impaired, to his detriment, except in the use and improvement of the highway for highway purposes, without making compensation to him.<sup>22</sup> These rights are frequently spoken of as "easements" in the highway, or in the land used for the highway, and they are in some respects analogous to easements.<sup>23</sup>

It is on the theory that such rights are impaired that an abutting owner has been held to be entitled to compensation on account of the construction and maintenance of an ele-

<sup>21</sup> *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552. See *Lewis, Eminent Domain*, § 115, note 6.

<sup>22</sup> *Barnett v. Johnson*, 15 N. J. Eq. 481; *Barrows v. City of Syracuse*, 150 Ill. 588; *Decker v. Evansville, S. & N. Ry. Co.*, 133 Ind. 493; *Chesapeake & P. Telephone Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219; *Fratser v. Hamilton County*, 90 Tenn. 661; *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154; *McQuaid v. Portland & V. Ry. Co.*, 18 Or. 237; *Johnston v. Old Colony R. Co.*, 13 R. I. 642; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610; 1 *Lewis, Eminent Domain*, §§ 91e-91h.

<sup>23</sup> See, as to the character of such rights, 15 *Harv. Law Rev.* 305.

vated railway in the street;<sup>54</sup> and since the maintenance of a steam railroad in the highway, for the purpose of transporting freight as well as passengers from town to town, is usually regarded as a use of the highway for other than highway purposes, the abutting owners are, it seems, entitled to compensation for the resulting interference with their rights of light, air, and access, irrespective of the ownership of the land within the highway limits.<sup>55</sup> A passenger street railway, operated on the surface of the highway, whether it be a horse, electric, or cable railway, is regarded as a use of the highway for highway purposes, and consequently not ground for the recovery of damages by the abutting owner.<sup>56</sup>

The authorities are generally to the effect that an owner of land abutting on a street is not entitled to compensation for impairment of the value of his land by a change of the

<sup>54</sup> *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268; *Bischoff v. New York Elevated R. Co.*, 128 N. Y. 257. By *Fries v. New York & H. R. Co.*, 169 N. Y. 270, the right to compensation is apparently excluded when a surface railway is changed into an elevated railway. See 2 *Columbia Law Rev.* 158.

<sup>55</sup> *South Carolina R. Co. v. Steiner*, 44 Ga. 546, 560; *Theobald v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279; *Chicago, R. I. & P. Ry. Co. v. Sturey*, 55 Neb. 137; *White v. Northwestern North Carolina R. Co.*, 118 N. C. 610; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656. See *Decker v. Evansville, S. & N. Ry. Co.*, 133 Ind. 493; *Kansas, N. & D. Ry. Co. v. Cuykendall*, 42 Kan. 284. But see *O'Connor v. St. Louis, K. O. & N. R. Co.*, 56 Iowa, 735; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 303, 35 Am. St. Rep. 706; *Sherlock v. Kansas City Belt Ry. Co.*, 142 Mo. 172; *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186; *City of Olney v. Wharf*, 115 Ill. 519.

<sup>56</sup> 1 *Lewis, Eminent Domain*, §§ 1150-1151; *Randolph, Eminent Domain*, §§ 402, 403; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Briggs v. Lewiston & A. H. R. Co.*, 79 Me. 363; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 270; *Placke v. Union Depot R. Co.*, 140 Mo. 634; *San Antonio Rapid Transit St. Ry. Co. v. Limburger*, 33 Tex. 79.

grade of the street, provided there is no actual encroachment upon the land; and the fact that the easements of light, air, or access are thereby affected is immaterial.<sup>37</sup>

— Rights of deviation.

There are a number of decisions in this country that, if a highway becomes impassable at a certain point, a traveler may deviate on the adjoining land.<sup>38</sup> The existence of such a right at common law has been generally assumed; but whether it would be recognized at the present day in England, in the absence of a prescriptive right to deviate, is doubtful.<sup>39</sup> Even where the right is recognized, it is restricted to cases of strict necessity,<sup>40</sup> and the deviation upon neighboring land must be to the smallest possible extent.<sup>41</sup>

<sup>37</sup> *Callender v. Marsh*, 1 Pick. (Mass.) 417, 430; *Radcliff's Ex'rs v. City of Brooklyn*, 4 N. Y. 195; *Smith v. Corporation of Washington*, 30 How. (U. S.) 135; *Roberts v. City of Chicago*, 26 Ill. 249; *City of Pontiac v. Carter*, 32 Mich. 164; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Kehrer v. Richmond City*, 81 Va. 745; *Randolph, Eminent Domain*, § 398; 1 *Lewis, Eminent Domain*, §§ 91e-102. In Ohio the abutting owner may recover compensation for damage to improved property from an unreasonable change of grade. *City of Akron v. Chamberlain Co.*, 34 Ohio St. 323; *Cincinnati v. Whetstone*, 47 Ohio St. 196.

<sup>38</sup> *Campbell v. Race*, 7 Cush. (Mass.) 408, 2 Gray's Cas. 592, 54 Am. Dec. 728; *Irwin v. Yeager*, 74 Iowa, 174; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Williams v. Safford*, 7 Barb. (N. Y.) 309; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811; *State v. Brown*, 109 N. C. 302; *Carey v. Rae*, 58 Cal. 159.

<sup>39</sup> See the remarks of Blackburn, J., in *Arnold v. Holbrook*, L. R. 8 Q. B. 96, in which he shows that, in *Duncomb's Case*, Cro. Car. 366, and *Absor v. French*, 2 Show. 23, usually referred to in support of the right, the question was not involved.

<sup>40</sup> *Campbell v. Race*, 7 Cush. (Mass.) 408, 2 Gray's Cas. 592; *State v. Brown*, 109 N. C. 302; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

<sup>41</sup> *Holmes v. Seely*, 19 Wend. (N. Y.) 510; *White v. Wiley*, 59 Hun, 618, 13 N. Y. Supp. 205.

## — Extinction of highway.

The common-law maxim, "Once a highway, always a highway,"<sup>42</sup> may be regarded as entirely obsolete in this country, and here a highway may cease to exist through one of several causes.

There are in many states statutory provisions for the "vacation" of a highway, frequently by proceedings upon petition, more or less similar to proceedings for the establishment of a highway.<sup>43</sup> The owner of land abutting on the highway thus vacated is usually regarded as deprived of property by reason of the impairment of his right of access, and so entitled to compensation.<sup>44</sup>

Some courts hold that the public rights to use land for a highway may be lost by adverse possession on the part of an individual, they taking the view that the maxim "*Nullum tempus occurrit regi*" is not applicable, since the ownership of the highway is to be regarded as vested in the municipality or *quasi* municipality, rather than in the state.<sup>45</sup> Other courts, however, deny that a highway can be thus extinguished;<sup>46</sup> and this would seem to be the better view, since

<sup>42</sup> Dawes v. Hawkins, 8 C. B. (N. S.) 348, 358.

<sup>43</sup> 15 Am. & Eng. Enc. Law, 396 et seq.; Elliott, Roads & St. §§ 379-381.

<sup>44</sup> 1 Lewis, Eminent Domain, § 134; Randolph, Eminent Domain, § 410; Elliott, Roads & St. § 377.

<sup>45</sup> Inhabitants of Town of Litchfield v. Wilmot, 2 Root (Conn.) 288; Ostrom v. City of San Antonio, 77 Tex. 345; Knight v. Heaton, 22 Vt. 480; Meyer v. City of Lincoln, 33 Neb. 566; Dudley v. Trustees of Frankfort, 12 B. Mon. (Ky.) 612; City of Big Rapids v. Comstock, 65 Mich. 78; City of Fort Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19.

<sup>46</sup> Com. v. Moorehead, 118 Pa. St. 344, 4 Am. St. Rep. 599; Hoboken Land & Improvement Co. v. City of Hoboken, 36 N. J. Law, 540; Heddlestone v. Hendricks, 52 Ohio St. 460; Yates v. Town of Warrenton, 84 Va. 337; Almy v. Church, 18 R. I. 182; Driggs v. Phillips, 103 N. Y. 77; Ulman v. Charles Street Ave. Co., 83 Md.

the municipality, so far as it can be considered as the owner of the highway, is so merely as an agent of the state, and since any adverse acts by an individual constitute an obstruction of the highway, and are consequently a public nuisance, the effect of the opposite view being to validate, by lapse of time, a public nuisance,—a thing which, by the authorities generally, cannot be done.<sup>47</sup>

— — Abandonment.

There are a number of decisions to the effect that an abandonment of a highway may be shown by nonuser, in conjunction with other circumstances.<sup>48</sup> The underlying theory of such an extinction of a highway by abandonment is presumably that a release of the right by the state or a statutory vacation is, in such a case, to be presumed. It is sometimes said that a highway is not lost by nonuser,<sup>49</sup> but in this respect the same principle apparently applies as in the case of private easements;<sup>50</sup> nonuser itself not extinguishing the highway, but being a circumstance to be considered with other circumstances, in determining whether a release or a vacation is to be presumed.

130; *Hoadley v. City of San Francisco*, 50 Cal. 265; *Reed v. City of Birmingham*, 92 Ala. 339; *Bice v. Walcott*, 64 Minn. 459; *Thompson v. Major*, 58 N. H. 242; *City of Vicksburg v. Marshall*, 59 Miss. 563.

<sup>47</sup> *Driggs v. Phillips*, 103 N. Y. 77; *Simmons v. Cornell*, 1 R. I. 519; *Wolfe v. Town of Sullivan*, 133 Ind. 331; *City of Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303; *Territory v. Deegan*, 3 Mont. 82; *Reed v. City of Birmingham*, 92 Ala. 339. See 2 Wood, Nuisances, § 936.

<sup>48</sup> *Larson v. Fitzgerald*, 87 Iowa, 402; *Louisville, N. A. & C. Ry. Co. v. Shanklin*, 98 Ind. 573; *Holt v. Sargent*, 15 Gray (Mass.) 97; *Burgwyn v. Lockhart*, 60 N. C. 264; *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *City of Peoria v. Johnston*, 56 Ill. 45; *Elliott, Roads & St.* §§ 871-874.

<sup>49</sup> *Thompson v. Major*, 58 N. H. 242; *Davies v. Huebner*, 45 Iowa, 574; *Com. v. McNaughten*, 131 Pa. St. 55.

<sup>50</sup> See ante, § 330.

The statute occasionally provides that the failure to open a highway for use within a certain time after its establishment by statutory proceedings shall be regarded as an abandonment,<sup>51</sup> and sometimes there is a provision that this shall be the result of a failure to use, for a period named, a highway which has been opened.<sup>52</sup>

— Effect of extinction.

When the highway involves merely a right of user by the public, the owner of the "fee," upon the extinction of the highway, resumes entire dominion over the land, free from any rights in the public.<sup>53</sup> Usually, the owner of the fee is the abutting proprietor, and thus the extinction inures to his benefit.<sup>54</sup> In some jurisdictions there is a statutory provision that the abutting owner shall have the land in such case.<sup>55</sup> When the "fee" is in the public, there is, by some cases, a reverter of the land to the original owner upon the extinction of the highway, upon the theory that the public, or rather the state, has merely a determinable fee.<sup>56</sup> By other decisions, there is a fee simple, and not a mere determinable fee, in the public, and no right of reverter exists.<sup>57</sup>

<sup>51</sup> *Trotter v. Barrett*, 164 Ill. 262; *Horey v. Village of Haverstraw*, 124 N. Y. 273; *McClelland v. Miller*, 28 Ohio St. 488; *Pickford v. City of Lynn*, 98 Mass. 491; 15 Am. & Eng. Enc. Law, 406.

<sup>52</sup> *McRose v. Bottyer*, 81 Cal. 122; *Amsbry v. Hinds*, 48 N. Y. 57; *Herrick v. Town of Geneva*, 92 Wis. 114; *Freeholders of Mercer County v. Pennsylvania R. Co.*, 45 N. J. Law, 82.

<sup>53</sup> *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Benham v. Potter*, 52 Conn. 248; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649.

<sup>54</sup> *Thomsen v. McCormick*, 136 Ill. 135; *Harrison v. Augusta Factory*, 73 Ga. 447; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Healey v. Babbitt*, 14 R. I. 533.

<sup>55</sup> 15 Am. & Eng. Enc. Law, 420. See *Southern Kansas Ry. Co. v. Showalter*, 57 Kan. 681; *Scudder v. City of Detroit*, 117 Mich. 77.

<sup>56</sup> *Gebhardt v. Reeves*, 75 Ill. 301; *Plumer v. Johnston*, 63 Mich. 165; *Board of Education of Van Wert v. Edson*, 18 Ohio St. 221. And see *Fairchild v. City of St. Paul*, 46 Minn. 540.

<sup>57</sup> *Pettingill v. Devin*, 35 Iowa. 344; *Tift v. City of Buffalo*, 82 N. Y. 304.

— Turnpikes.

Turnpikes are highways, the use of which by a member of the public is conditional upon payment by him of a certain fixed compensation or "toll." Turnpikes are usually, if not always, established by private corporations or associations of individuals, under authority granted by the state,<sup>58</sup> and the right of way may be acquired under the power of eminent domain, as in the case of any ordinary highway.<sup>59</sup> The proprietors of the turnpike usually have an easement only in the land for use as a highway,<sup>60</sup> but may have the ownership or "fee."<sup>61</sup> The turnpike must be kept in repair by the proprietors thereof, and for injuries caused by its negligent failure to make repairs they are liable.<sup>62</sup>

§ 366. Parks, squares, and commons.

In connection with the subject of highways, which they resemble as involving rights of user in the individual members of the public, it seems proper to refer to parks, public squares, and commons, though the ownership of land appropriated to these purposes is usually vested in the state or municipality, and consequently the rights exercised therein by the public are but seldom rights in another's land.

The term "park" is ordinarily applied to a tract of land, in or near a town or city, which is subject to state or municipal control, and designed to furnish the public with oppor-

<sup>58</sup> *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; *Angell, Highways*, § 8; *Elliott, Roads & St.* c. 4.

<sup>59</sup> 1 *Lewis, Eminent Domain*, § 168; *Randolph, Eminent Domain*, § 42.

<sup>60</sup> See *Wright v. Carter*, 27 N. J. Law, 76; *Robbins v. Borman*, 1 Pick. (Mass.) 122; *Turner v. Rising Sun & L. Turnpike Co.*, 71 Ind. 547; *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89.

<sup>61</sup> See *People v. Newburgh & S. Plank Road Co.*, 86 N. Y. 1.

<sup>62</sup> 2 *Shearman & R. Negligence*, c. 16; *Elliott, Roads & St.* §§ 101-106; *Carver v. Detroit & S. Plank Road Co.*, 61 Mich. 584; *Baltimore & L. Turnpike Co. v. Cassell*, 66 Md. 419.



tunities for recreation and to obtain fresh air and exercise.<sup>63</sup> The term "square" or "public square" is also used in this connection, without any very precise meaning, but usually with reference to a space in a city, under municipal control, a part or the whole of which is devoted to vegetation of an ornamental or at least agreeable character. Land may be acquired for the purpose of a park or public square by direct purchase,<sup>64</sup> by proceedings under the power of eminent domain,<sup>65</sup> or by dedication of land for the purpose by a private individual.<sup>66</sup>

— Commons.

The term "common" is sometimes used to describe lands open to use by all the inhabitants of a city or town, and subject to the control of the public authorities. This is the construction usually given to a grant or dedication of land for use as a "common," it being in effect thereby declared that the land shall be open for use by the public, subject to municipal, or, occasionally, state, control.<sup>67</sup>

<sup>63</sup> The term is also applied to inclosures belonging to private individuals, but these are subject to the same principles as other lands not subject to public use, and do not call for any special comment.

<sup>64</sup> *Holt v. City Council of Somerville*, 127 Mass. 408; *People v. Common Council of Detroit*, 28 Mich. 230, 15 Am. Rep. 202.

<sup>65</sup> 1 Lewis, *Eminent Domain*, § 175; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *West Chicago Park Com'rs v. Western Union Telegraph Co.*, 103 Ill. 33; *St. Louis County Court v. Griswold*, 58 Mo. 175.

<sup>66</sup> See post, § 421.

<sup>67</sup> See *City of Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431; *Den d. Commissioners of Town of Bath v. Boyd*, 23 N. C. 194; *City of Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *White v. Smith*, 37 Mich. 291; *Goode v. City of St. Louis*, 113 Mo. 257; *Crawford v. Mobile & G. R. Co.*, 67 Ga. 405; *Sheffield & Tuscumbia St. Ry. Co. v. Moore*, 83 Ala. 294; *Newell v. Town of Hancock*, 67 N. H. 244; *Trustees of Western University v. Robinson*, 12 Serg. & R. (Pa.)

ual,<sup>73</sup> or to go thereon in order to get water.<sup>74</sup> So there may be a custom for fishermen to dry nets on certain land,<sup>75</sup> or for persons in a certain trade (victualers) to erect booths upon certain private land during a fair.<sup>76</sup> The custom, to be valid, "must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."<sup>77</sup>

A right cannot be acquired by custom to use particular land on navigable water for a wharf or landing place, since this would in effect exclude the owner from all use of the land, and is unreasonable;<sup>78</sup> and so there can be no right by custom to maintain a building or other permanent structure on a person's land.<sup>79</sup> Likewise, a right to take profits from land, as distinct from the mere right to use the land, cannot be established by custom, since the effect of such a custom would be to exhaust the profits.<sup>80</sup>

<sup>73</sup> *Fitch v. Rawling*, 2 H. Bl. 394; *Abbott v. Weekly*, 1 Lev. 176, 2 Gray's Cas. 180.

<sup>74</sup> *Race v. Ward*, 4 El. & Bl. 702, 2 Gray's Cas. 10.

<sup>75</sup> *Blundell v. Caterall*, 5 Barn. & Ald. 268, 295, 2 Gray's Cas. 519.

<sup>76</sup> *Tyson v. Smith*, 9 Adol. & E. 406, 2 Gray's Cas. 180.

<sup>77</sup> 2 Leake, 552. See Co. Litt. 110b; *Tyson v. Smith*, 9 Adol. & E. 406, 2 Gray's Cas. 180; *Goodman v. City of Saltash*, 7 App. Cas. 633.

<sup>78</sup> *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Bethum v. Turner*, 1 Me. 111; *Chambers v. Furray*, 1 Yeates (Pa.) 167; *Cooper v. Smith*, 9 Serg. & R. (Pa.) 25. Compare *Knowles v. Dow*, 22 N. H. 387.

<sup>79</sup> *Attorney General v. Tarr*, 148 Mass. 309.

<sup>80</sup> *Smith v. Gatewood*, Cro. Jac. 152, 2 Gray's Cas. 6; *Id.*, sub nom. *Gateward's Case*, 6 Coke, 59b; *Race v. Ward*, 4 El. & Bl. 702, 2 Gray's Cas. 10; *Hill v. Lord*, 48 Me. 83; *Cobb v. Davenport*, 32 N. J. Law, 369; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Perley v. Langley*, 7 N. H. 233; *Smith v. Floyd*, 18 Barb. (N. Y.) 523; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 323.

In two states in this country it has been decided that rights to use private land cannot thus be created by custom, for the reasons that they would tend so to burden land as to interfere with its improvement and alienation, and also because there can be no usage in this country of an immemorial character.<sup>81</sup> In one state, on the other hand, the existence of such customary rights is affirmed,<sup>82</sup> and in others this is assumed in decisions adverse to the existence of the right in the particular case.<sup>83</sup>

### § 368. Rights of fishing.

While the individual members of the public have rights of fishing in waters, the soil below which is the property of the state,<sup>84</sup> except in those cases in which an exclusive right to fish there has been granted by the state legislature or other sovereign authority,<sup>85</sup> they have, as a general rule, no such right in water which covers land belonging to a private individual.<sup>86</sup> There is an exception to this rule, however, in

<sup>81</sup> *Ackerman v. Shelp*, 8 N. J. Law, 125, 2 Gray's Cas. 184; *Harris v. Carson*, 7 Leigh (Va.) 632; *Delaplane v. Crenshaw*, 15 Grat. (Va.) 457. See Gray, *Perpetuities*, §§ 572-586, where the subject of this section is fully dealt with.

<sup>82</sup> *Nudd v. Hobbs*, 17 N. H. 524; *Knowles v. Dow*, 22 N. H. 387.

<sup>83</sup> See cases cited ante, notes 78-80.

<sup>84</sup> *Arnold v. Mundy*, 6 N. J. Law, 1, 10 Am. Dec. 356; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; *Carson v. Blazer*, 2 Bin. (Pa.) 475, 2 Gray's Cas. 570; *Inhabitants of West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Collins v. Benbury*, 25 N. C. 277, 38 Am. Dec. 722; *Sloan v. Biemiller*, 34 Ohio St. 492; *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. Rep. 404; *Manchester v. Massachusetts*, 139 U. S. 240.

<sup>85</sup> See *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. Rep. 404; *Power v. Tarzewella*, 25 Grat. (Va.) 786; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Gould, Waters*, § 189.

<sup>86</sup> *Smith v. Andrews* [1891] 3 Ch. 678; *Holyoke Water Power Co. v. Lyman*, 15 Wall. (U. S.) 500; *Beckman v. Creamer*, 43 Ill. 447, 92 Am. Dec. 146; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Hooker v.*

the case of the shore of tide waters,—that is, the space between high and low water; and although this belongs to an individual, the public may take fish, including shellfish, thereon,<sup>87</sup> provided they do so without trespassing on the latter's land above high-water mark,<sup>88</sup> and do not undertake to attach fishing appliances to the shore.<sup>89</sup>

§ 369. Rights of navigation.

Every member of the public has the right of navigation in waters capable of such use, without reference to whether the land beneath the water belongs to the public or to individual owners. The rights which individual owners may have in the land below the water or in the shores or banks are subordinate to this right of navigation in the public, and consequently they cannot place any structure or article upon the land below the water which is calculated to interfere with navigation.<sup>90</sup>

Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828. See New England Trout & Salmon Club v. Mather, 68 Vt. 338.

<sup>87</sup> Bagott v. Orr, 2 Bos. & P. 472, 2 Gray's Cas. 516; Shiveley v. Bowlby, 152 U. S. 1; Weston v. Sampson, 8 Cush. (Mass.) 347, 2 Gray's Cas. 549; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Wilson v. Inloes, 6 Gill (Md.) 121; Peck v. Lockwood, 5 Day (Conn.) 22; Allen v. Allen, 19 R. I. 114; Lakeman v. Burnham, 7 Gray (Mass.) 437; Bickel v. Polk, 5 Har. (Del.) 325; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

<sup>88</sup> 3 Kent, Comm. 417; Bickel v. Polk, 5 Har. (Del.) 325; Coolidge v. Williams, 4 Mass. 140; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

<sup>89</sup> Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Matthews v. Treat, 75 Me. 594; Locke v. Motley, 2 Gray (Mass.) 265.

<sup>90</sup> Barney v. Keokuk, 94 U. S. 324; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Smith v. City of Rochester, 92 N. Y. 463; Barclay Railroad & Coal Co. v. Ingham, 36 Pa. St. 194; Volk v. Eldred, 23 Wis. 410; Brooks v. Cedar Brook & S. C. R. Improvement Co., 82 Me. 17, 17 Am. St. Rep. 459; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Com. v. Chapin, 5 Pick. (Mass.) 199; Cobb v. Bennett, 75 Pa. (826)

"Floatable" streams—that is, streams which, while not capable of navigation by vessels or boats, are capable of use for floating timber to market—are, in this limited sense, navigable, and the rights of private owners of the land thereunder are regarded as, to some extent, subject to the rights of the public to use them for floating timber.<sup>91</sup> Streams are to be regarded as "floatable," it seems, even though they can be thus used only at certain seasons of the year, provided these seasons recur with regularity.<sup>92</sup> The rights of the public to float timber on such streams are not exclusive of the rights of owners of land under or abutting on the stream to dam or otherwise utilize the waters thereof, it being sufficient if there be left a reasonable passage for timber.<sup>93</sup>

Incidental to the right of navigation is the right to anchor one's vessel in the stream for a reasonable time, either adjoining one's own land or elsewhere, in such a way as not to un-

St. 326; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Yolo County v. City of Sacramento*, 36 Cal. 193; *Charleston & S. Ry. Co. v. Johnson*, 73 Ga. 306; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Gould, Waters*, §§ 87, 92, 121-128.

<sup>91</sup> *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Shaw v. Oswego Iron Co.*, 10 Or. 371, 45 Am. Rep. 146; *Gatson v. Mace*, 33 W. Va. 14; *Olson v. Merrill*, 42 Wis. 203.

<sup>92</sup> *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, 2 Gray's Cas. 573; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 840, note; *Smith v. Fonda*, 64 Miss. 551; *Haines v. Hall*, 17 Or. 165; *Holden v. Robinson Mfg. Co.*, 65 Me. 216; *Morgan v. King*, 35 N. Y. 464, 91 Am. Dec. 58; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98.

<sup>93</sup> *Gould, Waters*, § 110; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Kretzschmar v. Meehan*, 74 Minn. 211; *Foster v. Searsport Spool & Block Co.*, 79 Me. 508; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652.

duly obstruct navigation or prevent access to the water, for purposes of navigation, by other persons who may own land abutting thereon.<sup>94</sup> But there is no incidental right of using adjoining land for a mooring or landing place,<sup>95</sup> of going thereon for the purpose of towage,<sup>96</sup> nor of hunting while sailing over another's land.<sup>97</sup>

<sup>94</sup> Gould, Waters, §§ 96, 97; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. Div. 713, 2 Gray's Cas. 560; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Rice v. Ruddiman*, 10 Mich. 125; *Delaware River Steamboat Co. v. Burlington & B. Steam Ferry Co.*, 81 Pa. St. 103. Compare *Wall v. Pittsburgh Harbor Co.*, 152 Pa. St. 427.

<sup>95</sup> *Ensminger v. People*, 47 Ill. 384; *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

<sup>96</sup> *Ball v. Herbert*, 3 Term R. 253, 2 Gray's Cas. 555. And see, as to trespasses on the banks while driving logs, or in the construction of booms, *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, 2 Gray's Cas. 573; *Hooper v. Hobson*, 57 Me. 273, 99 Am. Dec. 769. Compare *Weise v. Smith*, 3 Or. 445, 450; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542; 3 Kent, Comm. 426.

<sup>97</sup> *Sterling v. Jackson*, 69 Mich. 488, Finch's Cas. 361.

VOLUME II





## PART V.

### THE TRANSFER OF RIGHTS IN LAND.

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#### CHAPTER XVIII.

##### TRANSFER BY THE GOVERNMENT.

- § 370. The nature of the government title.
- 371. Grants by the United States.
- 372. Grants by the states.
- 373. Spanish and Mexican grants
- 374. Patents.

The title to all lands belonging to individual owners was originally acquired from the federal or a state government, or from a foreign government formerly owning some part of the present territory included in the United States.

The public lands of the United States have been disposed of by the federal government in various modes, including public sale, sale to settlers on the land under the "pre-emption" law, gifts to settlers under the "homestead" law, grants to aid in the construction of railroads, and grants to states to aid in education and internal improvements. Mineral lands have been granted, under a separate system, to persons working them.

A grant by the government may be a legislative act, taking effect immediately; but otherwise a patent is necessary to vest the legal title to government land in an individual. A patent which is valid on its face is conclusive in a court of law, but may, in equity, be shown to have been procured or issued by fraud or mistake.

- § 370. The nature of the government title.

All the land in the United States, now owned by individ-  
(829)

lands, formerly belonged either to the federal government, to an individual state, or to a foreign nationality, which disposed of it to an individual proprietor before that particular territory became a part of this country. These grants of land by foreign states to individuals, made before the incorporation of that particular territory in the United States, are the chief basis of titles in some parts of the country, and it seems proper to briefly sketch the history of the various acquisitions of territory by this nation, in order better to understand the various classes of government grants on which the existing proprietary rights of individuals may be based.

The British claim of dominion over the territory included within the original thirteen colonies was based upon discovery, consummated by possession, the wandering Indian tribes being regarded as having a mere right of occupancy.<sup>1</sup> The dominion and ownership thus acquired was, in some of the colonies, granted by the British crown to individual proprietors or proprietary companies, by whom parts of the land were in turn granted to individuals. In others of the colonies the title to the soil remained in the British crown, and grants were made to individuals by the governor of the colony in the name of the king. After the Revolution, the title of the crown to lands still undisposed of passed to the states, and lands belonging to the original proprietaries were in some cases confiscated. Thus it may be said that the title to all land within the original thirteen states is derived, directly or indirectly, from the British crown, with the exception only of considerable bodies of land in the state of New York, the title to which is based on grants by the Dutch government or its representatives, which grants, however, were recognized and confirmed by the British crown upon the conquest of that territory.

The territory west of the Allegheny mountains and east of

<sup>1</sup> Johnson's Lessee v. McIntosh, 8 Wheat. (U. S.) 543. (830)

the Mississippi river, which had been claimed by the French, came, as a result of the French and Indian war, and of the treaty of Paris in 1763, under the exclusive dominion of England. The lands within this territory were, by royal proclamation, set apart as "crown lands." After the separation of the colonies from England, a number of the colonies asserted claims to parts of these crown lands, as being included within their limits under their royal charters. These claims, so far as concerned what was known as the "Northwest Territory"—that is, the territory northwest of the Ohio river—were opposed by the other colonies in the negotiations leading up to the Articles of Confederation, and finally the colonies asserting such claims ceded practically all their lands, or their claims thereto, within the limits of such territory, to the confederation. Of the territory south of the Ohio river, the state of Kentucky was formed out of that part of Virginia west of the Allegheny mountains, while the balance of this territory, so far south as the Spanish territory of Florida, was ceded to congress by the respective states claiming it.

In 1803, the United States purchased from France the "Louisiana" territory, which was bounded on the east by the Mississippi river, and on the west by a line which ran, approximately, along the present eastern boundary of Idaho, and through the center of what are now Colorado and New Mexico. This territory extended north to Canada, and south to the Arkansas river and the present northern boundary of Texas. In 1819, the "Florida" purchase was made from Spain, this including the present Florida and parts of Mississippi, Alabama, and Georgia. In 1845, Texas, which had obtained independence from Mexico in 1836, was annexed to the United States. In 1848, as a result of the war with Mexico, that nation ceded to the United States territory included, approximately, within the present limits of .

California, Nevada, Utah, Arizona, and within parts of Colorado and New Mexico, it extending in effect from the Pacific ocean to the western limit of the Louisiana purchase; and subsequently, in 1853, a comparatively small portion of territory, adjoining the present Mexican boundary, was purchased from Mexico, in order to settle a question as to the limits of the cession of 1848, this being known as the "Gadsden Purchase." In 1846, by treaty with Great Britain, the territory comprising that now occupied by Washington, Oregon, and Idaho, which had been in dispute between the two countries for many years, was ceded by Great Britain, this country ceding in return all claim to the territory to the north thereof. In 1867 the present territory of Alaska was purchased from Russia.

While by far the greater part of the lands of which either the United States government or individual states have had the ownership and control has been acquired either from a foreign state or by cession from the general government to a state, or *vice versa*, land may be acquired from individual owners, by either the United States or an individual state, by forfeiture, escheat, the exercise of the power of eminent domain, or voluntary transfer.

### § 371. Grants by the United States.

The territory ceded to the confederation by individual states, and that acquired by the present government from foreign powers, was, for the most part, free from any claims of ownership by individuals, and was therefore open to disposition by the government in such a way as seemed expedient. The land thus owned and controlled by the government, known as "public land," has been gradually disposed of to individuals and corporations by various methods, intended, and usually adapted, to aid in the settlement and

industrial development of the country. The more important methods of disposition which have been adopted will be briefly described.

— Public sales.

In the early period of the land system it was the custom to offer lands, as soon as surveyed, at public sale, in accordance with a proclamation by the president, and at a minimum price.<sup>2</sup> This system of disposing of public lands gave room for much abuse and oppression, it often occurring that the land had been improved by actual settlers, who would be dispossessed by purchasers at these sales, and it gradually fell into disuse. It is now to some extent abolished by statute.<sup>3</sup> The amount of land held under title thus acquired from the government is not large.

— Pre-emption.

In consequence of the evils resulting from the system of public sales, the "pre-emption" system was instituted, by which one who settled on one hundred and sixty acres of land, improving it and erecting a dwelling thereon, was entitled to purchase the land in preference to any other person. After settling on the land, he was required to file a statement or "entry" in the land office within a certain time, declaring his purpose to claim the right of pre-emption, and also to file proof that he was entitled to the right, and to pay the sum fixed by law as the purchase price. He then received a certificate of entry.<sup>4</sup> Before making such proof and payment, the claimant was regarded as having merely a privilege to purchase the land, of which he might be de-

<sup>2</sup> See Rev. St. U. S. §§ 2353, 2357-2360.

<sup>3</sup> See 26 U. S. Stat. 1099, §§ 9, 10; 1 Dembitz, Land Titles, p. 620, note.

<sup>4</sup> Rev. St. U. S. §§ 2257-2258.

prived by the government by a grant or sale to others.<sup>5</sup> And such privilege or right of pre-emption could not, by the express provision of the statute, be assigned to another person, though the pre-emptor could transfer his interest after payment and issue of the certificate.<sup>6</sup> The pre-emption law has now been repealed.<sup>7</sup>

— Homestead entry.

Since the repeal of the laws allowing public sales and of the pre-emption law, the only system of general application for the acquisition of public lands is under the "homestead" law. By this law, any citizen, or intending citizen, who is an adult or head of a family, who does not own one hundred and sixty acres of land in any state or territory, and who has not previously exercised the homestead right, may make application for the benefit of the law, and this, if followed by *bona fide* occupation and cultivation of the land for five years, entitles him to a certificate and patent for the land, without making any payment other than the land-office fees.<sup>8</sup>

— Railroad grants.

Great quantities of land have been granted out of the public domain of the United States to aid and stimulate railroad construction through the territory in which the land lay. These grants usually consist of the odd-numbered sections on both sides of the railroad to a certain distance, frequently five miles, and the even-numbered sections, thereby presumably increased in value, the government thereafter holds at an increased price. In many cases these grants to

<sup>5</sup> *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Yosemite Valley Case*, 15 Wall. (U. S.) 77.

<sup>6</sup> Rev. St. U. S. § 2263; *Myers v. Croft*, 13 Wall. (U. S.) 231.

<sup>7</sup> Act March 3, 1891 (26 Stat. 1097).

<sup>8</sup> Rev. St. U. S. §§ 2289-2302.

aid in the building of railroads have been made to the state in which the railroad was to be built, instead of to the corporation building it. In such cases the state takes merely the legal title, in trust for the railroad.<sup>9</sup>

These grants to the railroads are subject to any previous rights which may have been acquired by others in the lands granted, under the pre-emption, homestead, or other laws. To compensate for any loss to the railroad corporation through such causes, the statute making the grant usually provides for "indemnity lands" at a greater distance from the railroad, these being lands which the railroad company is authorized to take in lieu of those in its original grant already taken up by others.<sup>10</sup> A railroad grant almost invariably takes effect so soon as the survey or location of the proposed railroad through the public land has been approved by the land office, and the title to the alternate sections, as named in the act constituting the grant, then vests in the railroad company as of the date of the grant.<sup>11</sup>

— Grants to states.

Congress has, at various times and for divers purposes, granted parts of the land to states. Among the most important of these grants are those for educational purposes. Usually, section sixteen in every township, and sometimes also section thirty-two, has been granted to the state or

<sup>9</sup> *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 360; *Wolsey v. Chapman*, 101 U. S. 755; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 60.

<sup>10</sup> *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Broder v. Natoma Water & Mining Co.*, 101 U. S. 374; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618; *Sioux City & Iowa Falls Town Lot & Land Co. v. Griffey*, 143 U. S. 32.

<sup>11</sup> *Van Wyck v. Knevals*, 106 U. S. 360; *Sioux City & Iowa Falls Town Lot & Land Co. v. Griffey*, 143 U. S. 32; *Curtner v. United States*, 149 U. S. 672; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720.

territory for the support of schools; besides which, grants have been made for state universities, agricultural colleges, and similar purposes.

To each state, also, in which there were then public lands, five hundred thousand acres were, by act of congress, granted for internal improvements, and this grant extends to each new state as it is admitted.<sup>12</sup>

By the "swamp-land" grant of 1850, all swamp and overflowed lands unfit for cultivation on that account were granted to the several states in which they were situated, subject to certain restrictions, for the purpose of aiding in the reclamation of such lands.<sup>13</sup>

#### — Townsites.

The statutes of the United States specify three methods by which public lands may be acquired for townsites: (1) The president may reserve land for townsite purposes on harbors or rivers, or at other possible centers of population, and lots therein may be sold at public outcry. (2) Persons desiring to found a city or town on public land may locate a townsite not over six hundred and forty acres in extent, and lay off lots therein, and the president may then authorize the sale of such lots at a minimum price of ten dollars per lot. (3) Public land which has actually been settled upon and occupied as a townsite may be entered in the land office as a townsite by the municipal authorities thereof, or by the county judge.<sup>14</sup>

#### — Mineral lands.

Lands belonging to the United States which contain valu-

<sup>12</sup> Act Sept. 8, 1841 (Rev. St. U. S. § 2378).

<sup>13</sup> Rev. St. U. S. § 2479.

<sup>14</sup> Rev. St. U. S. §§ 2380-2389; 2 Copp. Pub. Land Laws (1890) 1010-1012.



able deposits of minerals have usually been excepted from the operation of general laws for the acquisition of land by individuals, such as the pre-emption and homestead laws. For many years, mineral lands were merely leased by the government for the purpose of working. After the discoveries of precious metals in the western territory, the mineral deposits on the public lands were worked by the immigrants under mining regulations established by themselves, and without any permission from the government, and the courts adopted the fiction that the first appropriator, in accordance with the local mining regulations, had a license from the government to work the mines.<sup>15</sup> It was not until 1866 that congress passed an act providing for the acquisition of mineral lands within the public domain by individuals at nominal prices. This statute adopted the essential features of the local miners' regulations in regard to the acquisition or "location" of claims, and all legislation by congress on the subject has recognized the validity of such regulations, as well as of state statutes, when not in conflict with the acts of congress.<sup>16</sup>

The statutes on the subject of the acquisition of claims make a distinction between mineral deposits in "lodes" or "veins," these being equivalent terms, and "placer" deposits. A "lode" or "vein," as the terms are used in the statute, is a "line or aggregation of metal imbedded in quartz or other rock in place," while the term "placer" is applied to ground which "contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place,—that is, not fixed in rock,—but which are in a loose state, and may, in most

<sup>15</sup> *Sparrow v. Strong*, 3 Wall. (U. S.) 97; *Barringer & A. Mines*, 196; *Wade*, Min. Law, §§ 2, 3.

<sup>16</sup> The United States statutes on the subject are to be found in Rev. St. §§ 2318-2352.

cases, be collected by washing or amalgamation without milling."<sup>17</sup>

Any citizen or intending citizen, upon discovering a vein or lode of minerals on public land, may "locate" a claim thereto by marking the limits of his claim on the ground, and in some states, by local requirements, by posting notice of the claim, and recording a certificate of the location.<sup>18</sup> The extent of the claim is, in the case of a lode or vein, limited by the United States statute to fifteen hundred feet in the direction in which the lode or vein runs, and three hundred feet on each side of the vein; the boundaries running in the direction of the vein being known as "side" lines, and those running across the vein as "end" lines. The locator is entitled to any ore within the space marked by these surface lines extended downward vertically, and may follow the vein across his side lines, even though, in so doing, he takes ore from beneath the surface claim of another, but he cannot follow the vein across his end lines.

A placer claim or location is limited to one hundred and sixty acres in case the location is made by an association of not less than eight *bona fide* locators, and to twenty acres in the case of a location by an individual.

In order that one who has located a claim may continue to hold it, he must do work or make improvements thereon to the value of at least one hundred dollars in each year, and, in case of his failure so to do, the claim is forfeited, and open to location by another person.<sup>19</sup>

### § 372. Grants by the states.

Of the lands within the original thirteen colonies, the

<sup>17</sup> Mr. Justice Field in *United States v. Iron Silver Min. Co.*, 134 U. S. 673.

<sup>18</sup> *Barringer & A. Mines*, c. 7.

<sup>19</sup> Rev. St. U. S. § 2324; *Barringer & A. Mines*, c. 9,

larger part had, at the time of the American Revolution, been granted to individuals or to associations, to hold in private ownership, and their rights, except in so far as the lands were confiscated for disloyalty, were not affected by the transfer of the sovereignty to the state. Those lands, however, which had not been granted away by the crown, passed to the respective state governments as successors to the crown, and as representatives of the public. Such lands, the title to which was thus vested in any of the original states, have been disposed of either by special legislative grants, or in accordance with a regular statutory system, established for the purpose, providing for their survey and sale to persons making formal application to the state authorities.

The territory ceded by certain states to the general government was, to some extent, incumbered by grants previously made to individuals by the ceding state, and these grants were usually, by the agreement for cession, recognized by the United States. Of the lands of which the title thus became vested in the states, the most important were those under tidal and navigable waters, over which the state governments have always exercised control, and which they have, as a general rule, not granted away to individuals; the policy of the states, however, differing among themselves in this regard.<sup>20</sup>

Within the territory ceded to the United States by foreign governments, the states formed therefrom have no rights to vacant lands except as these may have been granted to them by the United States government. Such grants have, however, as above stated, been made to a very considerable extent, and the lands so granted to the states they have disposed of to individuals and corporations in various ways.

The land under navigable waters within the limits of the

<sup>20</sup> *Martin v. Waddell's Lessee*, 16 Pet. (U. S.) 867; *Shiveley v. Bowlby*, 152 U. S. 1. See ante, § 254.

territory ceded to the United States, either by one of the states or by a foreign country, passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of such territory, and, upon the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, subject, however, to any grants of rights therein which may have been made for appropriate purposes by the United States government while holding the country as a territory. Consequently, the new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions, and they may accordingly grant rights therein to individuals, as it may seem most expedient, subject only to the paramount rights of navigation and commerce.<sup>21</sup>

The vacant lands which belonged to the state of Texas, lying within its limits, never became part of the public domain of the United States, there being an express provision to that effect in the resolutions passed by congress for its admission as a state.<sup>22</sup> These lands have been gradually disposed of, usually by locations under "land certificates," these certificates having been issued for various purposes, as to encourage settlement, to reward participants in the War of Independence, or their heirs, and to promote the construction of railroads.<sup>23</sup>

The systems and regulations adopted by the various states in disposing of their public lands have been of the most diverse character. Usually, however, a warrant is issued, either to one entitled as a beneficiary by some legislative act,

<sup>21</sup> *Shiveley v. Bowlby*, 152 U. S. 1.

<sup>22</sup> 5 U. S. Stat. 797.

<sup>23</sup> The mode of disposal of Texas lands is well stated in 1 Dem-  
bts. Land Titles, 561 et seq.

or in consideration of the payment of a sum fixed by law, this warrant authorizing him to "locate" or "enter" a certain number of acres in the public domain. The holder of the warrant then selects his land, and files with a designated official a description of the land, this being known as the "entry." The land so applied for is then usually surveyed by the public surveyor, and, after such survey, and his compliance with all the other requirements of the statute, the applicant is entitled to a "patent" or grant from the state.<sup>24</sup>

### § 373. Spanish and Mexican grants.

Within the territory ceded to the United States by France, Spain, and Mexico, there existed, at the time of the cession, private rights based upon grants previously made by the nation having dominion therein, and these grants the United States government was, either by express stipulation in the treaty to that effect, or by provisions preserving rights of property, required to recognize.

Though the Louisiana territory was purchased from France, most of the grants made therein before its cession to the United States were made by the Spanish, and not by the French, government, the territory having passed from the former to the latter but a short time previously. The grants made within the limits of the Florida purchase previous to the treaty of cession were expressly recognized in that treaty.

Before the cession of territory by Mexico to the United States, numerous grants had been made by that government from the time of its acquisition of independence from Spain, early in the nineteenth century. Grants made before that period were by the Spanish crown, acting through the governor or viceroy.

In the performance of its treaty obligations to recognize

<sup>24</sup> See 2 Minor, Inst. 898; 1 Dembits, Land Titles, 500; 23 Am. & Eng. Enc. Law (1st Ed.) 58 et seq.

these prior existing grants of land in the ceded territory, this government has adopted the policy of requiring all persons claiming under grants made previous to the particular cession in question to submit their claims to examination either by commissioners named for the purpose, or by the federal courts, and the claims thus submitted have been the subject of many adjudications, frequently of an adverse character.

Lands comprised within the limits of the present state of Texas have been, in succession, the subject of grant by the Spanish government, the Mexican government, the Mexican state of Coahuila and Texas, the republic of Texas, and the present state of Texas.<sup>25</sup> Grants made by the previous sovereignties have always been recognized by the present state of Texas.

#### § 374. Patents.

A patent is a document issued by the government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title, or to furnish evidence of the transfer. Patents are regularly issued by the United States government, and also by the state governments, to persons who have, by the proper proceedings, established their right to the ownership of land previously belonging to the United States or the state. The patent is, in form, a conveyance of the land, and must, when issued by the United States, be signed in the name of the president, and sealed with the seal of the general land office, and countersigned by the recorder.<sup>26</sup> A state patent must

<sup>25</sup> See *Republic of Texas v. Thorn*, 3 Tex. 505; *Norton v. Mitchell*, 13 Tex. 51; *Jones v. Mulsbach*, 26 Tex. 237.

<sup>26</sup> *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316. See Rev. St. U. S. § 450.

usually be signed by the governor, and sealed with the state seal.<sup>27</sup>

A patent is necessary to pass a perfect title to public land in all cases except when the legislative branch of the government has made a grant taking effect *in praesenti*.<sup>28</sup> Consequently, when no such previous grant has been made, the patent constitutes, and is necessary for, the transfer of the legal title.<sup>29</sup> When, on the other hand, there has been a previous grant taking effect *in praesenti*, the purpose of the issue of the patent is not to transfer the title, but to furnish evidence of the transfer, or to show compliance with the conditions thereof, obviating, in any legal controversy, the necessity of other proof of title.<sup>30</sup>

Even when there has been no legislative grant of the land, the government, upon the payment of the purchase price of land by an individual, and other compliance with the statutory requirements, thereafter holds the legal title, as any other vendor of land who has received the purchase money, in trust for the vendee.<sup>31</sup> But this mere equitable title will not support an action of ejectment at common law, and for that purpose the legal title must be acquired by the issue of a patent.<sup>32</sup> In many of the states, however, it is pro-

<sup>27</sup> See *State v. Morgan*, 52 Ark. 150; *Exum v. Brister*, 35 Miss. 391; *Hulick v. Scovill*, 9 Ill. 159; *Jarrett v. Stevens*, 36 W. Va. 445.

<sup>28</sup> *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Carter v. Ruddy*, 166 U. S. 495.

<sup>29</sup> *McGarrahan v. New Idria Min. Co.*, 96 U. S. 216; *Langdon v. Sherwood*, 124 U. S. 74; *City of Brownsville v. Basse*, 36 Tex. 500; *Roads v. Symmes*, 1 Ohio, 281, 13 Am. Dec. 621; *Carter v. Ruddy*, 166 U. S. 495; *Wood v. Pittman*, 113 Ala. 212.

<sup>30</sup> *Morrow v. Whitney*, 95 U. S. 551; *Wright v. Roseberry*, 121 U. S. 488; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Kernan v. Griffith*, 27 Cal. 89; *Lee v. Summers*, 2 Or. 267.

<sup>31</sup> *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Hussman v. Durham*, 165 U. S. 144; *Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *Arnold v. Grimes*, 2 Iowa, 1.

<sup>32</sup> *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Gibson v. Chouteau*,

vided by statute that certificates issued by the United States land office, showing the making of final proof and payment, and so entitling the holder to a patent, shall be *prima facie* evidence of title sufficient to support an action of ejectment.<sup>33</sup> But a distinction is made in this respect between receipts issued by the land office after final proof, and receipts issued merely to show that an application or "filing" has been made, and the latter will not, even under these statutes, support ejectment.<sup>34</sup> When there has been a grant taking effect *in praesenti*, the grantee may, even without the aid of any statute, bring ejectment, as having the legal title, though a patent has not been issued to him.<sup>35</sup>

A patent is, as evidence of title, conclusive in a court of law as against collateral attack, unless it is invalid on its face for insufficiency of language or execution, or unless it is void for want of power to issue it, as when the land had been previously granted, or was reserved from sale.<sup>36</sup> In equity, however, a patent, valid on its face, can, as against

13 Wall. (U. S.) 92; *Langdon v. Sherwood*, 124 U. S. 74; *Seward's Lessee v. Hicks*, 1 Har. & McH. (Md.) 22.

<sup>33</sup> See *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Surginer v. Paddock*, 31 Ark. 528; *Case v. Edgeworth*, 87 Ala. 203; *Whittaker v. Pendola*, 78 Cal. 296; *Davis v. Freeland's Lessee*, 32 Miss. 645; *Pierce v. Frace*, 2 Wash. St. 81; *McLane v. Bovee*, 35 Wis. 27.

<sup>34</sup> *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Hemphill v. Davies*, 33 Cal. 577; *Dale v. Hunneman*, 13 Neb. 221; *Adams v. Couch*, 1 Okl. 17.

<sup>35</sup> *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Northern Pac. R. Co. v. Cannon* (C. C.) 46 Fed. 224; *Southern Pac. Co. v. Burr*, 86 Cal. 279; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

<sup>36</sup> *Pfield v. Seabury*, 19 How. (U. S.) 323; *Sherman v. Buick*, 93 U. S. 209; *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Davis' Adm'r v. Wiebbold*, 139 U. S. 507; *Moore v. Wilkinson*, 13 Cal. 488; *State v. Morgan*, 52 Ark. 150; *State v. Sioux City & P. R. Co.*, 7 Neb. 357; *Webster v. Clear*, 49 Ohio St. 392; *Langenour v. Shanklin*, 57 Cal. 70; *Bledsoe's Devisees v. Wells*, 4 Bibb (Ky.) 329; *Jarrett v. Stevens*, 36 W. Va. 445; *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; *Norvell v. Camm*, 6 Munf. (Va.) 233, 8 Am. Dec. 742.



others than *bona fide* purchasers of the land for value, be attacked, for fraud in its procurement or mistake in its issuance, either by the government or by a person otherwise entitled to the land;<sup>37</sup> and if the patent has been issued to one other than the person entitled thereto, he may procure a decree establishing a constructive trust in his favor, and requiring the patentee to make a conveyance to him.<sup>38</sup> The issuance of a patent, however, raises the presumption that it was validly issued, and one seeking to set it aside must sustain his averments in that regard by clear proof.<sup>39</sup>

A patent, when issued, dates back, as against intervening claimants, to the time when the equitable title vested in the patentee by payment of the purchase price, or otherwise.<sup>40</sup>

<sup>37</sup> *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636; *Sparks v. Pierce*, 115 U. S. 408; *Sanford v. Sanford*, 139 U. S. 642; *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358; *United States v. Marshall Silver Min. Co.*, 129 U. S. 579; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; *Romain v. Lewis*, 39 Mich. 233; *Norvell v. Camm*, 6 Munf. (Va.) 238, 8 Am. Dec. 742; *State v. Bachelder*, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410.

<sup>38</sup> *Stark v. Starrs*, 6 Wall. (U. S.) 412; *Widdicombe v. Childers*, 124 U. S. 400; *Cornellius v. Kessel*, 128 U. S. 456; *Bernier v. Bernier*, 147 U. S. 242.

<sup>39</sup> *Maxwell Land-Grant Case*, 121 U. S. 325; *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183; *City of Mobile v. Eslava*, 9 Port. (Ala.) 577; 33 Am. Dec. 325.

<sup>40</sup> *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Hussman v. Durham*, 165 U. S. 144; *Waters v. Bush*, 42 Iowa, 255; *Reynolds v. Plymouth County*, 55 Iowa, 90; *Waterman v. Smith*, 13 Cal. 419. See post, § 377, note 76.

## **CHAPTER XIX.**

### **VOLUNTARY TRANSFER INTER VIVOS.**

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**I. CLASSES OF CONVEYANCES.**

At common law, the modes of transfer of land by voluntary act of the owner were (1) feoffment, or livery of seisin; (2) fines and recoveries; (3) grant, which operated only on incorporeal things and future estates, as not being capable of livery; (4) lease, by which a less estate than that of the grantor was created; (5) surrender, by which a particular estate was conveyed to the reversioner or remainderman; (6) assignment, by which leasehold interests were transferred; and (7) exchange.

Conveyances operating under the Statute of Uses are (1) bargain and sale, and (2) covenant to stand seised.

In this country all the above classes of conveyances are valid, but feoffment, fines and recoveries, and exchange, are practically obsolete. There are, moreover, in many states, statutory provisions for conveyances in writing, without reference to any requirements existing at common law or by the Statute of Uses. A conveyance by "quitclaim," which is frequently employed, corresponds, to some extent, to a release, in that it purports to convey only such estate as the grantor owns.

A conveyance which, for any reason, cannot operate as intended, will be supported as another class of conveyance, if possible.

**§ 375. Conveyances at common law—Feoffment.**

The transfer of land by "livery of seisin," which has already been briefly described,<sup>1</sup> was ordinarily known as a

<sup>1</sup> Ante, § 16.

"feoffment," and the terms were, it seems, used interchangeably.<sup>2</sup> The person making the transfer was known as the "feoffor," and the transferee as the "feoffee." The livery was ordinarily accompanied by a "charter of feoffment," declaring the limitations of the estate or estates vested in the feoffee, but the livery of seisin was alone necessary until the passage of the Statute of Frauds, which in effect declared that all estates created by livery of seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents, should be estates at will merely.<sup>3</sup> This mode of transfer was available only in the case of estates accompanied by seisin,—that is, estates of freehold in possession,—and was not available for the transfer of rights in incorporeal things.<sup>4</sup>

Since a feoffment operated on the possession alone, any person having possession of land, even though, as in the case of a tenant for years, not actually seised, could, by a feoffment to a stranger, create in the latter an estate of any quantum; and so one having seisin as of an estate for life could create in another a greater estate. Since the effect of such a transfer of seisin was to operate wrongfully upon the interest of the owner of the reversion or remainder, it was termed a "tortious" conveyance.<sup>5</sup>

Transfer by feoffment is now in effect obsolete, though occasionally the theory of such a transfer may be resorted to for the purpose of upholding a conveyance otherwise invalid or ineffective to carry out the evident purpose of the parties.<sup>6</sup> In many states the statutes expressly dispense with

<sup>2</sup> Challis, Real Prop. 321.

<sup>3</sup> 29 Car. II. c. 3, § 1. See Co. Litt. 48; 2 Bl. Comm. 313; Challis, Real Prop. 326, 327.

<sup>4</sup> Sheppard's Touchstone, 228; Williams, Real Prop. (18th Ed.) 239; 2 Bl. Comm. 314. See ante, § 16.

<sup>5</sup> Co. Litt. § 611, and Butler's note; Co. Litt. 251a, 320b; Challis, Real Prop. 328.

<sup>6</sup> Hunt v. Hunt, 14 Pick. (Mass.) 374; Carr v. Richardson, 157 (848)

the necessity of livery of seisin for the conveyance of real property.<sup>7</sup>

— Fines and recoveries.

Fines and recoveries were collusive actions brought for the purpose of effecting a transfer of interests in land not otherwise transferable. They have been abolished by statute in England, and in no state of this country are they, it is believed, in practical use.<sup>8</sup> They were for many years utilized for the purpose of barring estates tail, and thereby evading the statute *De Donis Conditionalibus*,<sup>9</sup> but they were appropriate and necessary for other purposes, the most important of which was the transfer of land by a married woman, she not being competent to make an ordinary conveyance.

— Grant.

A grant was, at common law, made use of for the transfer of such interests in land as, from their nature, were incapable of transfer by feoffment,—that is, of which there could be no seisin, including all rights in another's land, or other incorporeal things, and also future estates.<sup>10</sup> A grant always involved a "deed,"—that is, a writing under seal,—since no other form of writing had, at common law, any legal effect.<sup>11</sup>

At common law the lord's right to the services of the tenant—the "seignory"—could not be transferred to another

Mass. 576; *Eckman v. Eckman*, 68 Pa. St. 460; *Witham v. Brooner*, 63 Ill. 344.

<sup>7</sup> 1 Stimson's Am. St. Law, § 1470.

<sup>8</sup> These proceedings are explained in 2 Bl. Comm. 348.

<sup>9</sup> Ante, § 27.

<sup>10</sup> Co. Litt. 9b, 49a, 172a; 2 Bl. Comm. 317; 2 Sanders, Uses & Trusts (5th Ed.) 29.

<sup>11</sup> Co. Litt. 172a; Sheppard's Touchstone, 229; 1 Hayes, Conveyancing (5th Ed.) 25; 2 Sanders, Uses & Trusts (5th Ed.) 41.

without "attornment" by the tenant,—that is, acceptance of the new lord. The same principle applied in the case of the grant of a reversion, it not being valid unless the tenant attorned to the grantee.<sup>12</sup> The necessity of attornment was, as before stated, abolished in England by 4 Anne, c. 16, § 9, and is no longer recognized in this country.<sup>13</sup>

— Lease.

A lease is a conveyance of an estate for life, for years, or at will, by one who has a greater estate. At common law, if the estate conveyed was for life, livery of seisin was also required,<sup>14</sup> but if for years or at will merely, an oral lease was sufficient.<sup>15</sup> By the Statute of Frauds, a writing was rendered necessary for the transfer of an estate for years, excepting certain leases not exceeding three years.<sup>16</sup> But, even at common law, a lease for years of an incorporeal thing was invalid unless in writing and under seal, since such a thing lay in grant for all purposes, and no other method of transfer was recognized.<sup>17</sup> The form and requisites of a lease have been previously considered, in connection with the subject of estates for years.

— Release.

A conveyance by release is a conveyance of an estate or interest in land to one who has possession thereof, or a vested estate therein. It was utilized, at common law, in cases in which the person to whom the conveyance was to be made was al-

<sup>12</sup> Litt. §§ 551, 567, 568; Co. Litt. 809a, Butler's note.

<sup>13</sup> See ante, § 47.

<sup>14</sup> 2 Bl. Comm. 318.

<sup>15</sup> Sheppard's Touchstone, 267.

<sup>16</sup> 29 Car. II. c. 3, §§ 1, 2.

<sup>17</sup> Co. Litt. 85a; Tottel v. Howell, Noy, 54; 14 Vin. Abr. tit. "Grant" (Ga.); Sheppard's Touchstone, 267; Somerset v. Fogwell, 5 Barn. & C. 875, 3 Gray's Cas. 230; Bird v. Higginson, 2 Adol. & N. 696, 3 Gray's Cas. 231.

ready in possession, so that no livery of seisin could be given unless he should first quit possession, which would have involved an idle multiplication of ceremonies.<sup>18</sup> A release may be made by the owner of the reversion or remainder expectant upon a life estate, whether it be created by act of the parties<sup>19</sup> or by act of the law, such as an estate of dower or curtesy,<sup>20</sup> the life estate being thereby enlarged to a fee simple or fee tail. A release may also be made by the owner of the reversion to the tenant of an estate for years or at will,<sup>21</sup> but not to a tenant at sufferance.<sup>22</sup> Releases thus made by a reversioner or remainderman to the particular tenants were said to inure by way of enlargement of the estate (*enlarger l'estate*).<sup>23</sup> A mere *interesse termini*—that is, the right of a lessee who has not yet entered under his lease—does not entitle him to take a release by way of enlargement,<sup>24</sup> it being necessary that the lessee be in actual possession, or in possession by force of the Statute of Uses.<sup>25</sup> A release, in order to enlarge the particular estate to one of inheritance, must, at common law, contain the word “heirs,” as in the case of a conveyance between strangers.<sup>26</sup>

A release may also be made, not by way of enlargement of an estate, but by way of passing an estate (*mitter l'estate*), as when one joint tenant or coparcener releases his estate to his cotenant. In this case, words of inheritance have never been required, since the person to whom the release is made is regarded as already seised of the freehold, and the release is merely a discharge from the claim of another seised under

<sup>18</sup> 2 Pollock & Maitland, Hist. Eng. Law, 90.

<sup>19</sup> Co. Litt. 273b.

<sup>20</sup> 2 Sanders, Uses & Trusts (5th Ed.) 73.

<sup>21</sup> Litt. §§ 460, 465.

<sup>22</sup> Co. Litt. 270b.

<sup>23</sup> Litt. § 465; Challis, Real Prop. 331.

<sup>24</sup> Litt. § 459; Co. Litt. 270a.

<sup>25</sup> See ante, § 88.

<sup>26</sup> Litt. § 465; Co. Litt. 273b.

the same title.<sup>27</sup> A release was never regarded as sufficient to pass the interest of one tenant in common to another, since they are regarded as having distinct freeholds.<sup>28</sup> A third mode of operation of a release is by way of "extinguishment" of an interest in another's land, as when the owner of a rent, a right of profit, or an easement, releases his rights to the owner of the land subject thereto.<sup>29</sup> The only other modes of operation of release at common law occurred in the case of a release, by one disseised, of all his right or claim in favor of the disseisor, or of his heir or feoffee, this being known as a "release by way of passing the right" (*mitter le droit*).<sup>30</sup>

A release must, at common law, be by deed,—that is, by writing under seal.<sup>31</sup>

Strictly speaking, at the present day, as at common law, a release cannot be made to one having neither title to or possession of the land,<sup>32</sup> but a conveyance purporting to be a release will almost invariably be upheld as a conveyance by bargain and sale or grant.<sup>33</sup>

#### — Surrender.

A surrender is a yielding up of an estate for life or years to him that has the immediate reversion or remainder,

<sup>27</sup> Co. Litt. 273b, and Butler's note.

<sup>28</sup> 4 Cruise, Dig. tit. 32, c. 6, § 25; 2 Preston, Abstracts, 77.

<sup>29</sup> Litt. § 480; Co. Litt. 280a.

<sup>30</sup> Litt. § 466; 4 Cruise, Dig. tit. 32, c. 6, § 26.

<sup>31</sup> Co. Litt. 264b; 2 Pollock & Maitland, Hist. Eng. Law, 91.

<sup>32</sup> Runyon v. Smith (C. C.) 18 Fed. 579; Branham v. City of San Jose, 24 Cal. 585; Warren v. Childs, 11 Mass. 222. Compare Sessions v. Reynolds, 7 Smedes & M. (Miss.) 130.

<sup>33</sup> Pray v. Pierce, 7 Mass. 381, 5 Am. Dec. 59; Conn's Heirs v. Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417; Hall's Lessee v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424; Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365; Lynch v. Livingston, 6 N. Y. 423. See Ely v. Stannard, 44 Conn. 523.



wherein the particular estate may merge or "drown," by agreement of the parties.<sup>34</sup> A surrender may be either "express" or "implied," an implied surrender being usually referred to as a surrender "by operation of law."

— — Express surrender.

An express surrender, to be valid, must be by one in possession, and consequently it cannot be made by one having a mere *interesse termini*.<sup>35</sup> Furthermore, as above stated, the interest surrendered must bear such a relation, both in quantum and position, to the estate of the surrenderee, that it may merge therein, and consequently the estate surrendered must immediately precede the estate of the surrenderee, with no vested estate intervening, and it must be no greater in quantum than the surrenderee's estate.<sup>36</sup>

At common law, a surrender might be by parol; but by the Statute of Frauds it is provided that no surrender (otherwise than by "act and operation of law") shall be valid if not in writing, signed by the surrenderor, or by his agent, lawfully authorized.<sup>37</sup> Accordingly, mere cancellation or destruction of the lease is not effective as a surrender of a leasehold estate.<sup>38</sup>

While the words "surrender, grant, and yield up," or similar expressions, are commonly employed in a surrender, no

<sup>34</sup> Co. Litt. 337b; 2 Bl. Comm. 326.

<sup>35</sup> Co. Litt. 338b; Bacon, Abr. "Leases" (S) 2, 2.

<sup>36</sup> Co. Litt. 337b; 3 Preston, Estates, 150, 151, 194. See ante, § 32.

<sup>37</sup> 29 Car. II. c. 3, § 2. See *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145; *Kittle v. St. John*, 7 Neb. 73; *Felker v. Richardson*, 67 N. Y. 509; *Greider's Appeal*, 5 Pa. St. 422; *Burnham v. O'Grady*, 90 Wis. 461; *Ooe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

<sup>38</sup> *Magennis v. MacCulloch*, Gilb. Cas. 235, 3 Gray's Cas. 242; *Roe d. Berkeley v. Archbishop of York*, 6 East, 86; *Doe d. Courtall v. Thomas*, 9 Barn. & C. 288; *Rowan v. Lytle*, 11 Wend. (N. Y.) 517. See *National Union Bldg. Ass'n v. Brewer*, 41 Ill. App. 223.

particular words are necessary, and it is sufficient that the intention of the parties to effect a surrender clearly appears.<sup>39</sup>

— — Surrender by operation of law.

A surrender by "act and operation of law," which is expressly excepted from the Statute of Frauds, is a surrender which the law infers from certain acts by the parties as being inconsistent with the continued distinct existence of the two former estates.

A surrender by operation of law occurs when the tenant accepts from the reversioner a new lease, to begin immediately, or at any time during the existence of the previous lease; this result being based on the theory that, by such acceptance, the tenant is estopped to deny the validity of such new lease, which nevertheless cannot be valid unless the first lease is terminated.<sup>40</sup> The new lease must be a valid lease,<sup>41</sup> and must, it seems, be sufficient to pass an interest according to the intention and contract of the parties.<sup>42</sup> The fact that the new lease is oral is immaterial if an oral lease is sufficient to create the interest intended to be

<sup>39</sup> 2 Taylor, Landl. & Ten. § 510; Woodfall, Landl. & Ten. (16th Ed.) 315; Harris v. Hiscock, 91 N. Y. 240; Shepard v. Spaulding, 4 Metc. (Mass.) 416.

<sup>40</sup> Ive v. Sams, 2 Cro. Eliz. 521, 3 Gray's Cas. 241; Ive's Case, 5 Coke, 11a; Lyon v. Reed, 13 Mees. & W. 285, 3 Gray's Cas. 254; Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267; Bacon, Abr. "Leases" (S) 2, 1; Otis v. McMillan, 70 Ala. 46; Donkersley v. Levy, 38 Mich. 54; Enyeart v. Davis, 17 Neb. 228; Jungerman v. Bovee, 19 Cal. 354; Flagg v. Dow, 99 Mass. 18.

<sup>41</sup> Zouch v. Parsons, 3 Burrows, 1794; Doe d. Egremont v. Courtenay, 11 Q. B. 702; Smith v. Kerr, 108 N. Y. 31, 2 Am. St. Rep. 362.

<sup>42</sup> Woodfall, Landl. & Ten. (16th Ed.) 318; Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120. See 5 Bacon, Abr. (Am. Ed.) p. 664. But see Hamerton v. Stead, 3 Barn. & C. 478, 3 Gray's Cas. 246.

created.<sup>45</sup> Since the effect of a new lease as a surrender is by the operation of a rule of law, and is not the effect of an agreement of the parties, it might be considered that such operation would not be affected by the fact that it is contrary to the intention of the parties.<sup>46</sup> In at least two states, however, a different view is taken, the new lease being regarded as merely raising a presumption of a surrender, which may be rebutted by evidence that the intention was otherwise.<sup>45</sup>

If the tenant abandons possession of the premises, and the landlord consents thereto, or takes possession with the purpose of accepting the abandonment, a surrender results, whether there is or is not an express agreement that the change of possession shall have such an effect.<sup>46</sup> But the taking of possession by the landlord must be with the intention of accepting the tenant's action as a surrender of the premises, and no surrender results if he takes possession merely to protect or repair the premises.<sup>47</sup> So, the acceptance of the keys by the landlord does not necessarily

<sup>45</sup> Comyn's Dig. "Surrender," 1, 1; *Dodd v. Acklom*, 6 Man. & G. 679, 3 Gray's Cas. 250; *Evans v. McKanna*, 89 Iowa, 362; *Nachbour v. Wiener*, 34 Ill. App. 237. See *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267.

<sup>46</sup> See *Lyon v. Reed*, 13 Mees. & W. 285, 3 Gray's Cas. 254; *Brown v. Cairns*, 107 Iowa, 727.

<sup>47</sup> *Flagg v. Dow*, 99 Mass. 18; *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; *Winant v. Hines*, 6 N. Y. St. Rep. 261.

<sup>48</sup> *Grimman v. Legge*, 8 Barn. & C. 324; *Dodd v. Acklom*, 6 Man. & G. 672, 3 Gray's Cas. 251; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116, 32 Am. Dec. 152; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Baumier v. Antiau*, 65 Mich. 31; *Elliott v. Aiken*, 45 N. H. 30; *Prior v. Kiso*, 81 Mo. 241.

<sup>49</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Finch v. Moore*, 56 Minn. 116; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Milling v. Becker*, 96 Pa. St. 182; *Texas Loan Agency v. Fleming* 92 Tex. 453.

effect a surrender by operation of law.<sup>48</sup> Even the fact that the landlord attempts to lease the premises to another person does not necessarily show a consent to the abandonment.<sup>49</sup> But if the landlord does make another lease to a third party, since this deprives the former lessee of all dominion over the premises, it is regarded as constituting an acceptance of the abandonment,<sup>50</sup> unless he reserves his rights as against the former tenant by express notice or stipulation.<sup>51</sup>

A surrender by operation of law also occurs when the lessee consents to the granting of a lease to another, and gives up his possession to such other;<sup>52</sup> and on this principle a

<sup>48</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Auer v. Penn*, 99 Pa. St. 370, 3 Gray's Cas. 273; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Nelson v. Thompson*, 23 Minn. 508; *Prentiss v. Warne*, 10 Mo. 601.

<sup>49</sup> *Walls v. Atcheson*, 3 Bing. 462; *Oastler v. Henderson*, 2 Q. B. Div. 575; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Reeves v. McComeskey*, 168 Pa. St. 571; *Vincent v. Frellich*, 50 La. Ann. 378, 69 Am. St. Rep. 436.

<sup>50</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145; *Ladd v. Smith*, 6 Or. 316; *Pelton v. Place*, 71 Vt. 430; *Huling v. Roll*, 43 Mo. App. 234; *Williamson v. Crossett*, 62 Ark. 393; *Schulzler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168.

<sup>51</sup> *Dawson v. Lamb*, 3 Car. & K. 269; *Auer v. Penn*, 99 Pa. St. 370, 3 Gray's Cas. 273; *Underhill v. Collins*, 132 N. Y. 269; *Winant v. Hines*, 6 N. Y. St. Rep. 261; *Bloomer v. Merrill*, 1 Daly (N. Y.) 485, 29 How. Pr. (N. Y.) 259; *Brown v. Cairns*, 107 Iowa, 727; *Alsup v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Rees v. Lowy*, 57 Minn. 381. See *Wolfe v. Wolfe*, 69 Ala. 549, 44 Am. Rep. 526. But that the landlord cannot lease to another, and yet reserve his rights against the former lessee, see *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145.

In Illinois, a lease to another by the landlord after abandonment by the tenant does not involve a surrender, even though there is no notice or stipulation that the lease shall not have that effect. *Humiston v. Wheeler*, 175 Ill. 514; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181.

<sup>52</sup> *Nickells v. Atherstone*, 10 Q. B. 944, 3 Gray's Cas. 264; *Kinsey* (856)

surrender may be implied from the fact that the landlord accepts as his tenant a sublessee of the original tenant.<sup>53</sup> In order that, in cases of this character, the lease to a third person effect a surrender, it must be accompanied or followed by a transfer to him of the possession.<sup>54</sup>

— Assignment.

The term "assignment," in connection with the law of land, is commonly applied to the transfer of a chattel interest in land.<sup>55</sup> At common law, an assignment of an interest in land, as distinguished from an interest in an incorporeal thing, might be made without writing,<sup>56</sup> but, by the Statute of Frauds,<sup>57</sup> a writing signed by the assignor, or by his agent duly authorized, is required. The important questions as to the right of a tenant to make an assignment of his leasehold interest, and as to when a transfer by him constitutes an assignment and when a sublease, have been previously considered.<sup>58</sup>

— Exchange.

An exchange is a mutual conveyance of equal interests in distinct pieces of land. At common law, if both pieces of

*v. Minnick*, 43 Md. 112; *Dills v. Stobie*, 81 Ill. 202; *Fry v. Patridge*, 73 Ill. 51; *Morgan v. McCollister*, 110 Ala. 319; *Wallace v. Kennelly*, 47 N. J. Law, 242; *Bowen v. Haskell*, 53 Minn. 480.

<sup>53</sup> *Thomas v. Cook*, 2 Barn. & Ald. 119, 3 Gray's Cas. 244; *Nickells v. Atherstone*, 10 Q. B. 944, 3 Gray's Cas. 264; *Amory v. Kanoffsky*, 117 Mass. 351, 19 Am. Rep. 416.

<sup>54</sup> *Wallis v. Hands* [1893] 2 Ch. 75; *Davison v. Gent*, 1 Hurl. & N. 744; *Felker v. Richardson*, 67 N. H. 509.

Such a case of a new lease must be carefully distinguished from the acceptance by the landlord of the lessee's assignee as tenant under the old lease. See ante, § 46. And see *Hunt v. Gardner*, 29 N. J. Law, 530; *Jones v. Barnes*, 45 Mo. App. 590.

<sup>55</sup> 4 Cruise, Dig. tit. 32, c. 6, § 15; 2 Bl. Comm. 328.

<sup>56</sup> 4 Cruise, Dig. tit. 32, c. 6, § 20.

<sup>57</sup> 29 Car. II. c. 3, § 2.

<sup>58</sup> See ante, §§ 46, 48.

land lay in the same county, the exchange might be oral, while, if situated in different counties, a deed was required.<sup>59</sup> But, by the Statute of Frauds, a writing is necessary on the exchange of freeholds or of terms for years other than certain terms for three years or less.<sup>60</sup> No livery of seisin was necessary at common law, but each party to the exchange was required to enter while both were alive.<sup>61</sup>

A common-law exchange could not be effected unless the estates of the respective parties were of the same legal quantum,—that is, an estate in fee simple could be exchanged only for an estate of the same character, an estate for twenty years only for an estate for twenty years, and so on.<sup>62</sup> The word “exchange” was required to be used, and no other expression would supply its place.<sup>63</sup> A common-law exchange, answering to the foregoing requirements, probably never occurs in modern practice.

§ 376. Conveyances operating under the Statute of Uses.

The Statute of Uses, as has been previously explained, gave rise to two entirely new methods of transferring legal estates in land, to-wit, the conveyance by “bargain and sale,” and that by “covenant to stand seised”; the former being based upon a use raised in the intended grantee by the payment of a pecuniary consideration, usually merely nominal,

<sup>59</sup> Litt. §§ 62, 63; Co. Litt. 50a.

<sup>60</sup> 29 Car. II. c. 3, §§ 1-3; Co. Litt. 50a, Butler's note. See *Dowling v. McKenney*, 124 Mass. 478; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Rice v. Peet*, 15 Johns. (N. Y.) 503.

<sup>61</sup> Co. Litt. 50b.

<sup>62</sup> Litt. §§ 64, 65; Co. Litt. 51a; 2 Bl. Comm. 323; *Anonymous*, 3 Salk. 157; *Windsor v. Collinson*, 32 Or. 297; *Long v. Fuller*, 31 Wis. 121.

<sup>63</sup> Co. Litt. 51b; 2 Bl. Comm. 323; *Eton College v. Winchester*, 3 Wils. 468; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Windsor v. Collinson*, 32 Or. 297.

and the latter being based on the raising of a use by a covenant, in favor of one related by blood or marriage, to hold the title for the use of the latter, the statute executing the use in both cases.<sup>64</sup> Since the effect of this statute was to enable the owner of land, by a mere contract of sale, upon the payment of a pecuniary consideration, to vest the legal title in another, without any writing or ceremony whatever, and with absolute secrecy, a statute was passed in the same year, called the "Statute of Enrollments,"<sup>65</sup> requiring all bargains and sales of freehold interests, in order to be valid, to be made by deed,—that is, a writing under seal, enrolled in court, or with certain officials. The statute did not apply to conveyances by covenant to stand seised. This statute has usually been regarded as not in force in this country.<sup>66</sup> Clandestine conveyances by bargain and sale being thus prevented by the Statute of Enrollments, conveyancers, soon after the statute, devised the conveyance by "lease and release," taking advantage of the fact that the statute required the enrollment of bargains and sales of "freehold" interests only. This conveyance, as before explained, consisted of a bargain and sale of a leasehold interest to the intended grantee, which vested him with the legal possession, and this was followed by a deed of release of the reversion remaining in the former owner.<sup>67</sup>

§ 377. Conveyances employed in the United States.

In most of the states of this country there are statutory provisions authorizing the transfer of land by simple forms

<sup>64</sup> See ante, § 33.

<sup>65</sup> 27 Hen. VIII. c. 16 (A. D. 1535). See 2 Sanders, Uses & Trusts (5th Ed.) 64.

<sup>66</sup> See *Givan v. Tout*, 7 Blackf. (Ind.) 210. *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76.

<sup>67</sup> 1 Hayes, Conveyancing (5th Ed.) 76. See ante, § 33.

of conveyance,<sup>68</sup> which, in their operation, much resemble the common-law "grant," except that they are not confined to incorporeal things. The same purpose of simplification of conveyancing has in England been attained by a statute providing that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery.<sup>69</sup>

Conveyances by way of bargain and sale have, however, been in constant use in this country,<sup>70</sup> and, even in states where there are statutory provisions of the character referred to, the words "bargain and sell" are ordinarily used in a conveyance. In such states, in fact, it is difficult, and for most, if not all, purposes, unimportant, to say whether a particular conveyance operates by force of the Statute of Uses or under the local statute. In order, however, that a conveyance be regarded as taking effect by way of bargain and sale, it must, as was before stated, be supported by a valuable consideration.<sup>71</sup>

Conveyances by way of covenant to stand seised are recognized in this country,<sup>72</sup> but, since a consideration of blood or marriage is necessary,<sup>73</sup> there is but little opportunity for

<sup>68</sup> 1 Stimson's Am. St. Law, §§ 1480-1482.

<sup>69</sup> "Real-Property Act," St. 8 & 9 Vict. c. 106, § 2 (A. D. 1845).

<sup>70</sup> See *Pascault v. Cochran* (C. C.) 34 Fed. 358; *Givan v. Tout*, 7 Blackf. (Ind.) 310; *Nelson v. Davis*, 35 Ind. 474; *Chiles v. Conley's Heirs*, 2 Dana (Ky.) 21; *Sanders v. Hartzog*, 6 Rich. (S. C.) 479; *Holland v. Rogers*, 33 Ark. 251.

<sup>71</sup> *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Lambert v. Smith*, 9 Or. 185; *Den d. Jackson v. Hampton*, 30 N. C. 457; *Gault v. Hall*, 26 Me. 561; *Boardman v. Dean*, 34 Pa. St. 252.

<sup>72</sup> *Jackson v. Swart*, 20 Johns. (N. Y.) 85; *Ward v. Wooten*, 75 N. C. 413; *Sprague v. Woods*, 4 Watts & S. (Pa.) 192; *Fisher v. Strickler*, 10 Pa. St. 348, 51 Am. Dec. 488; *Watson v. Watson*, 24 S. C. 228, 58 Am. Rep. 247; *Barry v. Shelby*, 4 Hayw. (Tenn.) 229.

<sup>73</sup> *Rollins v. Riley*, 44 N. H. 9; *Jackson v. Caldwell*, 1 Cow. (N. Y.) 622; *Gault v. Hall*, 26 Me. 561; *Thompson v. Thompson*, 17 (860).



their employment. Even when the proper consideration does exist, a conveyance in form under the local statute, or by way of bargain and sale, with a recital of a pecuniary consideration, would usually be employed.

Conveyances by lease and release have never been employed to any extent in this country, since the Statute of Enrollments, which constituted the reason for their use in England, is not in force here.

— "Quitclaim deeds."

There is, in this country, a well-recognized class of conveyances, known as "quitclaim deeds," which are to some extent a development of the common-law release, and which have acquired their name from one of the words ordinarily used in the latter instrument.<sup>74</sup> Such a conveyance purports merely to convey whatever title to the particular land the grantor may have, and its use excludes any implication that he has a good title, or any title at all.<sup>75</sup> It necessarily, therefore, contains no covenants for title, and its employment is, in some states, regarded as in itself notice to the purchaser of possible defects in the title, so that he cannot claim to occupy the position of a *bona fide* purchaser.<sup>76</sup> A quitclaim,

Ohio St. 649; Doe d. Cobb v. Hines, 44 N. C. 343, 59 Am. Dec. 559; 2 Sanders, Uses & Trusts (5th Ed.) 98. Contra in Massachusetts. Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494. See ante, § 134.

<sup>74</sup> See, as to the early use of the word "quitclaim," 2 Pollock & Maitland, Hist. Eng. Law, 91.

<sup>75</sup> City & County of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Kerr v. Freeman, 33 Miss. 292; Emmel v. Headlee (Mo.) 7 S. W. 22; Coe v. Persons Unknown, 43 Me. 432; Garrett v. Christopher, 74 Tex. 453, 15 Am. St. Rep. 850

<sup>76</sup> See post, § 482.

Since a government patent, when issued, relates back to the date of the entry, it inures to the benefit of one to whom the patentee has, since the entry, conveyed the land, even though by a "quitclaim" purporting to convey merely such title as he has. Crane v. Salmon, 41 Cal. 63; Welch v. Dutton, 79 Ill. 466; Callahan v. Davis,

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however, is sufficient in itself to pass the grantor's existing title to the same extent as a deed of grant or bargain and sale,<sup>77</sup> and its validity is not, like the common-law release, dependent upon the existence of an estate or interest in the grantee.<sup>78</sup> The question whether a conveyance is a mere quitclaim is determined by a construction of the instrument as a whole, with reference to the circumstances under which it was given.<sup>79</sup>

§ 378. Conveyances failing to take effect in the manner intended.

A conveyance which is intended to take effect as a certain class of conveyance, if not valid for that purpose, will, if possible, be construed as a conveyance of another character, in order that it may take effect.<sup>80</sup> This important rule has been applied in numerous connections. For instance, a conveyance intended to take effect as a bargain and sale, but which is void as such for want of a pecuniary consideration, will take effect as a covenant to stand seised, if a considera-

<sup>79</sup> *Mo. 78; Landes v. Brant*, 10 How. (U. S.) 372; *French's Lessee v. Spencer*, 21 How. (U. S.) 228.

<sup>77</sup> *Bradbury v. Davis*, 5 Colo. 265; *Kyle v. Kavanagh*, 103 Mass. 356; *Grant v. Bennett*, 96 Ill. 513; *Wilson v. Albert*, 89 Mo. 537; *McInerney v. Peck*, 10 Wash. 515. So by statute in some states. See *Hoffman v. Harrington*, 28 Mich. 90; *Kerr v. Freeman*, 33 Miss. 292.

<sup>78</sup> *Spaulding v. Bradley*, 79 Cal. 449; *Kerr v. Freeman*, 33 Miss. 292.

<sup>79</sup> See *United States v. California & Oregon Land Co.*, 148 U. S. 31; *Derrick v. Brown*, 66 Ala. 162; *Reynolds v. Shaver*, 59 Ark. 299; *Wightman v. Spofford*, 56 Iowa, 145; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Cummings v. Dearborn*, 56 Vt. 441; *Morrison v. Wilson*, 30 Cal. 344.

<sup>80</sup> *Elphinstone*, Interpret. of Deeds, 40, citing the numerous English cases. *Goodtitle v. Bailey*, Cowp. 600; *Roe d. Wilkinson v. Tranmer*, Willes, 682, 1 Gray's Cas. 494; *Foster's Lessee v. Dennison*, 9 Ohio, 121; *Hunt v. Hunt*, 14 Pick. (Mass.) 374.

tion of blood or marriage exists;<sup>81</sup> and, as before stated, a conveyance in words of release, void as such for want of an estate or possession in the releasee, will be supported as a conveyance by bargain and sale, or otherwise.<sup>82</sup> This principle has also been adopted to support limitations of future estates which could not be supported unless the conveyance were regarded as operating under the Statute of Uses.<sup>83</sup>

## II. FORM AND ESSENTIALS OF A CONVEYANCE

A conveyance must identify the parties thereto and the land conveyed, and must contain words showing an intention that it is to transfer rights in the land. It must also be properly executed. It frequently, moreover, contains words limiting the estate to be taken by the grantee; and may likewise contain a reservation creating new rights in the land in favor of the grantor, such as easements or rights of profit.

No consideration is necessary to the validity of a conveyance not operating under the Statute of Uses. The conveyance may be set aside if induced by fraud or duress, or, in some cases, if executed under a mistake.

### § 379. General considerations.

All conveyances of freehold or leasehold interest in lands, other than certain leases for three years or less, must, by the Statute of Frauds, be in writing.<sup>84</sup> In most if not all the states of this country there are statutes to the same effect<sup>85</sup>

<sup>81</sup> *Crossing v. Scudamore*, 2 Lev. 9, 1 Mod. 175; *Horton v. Sledge*, 29 Ala. 478; *Bank of United States v. Housman*, 6 Paige (N. Y.) 526; *Eckman v. Eckman*, 68 Pa. St. 460.

<sup>82</sup> See ante, note 23.

<sup>83</sup> *Roe d. Wilkinson v. Tranmer*, 2 Will. 75, Willes, 682, 1 Gray's Cas. 494; *Ward v. Wooten*, 75 N. C. 413; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147.

<sup>84</sup> 29 Car. II. c. 3, §§ 1-3.

<sup>85</sup> 1 Stimson's Am. St. Law, §§ 1560, 4143.

These statutes do not, however, as before stated, interfere with surrenders by operation of law.<sup>86</sup>

At common law, all written conveyances of land, as well as most other written instruments, were in the form of deeds,—that is, of instruments under seal,—and a deed was either a “deed of indenture” or a “deed poll.” A deed of indenture was a deed made between two or more persons, while a deed poll was made by one person only.<sup>87</sup> These terms are thus used in England at the present day, and they are occasionally so used in this country.

A carefully drawn conveyance usually consists of the following parts: At the commencement the names of the parties are stated,<sup>88</sup> and the date is sometimes here given, though it is frequently placed at the end. Next come the recitals, if there are any, these being statements of fact explanatory of the transaction. A statement of the consideration and of its payment and receipt then follow,<sup>89</sup> and, after this, the operative words of conveyance,<sup>90</sup> with a description of the land conveyed,<sup>91</sup> and any exception therefrom.<sup>92</sup> The parts thus far enumerated constitute what is known as “the premises.” The premises are followed by the “habendum,” which limits the estate to be taken by the grantee, and is usually

<sup>86</sup> See ante, § 375.

<sup>87</sup> Co. Litt. 229a. The word “indenture” originated in the fact that two copies of the deed were usually written on the same piece of parchment, with some word or letters written between them, through which the parchment was cut in an indented or waiving line. The words “deed poll” refer to a deed “polled” or shaven at the top. Subsequently, conveyancers adopted the practice, which still, it seems, prevails in England, of cutting all deeds between two or more parties in a waving line at the top. 3 Bl. Comm. 296; Williams, Real Prop. (18th Ed.) 150.

<sup>88</sup> Post, § 380.

<sup>89</sup> Post, § 384.

<sup>90</sup> Post, § 381.

<sup>91</sup> Post, §§ 387-392.

<sup>92</sup> Post, § 382.

introduced by the words "to have and to hold."<sup>83</sup> Any declaration of trust which is sought to be made is here inserted. The "reddendum" or reservation<sup>84</sup> then follows, after that the statement of any condition or power affecting the grant, and then the covenant or covenants of title.<sup>85</sup> The conclusion usually consists of a formal reference to the execution, and the signatures and seals of the parties are then placed by them at the foot of the instrument.<sup>86</sup> There is also, almost invariably, a certificate by an officer that the conveyance was acknowledged by the grantors.<sup>87</sup>

Though a well-drawn conveyance usually contains all or most of these parts above referred to, a conveyance containing merely the names of the parties and words of conveyance, with a description of the land, if duly executed, is sufficient to vest at least an estate for life in the grantee.<sup>88</sup>

### § 380. Designation of the parties.

A conveyance should designate with certainty the name of the grantor, and this should regularly be done at the commencement. It is sufficient, however, if the name as given is sufficient to enable the grantor to be identified, and the fact that his name as it appears in the instrument differs from his actual name, or from the name signed thereto, does not invalidate the conveyance.<sup>89</sup> A conveyance by the "heirs"

<sup>83</sup> Post, § 382.

<sup>84</sup> Post, § 383.

<sup>85</sup> Post, §§ 394-401.

<sup>86</sup> Post, §§ 402, 403.

<sup>87</sup> Post, § 405.

<sup>88</sup> Co. Litt. 7a; 4 Kent's Comm. 461.

<sup>89</sup> Comyn's Dig. "Fait" (E 3); *Erskine v. Davis*, 25 Ill. 251; *Nicomemus v. Young*, 90 Iowa, 423; *Houx v. Batteen*, 68 Mo. 84; *Rupert v. Penner*, 35 Neb. 587; *Jenkins v. Jenkins*, 148 Pa. St. 216; *Bierer v. Fretz*, 32 Kan. 329.

of a decedent is sufficient, provided such heirs can be identified.<sup>100</sup>

It is generally held that, when two or more persons join in the execution of a conveyance, only such as are named in the body of the instrument will be regarded as parties thereto. This rule has usually been applied in the cases of conveyances by a husband, the joinder in the execution of which by the wife has been held to be insufficient to release her dower, or otherwise divest her rights;<sup>101</sup> but the rule is applicable, for even stronger reasons, it would seem, in the case of strangers joining in the execution.<sup>102</sup> The same necessity that the grantor be named in the conveyance does not exist, it would seem, in the case of a conveyance executed by and purporting to be the act of one person only, since the name of the grantor is put in "but to make certainty of the grantor,"<sup>103</sup> and there

<sup>100</sup> *Blaisdell v. Morse*, 75 Me. 542.

<sup>101</sup> *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56, 3 Gray's Cas. 621; *Leavitt v. Lampray*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Prather v. McDowell*, 8 Bush (Ky.) 46; *Agricultural Bank of Mississippi v. Rice*, 4 How. (U. S.) 225; *Batchelor v. Brereton*, 112 U. S. 396; *Cox v. Wells*, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; *Merrill v. Nelson*, 18 Minn. 366 (Gil. 335); *Stone v. Sledge*, 37 Tex. 49, 47 Am. St. Rep. 65; *Laughlin v. Fream*, 14 W. Va. 322; *Harrison v. Simons*, 55 Ala. 510. Contra, *Armstrong v. Stovall*, 26 Miss. 276; *Johnson v. Montgomery*, 51 Ill. 185; *Ingoldsby v. Juan*, 12 Cal. 564; *Elliot v. Sleeper*, 2 N. H. 525; *Woodward v. Leaver*, 38 N. H. 29. In *Burge v. Smith*, 27 N. H. 332, a release of dower by the mere execution by the wife of the husband's deed is upheld, on the ground that, in that state, a contrary decision would overthrow many titles, but that this holding is wrong in principle is strongly asserted.

<sup>102</sup> *Harrison v. Simons*, 55 Ala. 510. See *Stone v. Sledge*, 37 Tex. 49, 47 Am. St. Rep. 65; *Batchelor v. Brereton*, 112 U. S. 396. Contra *Hrouska v. Janke*, 66 Wis. 252.

<sup>103</sup> *Perkins*, § 26.

can, in such a case, be no question that the person executing the conveyance is the grantor therein.<sup>104</sup>

The grantee or grantees must be named in the conveyance, or means for their identification furnished thereby.<sup>105</sup> A conveyance to a deceased person is invalid;<sup>106</sup> but a conveyance to the heirs of one deceased is sufficient, since their identity can be determined.<sup>107</sup> On the other hand, one cannot convey land to the heirs of a living person, since they are incapable of identification.<sup>108</sup>

— Name of grantee left blank.

At the common law, a deed,—that is, an instrument under seal,—if delivered with a blank therein as to an essential part, is void, although this blank be afterwards filled by one having parol authority from the maker of the deed so to do; this being based on the theory that an authority to make an instrument under seal must itself be under seal.<sup>109</sup> Apply—

<sup>104</sup> *Elliot v. Sleeper*, 2 N. H. 525. But see, to the contrary, *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

So it would seem that a conveyance in the first person, though not naming the grantor, if signed by him, would be sufficient to divest his title. Such a conveyance was upheld, without any question as to this particular point, in *Jackson v. Root*, 18 Johns. (N. Y.) 40; *Hutchins v. Carleton*, 19 N. H. 487.

<sup>105</sup> *Wunderlin v. Cadogan*, 50 Cal. 613; *Wood v. Boyd*, 23 Ark. 75; *Simmons v. Spratt*, 20 Fla. 495; *Hardin v. Hardin*, 32 S. C. 599; *Wright v. Lancaster*, 48 Tex. 250; *Chase v. Palmer*, 29 Ill. 306. See, as to conveyance to one under assumed name, *Thomas v. Wyatt*, 31 Mo. 138, *Finch's Cas.* 1075.

<sup>106</sup> *Lewis v. McGee*, 1 A. K. Marsh. (Ky.) 199.

<sup>107</sup> *Shaw v. Loud*, 12 Mass. 447; *Hoover v. Malen*, 33 Ind. 195; *Boone v. Moore*, 14 Mo. 421; *Gearheart v. Tharp*, 9 B. Mon. (Ky.) 31.

<sup>108</sup> *Booker v. Tarwater*, 138 Ind. 385; *Morris v. Stephens*, 46 Pa. St. 200; *Hall v. Leonard*, 1 Pick. (Mass.) 27. But otherwise if the word "heirs" means children. *Huss v. Stephens*, 51 Pa. St. 282; *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439.

<sup>109</sup> *Sheppard's Touchstone*, 54; *Comyn's Dig. "Fait"* (A 1); *Hibblewhite v. McMorine*, 6 Mees. & W. 200.

ing this rule, it has been held, in a number of states, that a conveyance under seal, with the name of the grantee left blank, is invalid, although the blank is afterwards filled up by another person acting under a parol authority from the grantor.<sup>110</sup> In other states, it has been held, without reference to the question of a seal, that an authority to insert the grantee's name must be in writing.<sup>111</sup> In a majority of states, however, at the present time, the name of the grantee, if left blank, may be inserted, in the grantor's absence, by one acting under oral authority from him, upon the ground of the technical character of the rule to the contrary, based, as it is, on the sanctity accorded at common law to the presence of a seal.<sup>112</sup> But even under this view, the name of the grantee must be inserted before the delivery of the conveyance to him,—that is, though the grantor may commit the instrument to his agent, to fill in the blank and then deliver it, one to whom the instrument is delivered by the grantor cannot insert his own name as grantee, though this is within the terms of his authority.<sup>113</sup>

<sup>110</sup> *Ingram v. Little*, 14 Ga. 173, 53 Am. Dec. 549; *Preston v. Hull*, 23 Grat. (Va.) 600; *Davenport v. Sleight*, 19 N. C. 281; *Burns v. Lynde*, 6 Allen (Mass.) 305.

<sup>111</sup> *Ayres v. Probasco*, 14 Kan. 175; *Adamson v. Hartman*, 40 Ark. 53; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266. See *Lindsley v. Lamb*, 24 Mich. 509.

<sup>112</sup> *Swartz v. Ballou*, 47 Iowa, 183, 29 Am. Rep. 470; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746; *Threadgill v. Butler*, 60 Tex. 599; *Inhabitants of South Berwick v. Huntress*, 53 Me. 90; *Lafferty v. Lafferty*, 42 W. Va. 783; *Schintz v. McManamy*, 23 Wis. 299.

But when the instrument must be executed by the grantor, and cannot be executed through an agent, as in some states is the case in a conveyance by a married woman, blanks in the conveyance cannot be filled by a third person acting under oral, or even sealed, authority. *Drury v. Foster*, 2 Wall. (U. S.) 24.

<sup>113</sup> See *Allen v. Withrow*, 110 U. S. 119; *McClung v. Steen* (C. C.) 32 Fed. 373; *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746 (semble); *Bell v. Kennedy*, 100 Pa. St. 215. See *Chauncey v. Arnold*, (868)



Even though the sufficiency of an oral authority for this purpose be denied, it is generally held that, as against a grantee who accepts the conveyance with his name appearing therein in its proper place, and who does not know of its insertion by the agent, the grantor is estopped to deny the validity of the conveyance.<sup>114</sup> Apart from such cases of estoppel, and without reference to the common-law requirement of a sealed authority, the statutory requirement existing in some states, that a conveyance be signed by the grantor, or by an agent authorized in writing, would apparently prevent the insertion of such an essential part of the conveyance, after its execution, by a person acting under a merely oral authority.

§ 381. Words of conveyance.

Though particular words are appropriate to particular classes of conveyances, it is not necessary that these particular technical terms be used, and the conveyance is valid, provided it contains any words signifying an intention to transfer the land or the grantor's interest therein.<sup>115</sup> The phrase "give, grant, bargain, and sell" is frequently employed, and is no doubt sufficient for any class of conveyance, in view of the rule before referred to, that a conveyance will be upheld if possible, though it cannot operate as intended. It is nec-

<sup>114</sup> 24 N. Y. 330. But see, to the contrary, *Threadgill v. Butler*, 60 Tex. 599.

<sup>115</sup> *Phelps v. Sullivan*, 140 Mass. 36; *Pence v. Arbuckle*, 22 Minn. 417; *State v. Matthews*, 44 Kan. 596; *Garland v. Wells*, 15 Neb. 298; *Quinn v. Brown*, 71 Iowa, 376. Contra, *Upton v. Archer*, 41 Cal. 85.

<sup>116</sup> *Shove v. Pincke*, 5 Term R. 124; *San Francisco & O. R. Co. v. City of Oakland*, 43 Cal. 502; *Gordon v. Haywood*, 2 N. H. 402; *Hutchins v. Carleton*, 19 N. H. 487; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Lynch v. Livingston*, 6 N. Y. 422; *Folk v. Varn*, 9 Rich. Eq. (S. C.) 303; *Howe v. Warnack*, 4 Bibb (Ky.) 234; *Evenson v. Webster*, 3 S. D. 332, 44 Am. St. Rep. 802.

essary, however, that the conveyance contain words showing an intention to transfer the grantor's interest,<sup>116</sup> and the words "sign over"<sup>117</sup> and "warrant and defend" have been held to be insufficient.<sup>118</sup>

§ 382. The habendum.

The purpose of the habendum is, as before stated, to limit the estate to be taken by the grantee. In its construction, in connection with other parts of the conveyance, the purpose is, of course, to arrive at the intention of the parties,<sup>119</sup> and, if possible, it will be construed so as to harmonize with the premises, thus giving effect to both.<sup>120</sup>

In the case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum.<sup>121</sup> If the estate limited in the habendum, however, is greater than

<sup>116</sup> Webb v. Mullins, 78 Ala. 111; Bell v. McDuffie, 71 Ga. 264; Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223.

<sup>117</sup> McKinney v. Settles, 31 Mo. 541, Finch's Cas. 1080.

<sup>118</sup> Hummelman v. Mounts, 87 Ind. 178.

<sup>119</sup> Higgins v. Wasgatt, 34 Me. 305; Ratliffe v. Marrs, 87 Ky. 26; Barnett v. Barnett, 104 Cal. 298; Smith v. Smith, 71 Mich. 633.

<sup>120</sup> Co. Litt. 183b; Edwards v. Beall, 75 Ind. 401; Warn v. Brown, 102 Pa. St. 347.

<sup>121</sup> Co. Litt. 299a; 2 Sanders, Uses & Trusts, 155; Challis, Real Prop. 333; Boddington v. Robinson, L. R. 10 Exch. 270; Robinson v. Payne, 58 Miss. 690; Adams v. Dunklee, 19 Vt. 382; Smith v. Smith, 71 Mich. 633; Fowler v. Black, 136 Ill. 363; Ratliffe v. Marrs, 87 Ky. 26; Winter v. Gorsuch, 51 Md. 180. Contra, Higgins v. Wasgatt, 34 Me. 305, in which a contrary intention was inferred, "taking the whole instrument into consideration." Compare Berridge v. Glassey, 112 Pa. St. 442, 56 Am. Rep. 322.

But the limitations in the habendum will control if there is in the premises an express reference to the "limitations hereinafter set forth," or similar expressions. Tyler v. Moore, 42 Pa. St. 374.

Although the grant in the premises be to A. and his "heirs," the habendum may show that a fee tail only is created, this being regarded, not as abridging the estate granted, but as merely a quali-

that named in the premises, the habendum will prevail.<sup>122</sup> So, an estate granted to A. for life may, by the habendum, be enlarged to a fee simple.

If there is no express limitation of an estate in the premises, the grant being simply to A., the habendum may determine the quantum of the estate granted. Thus, at common law, though such a grant without words of limitation creates an estate for life only in the grantee, it may be shown, by the habendum, that an estate in fee or for years is intended;<sup>123</sup> and where, under the modern statutes in force in many states,<sup>124</sup> a grant to A. creates a fee simple, or passes whatever estate the grantor may have, the habendum may show that an estate for life only is intended to be conveyed.<sup>125</sup>

The fact that the habendum mentions as grantees not only the person or persons named in the premises, but also another person, does not make this latter person a joint grantee

ification of the word "heirs" as first used. Co. Litt. 21a; Challis, Real Prop. 335; Turnman v. Cooper, Cro. Jac. 476; Altham's Case, 8 Coke, 154b. To the same effect, see Hunter v. Patterson, 142 Mo. 310. A conveyance to A. and the heirs of his body, habendum to him and his heirs forever, gives A. an estate tail, probably with a fee simple expectant. Co. Litt. 21a and Hargrave's note; Corbin v. Healy, 20 Pick. (Mass.) 514; Challis, Real Prop. 335.

<sup>122</sup> Co. Litt. 21a, 299a; 2 Sanders, Uses & Trusts, (5th Ed.) 156; Elphinstone, Interpret. of Deeds, 218; Goodtitle v. Gibbs, 5 Barn. & C. 709.

<sup>123</sup> Co. Litt. 183a; Altham's Case, 8 Coke, 154b; Challis, Real Prop. 334; Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107; McLeod v. Tarrant, 39 S. C. 271; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, Finch's Cas. 926; Phillips v. Thompson, 73 N. C. 543.

<sup>124</sup> See ante, 20.

<sup>125</sup> Montgomery v. Sturdivant, 41 Cal. 290; Bodine's Adm'rs v. Arthur, 91 Ky. 53, 34 Am. St. Rep. 162; Riggin v. Love, 72 Ill. 553; Kelly v. Hill (Md.) 25 Atl. 919; Doren v. Gillum, 136 Ind. 134; Haskett v. Sellars, 98 Ky. 2.

with the others, though it may enable him to take by way of remainder.<sup>126</sup>

§ 383. Exceptions and reservations.

The purpose and effect of an exception in a conveyance is to except or exclude from the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses thereon, it being always of a thing actually existent.<sup>127</sup> A reservation, on the contrary, as defined by the common-law writers, is a clause by which the grantor reserves to himself some new thing "issuing out of" the thing granted, and not *in esse* before. At common law, the term is applicable only to the reservation of a rent or some other service of a feudal nature.<sup>128</sup>

An exception must be of part of the thing granted,<sup>129</sup> and must not be as extensive as such thing, so as to be repugnant thereto.<sup>130</sup> Nor is it valid if it was previously specifically granted, as when, after granting twenty houses, one of such

<sup>126</sup> Elphinstone, Interpret. of Deeds, 214; Samme's Case, 13 Coke, 54; Sheppard's Touchstone (Preston's Ed.) 237; Blair v. Osborne, 84 N. C. 417; Moore v. City of Waco, 85 Tex. 206. See Hafner v. Irwin, 20 N. C. 433, 34 Am. Dec. 390. Contra, McLeod v. Tarrant, 29 S. C. 271.

<sup>127</sup> Co. Litt. 21a; Sheppard's Touchstone, 77 et seq.; Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646. See Brown v. Allen, 43 Me. 590; King v. Wells, 94 N. C. 344; Woodcock v. Estey, 43 Vt. 515; Truett v. Adams, 66 Cal. 218.

<sup>128</sup> Co. Litt. 47a; Sheppard's Touchstone, 80; Doe d. Douglas v. Lock, 2 Adol. & E. 743; Durham & S. Ry. Co. v. Walker, 2 Q. B. 940.

<sup>129</sup> Sheppard's Touchstone, 78; Moore v. Lord, 50 Miss. 229; Cornell v. Todd, 2 Denio (N. Y.) 130.

<sup>130</sup> Dorrell v. Collins, Cro. Eliz. 6; Shoenberger v. Lyon, 7 Watts & S. (Pa.) 184; Young's Petition, 11 R. I. 636. Compare Foster v. Runk, 109 Pa. St. 291, 58 Am. Rep. 720; Adams v. Warner, 23 Vt. 395.

houses is sought to be excepted.<sup>131</sup> The part excepted must be described with such certainty that it may be identified, or the exception is void.<sup>132</sup> There may be an exception, not only of a particular piece of land measured horizontally, but also of houses or other fixtures on the land conveyed,<sup>133</sup> or of timber growing thereon,<sup>134</sup> or of minerals therein.<sup>135</sup>

Since an exception is in effect merely a part of the description of the thing granted, the subject of the exception remains in the grantor, as before the conveyance, and no words of inheritance or other words of limitation are necessary in order that the grantor may retain the same estate in the thing excepted as he had before. A reservation, on the other hand, since it creates a thing not before *in esse*, must contain words of inheritance, in jurisdictions where the common-law rule has not been changed by statute.<sup>136</sup> An exception, from its nature, always operates in favor of the grantor, and a reservation likewise, it has long been settled, cannot operate in favor

<sup>131</sup> Sheppard's Touchstone (Preston's Ed.) 78; 4 Kent's Comm. 468.

<sup>132</sup> Mooney v. Cooledge, 30 Ark. 640; Andrews v. Todd, 50 N. H. 565; Den d. Waugh v. Richardson, 30 N. C. 470; Stambaugh v. Hollabaugh, 10 Serg. & R. (Pa.) 357; Butcher v. Creel's Heirs, 9 Grat. (Va.) 201.

<sup>133</sup> Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646; Sanborn v. Hoyt, 24 Me. 118. See ante, § 236.

<sup>134</sup> Sheppard's Touchstone, 78; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Howard v. Lincoln, 13 Me. 122; Putnam v. Tuttle, 10 Gray (Mass.) 48.

<sup>135</sup> Snoddy v. Bolen, 122 Mo. 479; Sloan v. Lawrence Furnace Co., 29 Ohio St. 568; Whitaker v. Brown, 46 Pa. St. 197.

<sup>136</sup> Co. Litt. 47a, 215b; Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672, 3 Gray's Cas. 587; Whitaker v. Brown, 46 Pa. St. 197; Emerson v. Mooney, 50 N. H. 318, 3 Gray's Cas. 579; Smith v. Ladd, 41 Me. 314. See Keeler v. Wood, 30 Vt. 242. In some of the earlier Massachusetts cases there are erroneous statements that words of inheritance are necessary in the case of an exception. Curtis v. Gardner, 13 Metc. (Mass.) 457, 3 Gray's Cas. 548; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 159, 170.

of a person other than the grantor,<sup>137</sup> this rule being presumably due to the feudal origin and purpose of a reservation, as formerly understood.

Such being the natures of an exception and a reservation at common law, neither was appropriate for the creation, on the conveyance of land, of an easement or right of profit in the land in favor of the grantor, and, accordingly, the English courts have decided that such an attempted exception or reservation must be construed as a grant back of an easement by the grantee of the land.<sup>138</sup> In this country, however, an entirely different view has been taken, and an easement is invariably regarded as the proper subject of a reservation,<sup>139</sup> and sometimes even of an exception.<sup>140</sup>

The adoption in this country of the rule that a right of use or profit may be thus created by a reservation seems not to involve a great extension of the common-law principle that a reservation is proper for the creation of a new right not before existent, and such a rule is rendered almost a necessity by the fact that here the conveyance is usually executed by the

<sup>137</sup> Sheppard's Touchstone, 80; *Ives v. Van Auken*, 34 Barb. (N. Y.) 566; *Young's Petition*, 11 R. L. 636; *Strasson v. Montgomery*, 32 Wis. 52; *Herbert v. Pue*, 72 Md. 307; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Murphy v. Lee*, 144 Mass. 371; *Bridger v. Pierson*, 45 N. Y. 601; *Hill v. Lord*, 48 Me. 83. But see *Hodge v. Boothby*, 48 Me. 63.

But in England, where the reservation of an easement takes effect as a re-grant, an easement may be created in favor of one not a party to the conveyance, if the conveyance is executed by the grantee. *Wickham v. Hawker*, 7 Mees. & W. 63.

<sup>138</sup> Ante, § 316.

<sup>139</sup> *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195; *Haggerty v. Lee*, 50 N. J. Eq. 464; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608. And see cases in notes 140-144.

<sup>140</sup> *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Ring v. Walker*, 87 Me. 550; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489.

grantor alone, so that the effect of viewing the reservation as a grant back, as is done by the courts in England, where the grantee almost invariably executes the instrument, would usually be to render such a stipulation entirely invalid. It is perhaps unfortunate, however, that an exception, the proper function of which is to particularize the description of the corporeal thing, an estate in which is conveyed, should be utilized for the entirely different purpose of creating an incorporeal thing. Some of the courts have adopted an ingenious distinction between a stipulation in favor of the grantor for an easement corresponding to a *quasi* easement, already existing, and one for an easement not corresponding to a pre-existing *quasi* easement; holding that the former is properly an exception, as being of a thing actually existent, while the latter is a reservation, as being of something not before existent.<sup>141</sup>

In construing conveyances thus creating, or attempting to create, rights in the land granted in favor of the grantor, the courts ignore the terms used, such as "except" and "reserve," and construe the language as an exception or a reservation, according to the nature of the rights sought to be created.<sup>142</sup>

<sup>141</sup> *White v. New York & N. H. R. Co.*, 156 Mass. 181; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Simpson v. Boston & M. R. R.*, 176 Mass. 359; *Bridger v. Pierson*, 45 N. Y. 601. See *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195.

This distinction seems somewhat artificial, since a quasi easement consists merely in the exercise of a right of user incident to the ownership of land, which may sometimes have certain results as raising an implication of a grant (see ante, § 317), but which does not in itself constitute a right recognized by the law, and there is as much a creation of a new and distinct legal right by the "exception" of an easement corresponding to such quasi easement as in the case of a "reservation" of a right of use or profit not before exercised.

<sup>142</sup> *State v. Willson*, 42 Me. 9; *Engel v. Ayer*, 85 Me. 453; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Whitaker v. Brown*, 46 Pa.

In some of the states in which the word "heirs" is still necessary to create an estate in fee, the question whether the language of the conveyance is to be construed as an exception or a reservation may have important results in determining whether the grantor has an easement in fee or for life only.<sup>143</sup> In others of such states, however, the courts have refused to apply the requirement of words of inheritance to the case of such a reservation of an easement, it being considered that, if this is evidently intended to be for the benefit of land retained by the grantor, he will have an easement of like duration with his estate in such land.<sup>144</sup>

#### § 384. Consideration.

A conveyance is not, properly speaking, a contract, though it is the result of agreement, and a consideration is not necessary to its validity, as in the case of a contract, except when the conveyance is one operating under the Statute of Uses.<sup>145</sup>

St. 197; *White v. New York & N. H. R. Co.*, 156 Mass. 181; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497; *Watkins v. Tucker*, 84 Tex. 428; *Hagerty v. Lee*, 54 N. J. Law, 580.

So, in construing a conveyance which seeks to create in favor of the grantor certain rights in a part of the land granted, the words will be regarded as an exception or reservation, according as an easement in such part is sought to be created, or the ownership of such part is retained. *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608; *Jones v. De Lassus*, 84 Mo. 541.

<sup>143</sup> *White v. New York & N. H. R. Co.*, 156 Mass. 181; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Simpson v. Boston & M. R. R.*, 176 Mass. 359; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Ring v. Walker*, 87 Me. 550. This view seems to have had weight in inducing the courts to construe such stipulations as exceptions, rather than as reservations.

<sup>144</sup> *Kennedy v. Scovil*, 12 Conn. 326; *Chappell v. New York & N. H. R. Co.*, 62 Conn. 195; *Lathrop v. Elsner*, 93 Mich. 599.

<sup>145</sup> 4 Kent's Comm. 462; *Thompson v. Thompson*, 9 Ind. 323, 63 Am. Dec. 638; *Laberee v. Carleton*, 53 Me. 211; *Gale v. Gould*, 40 Mich. 515; *Beal v. Warren*, 2 Gray (Mass.) 447; *Campbell v. Whit-*



In other words, the owner of land has the same right to make a gift thereof to another person as he has to sell it, and the only persons who can question the validity of the conveyance for want of consideration are creditors who may thereby lose the means of satisfying their demands.<sup>146</sup> The absence of consideration may also deprive the grantee of the right to claim the position of a purchaser for value as against the adverse rights of third persons subsequently accruing.<sup>147</sup>

Ordinarily in a conveyance, a consideration, frequently a nominal sum merely, is named, and the receipt thereof is expressly acknowledged. The purpose of inserting this clause in the conveyance is to rebut any implication of a resulting use or trust in favor of the grantor,<sup>148</sup> and likewise to furnish support for the conveyance as a bargain and sale.<sup>149</sup> Such an acknowledgment of the receipt of the consideration is conclusive upon the parties as to the fact that a consideration was paid, for the purpose of supporting the conveyance, and vesting a beneficial interest in the grantee.<sup>150</sup> It is not, however, conclusive upon the parties or upon third persons as regards the amount of the consideration.<sup>151</sup> And the ab-

son, 68 Ill. 240, 18 Am. Rep. 553; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *Brown v. Brown*, 44 S. C. 378; *Goodwin v. White*, 59 Md. 503.

<sup>146</sup> See post, § 495.

<sup>147</sup> See post, § 483.

<sup>148</sup> See *Meeker v. Meeker*, 16 Conn. 383; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Acker v. Priest*, 92 Iowa, 610; *Groff v. Rohrer*, 35 Md. 327; *Gould v. Lynde*, 114 Mass. 366; *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641; 2 Story, Eq. Jur. § 1199.

<sup>149</sup> See ante, § 376.

<sup>150</sup> *Russ v. Mebius*, 16 Cal. 350; *Kimball v. Walker*, 30 Ill. 432, 511; *Goodspeed v. Fuller*, 46 Me. 141; *Finlayson v. Finlayson*, 17 Or. 347, 11 Am. St. Rep. 836; *Acker v. Priest*, 92 Iowa, 610; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Beavers v. McKinley*, 50 Kan. 602; 2 Pomeroy, Eq. Jur. § 1036.

<sup>151</sup> *Goodspeed v. Fuller*, 46 Me. 141; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212; *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep.

sence of such a recital does not affect the right of the grantee to show its payment for the purpose of supporting the conveyance.<sup>152</sup>

§ 385. Reality of consent.

While a conveyance is presumed to have been made with the free consent of the parties thereto, it may, in certain cases, be shown that such consent was wanting. The want of consent may arise from mistake on the part of the parties as to a material fact concerning the subject-matter of the contract, as when the quantity of land embraced in the description is materially different from that which the parties supposed it to include, and with reference to which the price was fixed.<sup>153</sup> And the fact that the parties failed to agree as to the land to be conveyed, though supposing that they did so, is also ground for rescission of the conveyance.<sup>154</sup> A mistake in the preparation of the conveyance, as when it purports to convey land other than that which it was agreed should be conveyed, or when the land as described differs from that sold, is ground for reformation of the conveyance.<sup>155</sup> So, a mistake in the

577; *Kimball v. Walker*, 30 Ill. 482, 511; *Bolles v. Sachs*, 37 Minn. 318; *Hebbard v. Haughian*, 70 N. Y. 54; *Kickland v. Menasha Wood-en Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Wilkinson v. Scott*, 17 Mass. 249.

<sup>152</sup> *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676; *Boynton v. Rees*, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; *Jackson v. Dillon's Lessee*, 2 Overt. (Tenn.) 261; *Den d. Springs v. Hanks*, 27 N. C. 30; *Sprague v. Woods*, 4 Watts & S. (Pa.) 192; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Underwood v. Campbell*, 14 N. H. 393.

<sup>153</sup> *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282; *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Folsom v. Howell*, 94 Ga. 112; *Read's Adm'rs v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 204.

<sup>154</sup> *Barfield v. Price*, 40 Cal. 535; *Hodges v. Horsfall*, 1 Russ. & M. 116; *Harris v. Pepperell*, L. R. 5 Eq. 1.

<sup>155</sup> *Blair v. McDonnell*, 5 N. J. Eq. 327; *Baxter v. Tanner*, 85 W. (878)

words in the conveyance limiting the interest in the land which it was agreed should be conveyed may be corrected, as when there is an omission of words of inheritance.<sup>156</sup> Relief will also frequently be given when the legal nature and effect of the conveyance as written does not correspond with the agreement of the parties, in accordance with which it is made.<sup>157</sup>

The want of consent may also arise from the fact that the conveyance was procured by fraudulent representations,<sup>158</sup> or by duress,<sup>159</sup> or undue influence.<sup>160</sup>

Va. 60; *Barth v. Deuel*, 11 Colo. 494; *Felton v. Leigh*, 48 Ark. 498; *Baker v. Pyatt*, 108 Ind. 61; *Parker v. Benjamin*, 53 Ill. 255; *Stevens v. Holman*, 112 Cal. 345, 58 Am. St. Rep. 216.

<sup>156</sup> *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *McMillan v. Fish*, 29 N. J. Eq. 610; *Brock v. O'Dell*, 44 S. C. 22; *Lardner v. Williams*, 98 Wis. 514. See *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 316.

<sup>157</sup> *Paget v. Marshall*, 23 Ch. Div. 255; *Gruing v. Richards*, 23 Iowa, 283; *Kerr v. Couper*, 5 Del. Ch. 507; *Sparks v. Pittman*, 51 Miss. 511; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *In re Garnett*, 81 Ch. Div. 648, 23 Ch. Div. 300; *Thoroughgood's Case*, 2 Coke, 9a; *Pollock, Contracts* (6th Ed.) 443; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 316; *Canedy v. Marcy*, 13 Gray (Mass.) 373.

<sup>158</sup> *Blackburn v. Wooding*, 6 C. C. A. 6, 56 Fed. 545; *Castle v. Kemp*, 124 Ill. 307; *Carver v. Carver*, 97 Ind. 497; *Berry v. Whitney*, 40 Mich. 65; *Mortland v. Mortland*, 151 Pa. St. 593; *Matlack v. Shaffer*, 51 Kan. 208, 37 Am. St. Rep. 270; *Ruffner v. Ridley*, 81 Ky. 165.

<sup>159</sup> *Harshaw v. Dobson*, 67 N. C. 203; *Eadie v. Slimmon*, 26 N. Y. 12; *Gohegan v. Leach*, 24 Iowa, 509; *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360), 88 Am. Dec. 76; *Muller v. Buyck*, 12 Mont. 354; *Kocourek v. Marak*, 54 Tex. 201, 33 Am. Rep. 623. See *Rendleman v. Rendleman*, 156 Ill. 568.

<sup>160</sup> *Ross v. Conway*, 92 Cal. 632; *Chase v. Hubbard*, 153 Mass. 91; *Caspari v. First German Church of New Jerusalem*, 82 Mo. 649; *Graham v. Burch*, 44 Minn. 33; *Hoppin v. Tobey's Ex'rs*, 9 R. I. 42; *Leighton v. Orr*, 44 Iowa, 679; *Sands v. Sands*, 112 Ill. 225; *Allore v. Jewell*, 94 U. S. 506.

## § 386. Effect of alterations.

Since the conveyance takes effect only upon delivery,<sup>161</sup> until that is effected, the grantor may make such alterations or insertions therein as he may desire.<sup>162</sup>

An alteration made, after delivery, by consent of all the parties to the conveyance, is binding and effective if it is followed by a new delivery of the instrument,<sup>163</sup> provided, it seems, that no rights vested in the grantee by the conveyance as it originally stood are divested by such alteration,<sup>164</sup> and subject to the restriction that the record of the conveyance in its altered state will not affect innocent third persons unless it is acknowledged after the alteration.<sup>165</sup>

An alteration made after the delivery of the conveyance, not followed by a new delivery, is absolutely nugatory, so far as concerns any rights which may have already vested under the conveyance.<sup>166</sup> Any material alteration, erasure,

<sup>161</sup> Post, § 406.

<sup>162</sup> *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734; *Miller v. Williams* (Colo.) 59 Pac. 740; *Reformed Dutch Church of North Branch v. Ten Eyck*, 25 N. J. Law, 40; *Coney v. Laird*, 153 Mo. 408.

<sup>163</sup> *Malarin v. United States*, 1 Wall. (U. S.) 282; *Woodbury v. Allegheny & K. R. Co.* (C. C.) 72 Fed. 371; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681; *Bassett v. Bassett*, 56 Me. 127; *Prettyman v. Goodrich*, 23 Ill. 330; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Tucker v. Allen*, 16 Kan. 312; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250.

<sup>164</sup> See post, § 406.

<sup>165</sup> *Moelle v. Sherwood*, 148 U. S. 21; *Sharpe v. Orme*, 61 Ala. 263; *Webb v. Mullins*, 78 Ala. 111. See *Coit v. Starkweather*, 8 Conn. 289.

<sup>166</sup> *Doz d. Lewis v. Bingham*, 4 Barn. & Ald. 672; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125; *Stanley v. Epperson*, 45 Tex. 645; *North v. Henneberry*, 44 Wis. 306; *Rifener v. Bowman*, 53 Pa. St. 313; *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632.

or cancellation, however, invalidates any limitations or covenants therein having an operation in the future.<sup>187</sup>

### III. DESCRIPTION OF THE LAND.

The most usual modes of describing the land which is the subject of the conveyance are (1) the use of a distinctive designation recognized as applicable to that particular land; (2) reference to the township and section of the government survey; (3) reference to a map or plat which indicates the location of the land; (4) identification of the boundaries of the land by reference to monuments or courses and distances.

A conveyance of land as bounded on a body of water or watercourse, or on a highway, will pass the land under the water or within the highway as far as the grantor owns, this being usually as far as the center of a watercourse or a highway. A different rule is frequently adopted when the land is in terms bounded by the margin of the water or the highway.

Easements appurtenant to land pass therewith without special mention.

#### § 387. General considerations.

In order to make a valid conveyance of land, it is essential that the land itself, the subject of the conveyance, be capable of identification, and, if the conveyance does not refer to the land with such particularity as to render this possible, the conveyance is absolutely nugatory.<sup>188</sup> The lan-

<sup>187</sup> Sheppard's Touchstone (Preston's Ed.) 69; Mathewson's Case, 5 Coke, 23a; 2 Bl. Comm. 308; 4 Cruise, Dig. tit. 32, c. 27, §§ 12-22; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; North v. Henneberry, 44 Wis. 306; Withers v. Atkinson, 1 Watts (Pa.) 236; Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 608; Chessman v. Whittemore, 23 Pick. (Mass.) 231.

<sup>188</sup> Brandon v. Leddy, 67 Cal. 43; Holme v. Strautman, 35 Mo. 293; Carter v. Barnes, 26 Ill. 455; Wilson v. Johnson, 145 Ind. 40; Wilson v. Inloes, 6 Gill (Md.) 121; Bailey v. White, 41 N. H. 337; Kea v. Robeson, 40 N. C. 373; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769.

guage of the conveyance by which the land is sought to be identified is usually referred to as the "description."

The description may be by the use of a designation for the land which has a recognized application thereto, as when one conveys the "A." estate or the "B." farm.<sup>169</sup> The grantor may also describe the land as his land in a certain town, or in a certain block, or on a certain street, and such a description is sufficient if the land can be identified.<sup>170</sup> So, a conveyance of "all the land" or "all the property" owned by the grantor, or of all that owned by him in a particular district, is sufficient to convey land within the scope of the description,<sup>171</sup> as is a conveyance of all one's interest in the estate of a person deceased,<sup>172</sup> or of such land as formerly belonged to or was conveyed to a particular person.<sup>173</sup>

Whenever land is occupied and improved by a building or other structure designed for a particular purpose, which comprehends its beneficial use and enjoyment, it may be conveyed by a term which thus describes the purpose to which

<sup>169</sup> See *Haley v. Amestoy*, 44 Cal. 132; *Trentman v. Neff*, 124 Ind. 503; *Vaughan v. Swayzie*, 56 Miss. 706; *Charles v. Patch*, 37 Mo. 450; *Lennig's Ex'rs v. White* (Va.) 20 S. E. 831.

<sup>170</sup> *Frey v. Clifford*, 44 Cal. 335; *Blair v. Bruns*, 8 Colo. 397; *Bird v. Bird*, 40 Me. 398; *Harmon v. James*, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; *Doe d. Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267.

<sup>171</sup> *Pettigrew v. Dobbelaar*, 63 Cal. 396; *First Nat. Bank of Attleboro v. Hughes*, 10 Mo. App. 7; *Brown v. Warren*, 16 Nev. 228; *Marr v. Hobson*, 22 Me. 321; *Harvey v. Edens*, 69 Tex. 420; *Clifton Heights Land Co. v. Randell*, 32 Iowa, 89; *Sally v. Gunter*, 13 Rich. Law (S. C.) 72.

<sup>172</sup> *Sheppard's Touchstone*, 250; *Barnes v. Bartlett*, 47 Ind. 98; *Patterson v. Snell*, 67 Me. 559; *Butrick v. Tilton*, 141 Mass. 93; *Austin v. Dolbee*, 101 Mich. 292; *Stewart v. Cage*, 59 Miss. 558; *Barton's Lessee v. Morris' Heirs*, 15 Ohio, 408; *McGavock v. Deery*, 1 Cold. (Tenn.) 265.

<sup>173</sup> *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Hogan v. Page*, 22 Mo. 55; *McChesney's Lessee v. Wainwright*, 5 Ohio, 452; *Gresham v. Chambers*, 30 Tex. 544.

it is thus appropriated.<sup>174</sup> Thus, under the designation of a "house," a "mill," a "factory," or like expressions, not only the land beneath the building,<sup>175</sup> but also so much of the adjoining land as is ordinarily used therewith for the purpose expressed in such designation,<sup>176</sup> will pass, provided, of course, a contrary intention does not appear. So, by a conveyance of a "well," not merely the right to take water from the well, but the land itself occupied by the well, will pass.<sup>177</sup>

By a conveyance of "water," the land under the water does not usually pass, the proper description being land covered by water.<sup>178</sup> A conveyance of "woods" or "forests" is sufficient to pass the land itself.<sup>179</sup> A conveyance of the "prof-

<sup>174</sup> *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Cunningham v. Webb*, 69 Me. 92.

<sup>175</sup> *Comyn's Dig. Grant*, E 11; *Dikeman v. Taylor*, 24 Conn. 219; *Hatch v. Brier*, 71 Me. 542; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159; *Webster v. Potter*, 105 Mass. 414; *Cravens v. Pettit*, 16 Mo. 210; *Langworthy v. Coleman*, 18 Nev. 440; *Doe d. Wise v. Wheeler*, 28 N. C. 196; *Wilson v. Hunter*, 14 Wis. 683, 80 Am. Dec. 795; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401, 2 Metc. (Mass.) 591.

<sup>176</sup> *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Sparks v. Hess*, 15 Cal. 186; *Forbush v. Lombard*, 13 Metc. (Mass.) 109; *Ammidown v. Ball*, 8 Allen (Mass.) 293; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Gibson v. Brockway*, 8 N. H. 465, 31 Am. Dec. 200; *Winchester v. Hees*, 35 N. H. 43; *Marston v. Stickney*, 58 N. H. 609; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Doane v. Broad Street Ass'n*, 6 Mass. 332; *Smith v. Martin*, 2 Saund. 400, note 2. Compare *Ogden v. Jennings*, 62 N. Y. 526.

So a conveyance of a "pound" has been held to include the land under the pound (*Wooley v. Inhabitants of Groton*, 2 Cush. [Mass.] 305), of a "rope walk," land actually and exclusively devoted to the use of the rope walk (*Davis v. Handy*, 37 N. H. 65), and of a "bridge," land on which the bridge is erected (*Sparks v. Hess*, 15 Cal. 186). And a conveyance of a "railroad" may include land used with a railroad. *Missouri Pac. Ry. Co. v. Maffitt*, 94 Mo. 56.

<sup>177</sup> *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Mixer v. Reed*, 25 Vt. 254. See Co. Litt. 5.

<sup>178</sup> Co. Litt. 4b.

<sup>179</sup> Co. Litt. 4b.

its" of land will pass the land itself, "for what is the land but the profits" thereof.<sup>180</sup>

§ 388. Description by government survey.

One of the first acts passed by congress looking towards the disposal of the public domain provided for what is known as the "rectangular system" of surveys, which has ever since been in force, and which furnishes the method of description of land for all purposes of transfer in these parts of the country in which the title to land is derived from the United States.<sup>181</sup> By this system, the public lands are divided into "townships," each six miles square, these being formed by lines running east and west, six miles apart, which are crossed, at intervals of six miles, by lines running north and south. Each township, thus including approximately thirty-six square miles, is divided into thirty-six rectangular portions, each one mile square, called a "section." A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, these being the "quarter section," containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners, and "quarter quarter sections," of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the land, and the convergence of the meridians as one goes further north.

When the land which would otherwise be comprised within a section is in part covered by navigable waters, "meander" lines are run to define the sinuosities of the bank of the

<sup>180</sup> Co. Litt. 4b; Doe d. Goldin v. Lakeman, 2 Barn. & Adol. 42; Caldwell v. Fulton, 31 Pa. St. 484; Clement v. Youngman, 40 Pa. St. 844.

<sup>181</sup> See Rev. St. U. S. §§ 2395-2397.



stream or lake, and as a means of ascertaining the quantity of land in the "fractional" section, as it is called. These meander lines are not, however, boundaries of such fractional section,<sup>182</sup> these being the banks of the stream or lake, or the middle line thereof, in accordance with considerations previously referred to.<sup>183</sup>

Each tier of townships running north and south is known as a "range," and the range is described with reference to a line known as the "principal meridian," while each tier of townships running east and west is described with reference to some parallel of latitude, taken as a "principal base line." Thus, a township is referred to as being a certain number north or south of a certain base line, and a certain number east or west of a certain meridian.

The thirty-six sections in a township are numbered consecutively, beginning at the northeast corner, and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner. The quarter section or quarter quarter section is defined with reference to the section of which it forms a part, as when one conveys the southeast quarter of the northwest quarter of section ten, in township thirty-five north, range five east.<sup>184</sup>

§ 389. Reference to plat.

In many of the states there are statutory provisions authorizing an owner of land to have it surveyed and laid off in lots and blocks, streets, parks, and the like, and to file in the public records a plat or map of the land as thus laid off, authenticated and certified as may be required. Thereafter

<sup>182</sup> *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272.

<sup>183</sup> See *ante*, §§ 264-267.

<sup>184</sup> The government method of survey is briefly and clearly described in Warvelle, *Abstracts of Title*, 138 et seq.

any one of these lots or blocks may be conveyed by mere reference to the number which it bears upon the recorded plat, thus all necessity of a detailed description being obviated. The statute usually contains provisions to the effect that the filing of the plat shall constitute a dedication of the land marked thereon as intended for streets or other public uses.

Even though there is no statutory provision on the subject, or the plat is not authenticated and recorded as required by the statute, a reference in the conveyance to a particular plat for purposes of description makes the plat in effect a part of the conveyance, and it may accordingly be utilized to identify the land conveyed.<sup>185</sup> The only effect, therefore, of the statutes providing for the record of plats, so far as concerns their use for purposes of description, is apparently to furnish a means for their preservation, and thus to avoid any possible loss of the means of identifying the land.

§ 390. Monuments, courses, and distances.

Land is frequently described in a conveyance, or attempted to be described, by naming its boundaries in detail. Such a description, if properly made, is well calculated to identify the land, but frequently, owing to carelessness in making the survey on which the description is based, or in preparing the conveyance, there is difficulty in locating the boundaries on the ground. In the case of a description by boundaries, as in other cases, the intention of the parties, as inferred from the terms of the description, is the controlling consideration,<sup>186</sup> and any rules which the courts may have formulated

<sup>185</sup> *Simmons v. Johnson*, 14 Wis. 523; *Young v. Cosgrove*, 83 Iowa, 682; *Corbett v. Norcross*, 35 N. H. 99; *Deery v. Cray*, 10 Wall. (U. S.) 263; *Sanders v. Ransom*, 37 Fla. 457; *Sears v. King*, 91 Ga. 577; *Borough of Birmingham v. Anderson*, 48 Pa. St. 253; *Erskine v. Moulton*, 66 Me. 276; *Nichols v. New England Furniture Co.*, 100 Mich. 230; *Sanborn v. Mueller*, 38 Minn. 27.

<sup>186</sup> *Reed v. Proprietors of Locks & Canals on Merrimac River*, 8 (886)

as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention. Boundaries are described by naming natural or artificial monuments to, from, or along which the lines are to run, or by stating the "courses and distances" of such lines, and frequently by all these "elements" of description, as they are termed.

A monument, for the purpose of description, may consist of any object or mark on the land, whether natural or artificial, which may serve to identify the location of a line constituting a part of the boundary. The monument may be either a permanent natural object, such as a river, lake, ledge of rocks, or tree, or it may be an artificial object, such as a highway, wall, ditch, or a post.

Frequently the corners or lines are defined by reference to adjoining land, or to some adjoining structure which, in its legal signification, includes the land under it, such as a house or a mill. In such a case the land conveyed extends merely to the side of the land or structure referred to as a monument,<sup>187</sup> while in the ordinary case of a monument, the name of which does not include the ownership of land, such as a highway, wall, or post, the land conveyed extends to the center thereof.<sup>188</sup> A monument may even consist of an object or point not existent or fixed at the time of the conveyance, but which is intended to be thereafter erected or fixed, and, when this is done, the call therefor will be of the same

How. (U. S.) 274; *Abbott v. Abbott*, 51 Me. 575; *Codman v. Evans*, 1 Allen (Mass.) 443; *Serrano v. Rawson*, 47 Cal. 52; *Bruensmann v. Carroll*, 52 Mo. 313; *Peck v. Mallams*, 10 N. Y. 509; *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Miller v. Bryan*, 86 N. C. 167; *Browning's Adm'r v. Atkinson*, 37 Tex. 633.

<sup>187</sup> *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154.

<sup>188</sup> *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154; *Freeman v. Bellegarde*, 108 Cal. 179; *Sleeper v. Laconia*, 60 N. H. 201.

effect as if the monument had existed at the time of the conveyance.<sup>189</sup>

A "course" is the direction in which a line runs, stated with reference, not to its terminus, but to its correspondence with a certain point of the compass, or its variation from the magnetic or sidereal meridian.

Subject to the controlling consideration of the intention of the parties, the primary rule in applying a description by boundaries is that, in case of conflict, calls for fixed and known monuments will prevail over inconsistent calls for courses and distances, monuments marked on the ground being from their very nature more likely to be correct than mere paper statements as to the character of an imaginary line.<sup>190</sup> This rule is, however, not absolute, and the calls for monuments must yield to those for courses and distances if it in any way appears that the calls for courses and distances are more to be relied on.<sup>191</sup> When the courses and distances conflict, the whole description is to be considered to determine which conforms to the intention of the parties, and there is no rule by which preference is to be given to one element as against the other.<sup>192</sup>

<sup>189</sup> *Makepeace v. Bancroft*, 12 Mass. 469, 3 Gray's Cas. 287; *Lerned v. Morrill*, 2 N. H. 197, 3 Gray's Cas. 289; *Blaney v. Rice*, 20 Pick. (Mass.) 62, 3 Gray's Cas. 293; *Mosher v. Berry*, 30 Me. 83, 50 Am. Dec. 614. See *Maxey v. Thurman*, 50 Cal. 321.

<sup>190</sup> *Pernam v. Wead*, 6 Mass. 131, 3 Gray's Cas. 285; *Newsom v. Prior's Lessee*, 7 Wheat. (U. S.) 10; *White v. Williams*, 48 N. Y. 344, 3 Gray's Cas. 300; *Hoban v. Cable*, 102 Mich. 206, *Finch's Cas.* 1081; *Beaudry v. Doyle*, 68 Cal. 105; *Allen v. Kersey*, 104 Ind. 1; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Cox v. Couch*, 8 Pa. St. 147; *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. Rep. 27; 4 Kent's Comm. 466.

<sup>191</sup> *White v. Luning*, 93 U. S. 514; *United States v. Cameron* (Ariz.) 21 Pac. 177; *Hamilton v. Foster*, 45 Me. 32; *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Jamison v. Fopiano*, 48 Mo. 194.

<sup>192</sup> *Hall v. Eaton*, 139 Mass. 217, 3 Gray's Cas. 305; *Preston's* (888)

Quite frequently the quantity or estimated quantity of the land is named in the conveyance, but this is considered inferior as an indication of the location of the boundaries to the elements above named, and, if inconsistent, must yield to calls for courses and distances,<sup>192</sup> as well as to calls for monuments.<sup>194</sup> In particular cases, however, when the other calls evidently do not conform to the intention of the parties, a call for quantity may have a controlling effect.<sup>195</sup>

When the description of a boundary line is uncertain and ambiguous, if the parties to the conveyance locate and mark on the ground a certain line as being that described, and hold possession accordingly, this "practical location" of the line is regarded as showing the meaning of the ambiguous description, and, as such, conclusive on each of them.<sup>196</sup> Occasionally it has even been decided that a line thus marked out and acted on is conclusive upon the parties, though the course as given in the conveyance is free from ambiguity, and calls for a different line.<sup>197</sup>

*Heirs v. Bowmar*, 6 Wheat. (U. S.) 580; *McClintock v. Rogers*, 11 Ill. 279; *Blight v. Atwell*, 4 J. J. Marsh. (Ky.) 278; *Williams v. Mayfield*, 57 Tex. 364; *Curtis v. Aaronson*, 49 N. J. Law, 68; *Loring v. Norton*, 8 Me. 61.

<sup>192</sup> *Doe d. Phillips' Heirs v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Gilman v. Smith*, 12 Vt. 150; *Allen v. Kersey*, 104 Ind. 1; *Sanders v. Godding*, 45 Iowa, 463; *Ray v. Pease*, 95 Ga. 153.

<sup>194</sup> *Emery v. Fowler*, 38 Me. 99, 3 Gray's Cas. 295; *Allen v. Kersey*, 104 Ind. 1; *Doe d. Arden v. Thompson*, 5 Cow. (N. Y.) 371; *Thompson v. Sheppard*, 85 Ala. 611; *Petts v. Gaw*, 15 Pa. St. 218.

<sup>195</sup> *Winans v. Cheney*, 55 Cal. 567; *Hoffman v. City of Port Huron*, 102 Mich. 417; *Sanders v. Godding*, 45 Iowa, 463.

<sup>196</sup> *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; *Hastings v. Stark*, 36 Cal. 122; *Raymond v. Nash*, 57 Conn. 447; *Den d. Haring v. Van Houten*, 22 N. J. Law, 61; *Stone v. Clark*, 1 Metc. (Mass.) 381; *Meeks v. Willard*, 57 N. J. Law, 22; *Linney v. Wood*, 66 Tex. 22; *Messer v. Oestreich*, 52 Wis. 684.

<sup>197</sup> *Knowles v. Toothaker*, 58 Me. 172, 3 Gray's Cas. 297; *Kellogg v. Smith*, 7 Cush. (Mass.) 375. This seems to be an approximation to the view held by some of the courts that any adjoining owners

## § 391. Boundaries on water.

The question whether land under water belongs, in certain cases, to the state or to individuals, has been before discussed.<sup>198</sup> The question now arises as to when, in case of land under water not belonging to the state, a conveyance of land as abutting on the water will be construed as including land under the water belonging to the grantor. The general rule of construction of a conveyance of land bounded by water is that, unless a contrary intention appears, it passes the soil towards the center of the water as far as the grantor owns.<sup>199</sup> Accordingly, if the shore of the sea belongs to the owner of the upland, it passes by a conveyance by him of land bounded "by the sea" or "harbor," or other words descriptive of the water.<sup>200</sup> So, a grant of land bounded on a navigable nontidal river, in those states in which the land under such a river is not vested in the state, *prima facie* conveys the whole interest of the grantor so far as he owns, which is usually to the center of the stream.<sup>201</sup> So the grant of land bounded on a nontidal, nonnavigable river, the land under which is usually in the abutting owner *ad filum aquae*,—that is, to the middle or thread of the stream,—*prima facie* com-

may locate the intervening boundary line by mere oral agreement. See ante, §§ 259, 260.

<sup>198</sup> Ante, §§ 264-267.

<sup>199</sup> *Paine v. Woods*, 108 Mass. 160, 3 Gray's Cas. 323. See note to *Allen v. Weber*, 27 Am. St. Rep. 56.

<sup>200</sup> *City of Boston v. Richardson*, 105 Mass. 351; *Winslow v. Patten*, 34 Me. 25; *Partridge v. Luce*, 36 Me. 16; *Harlow v. Fisk*, 12 Cush. (Mass.) 302; *Freeman v. Bellegarde*, 108 Cal. 179.

<sup>201</sup> *Jones v. Janney*, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309; *Braxon v. Bressler*, 64 Ill. 492; *Norcross v. Griffiths*, 65 Wis. 615, 56 Am. Rep. 642; *Butler v. Grand Rapids & I. R. Co.*, 35 Mich. 246, 24 Am. St. Rep. 84; *June v. Purcell*, 36 Ohio St. 396; *City of Boston v. Richardson*, 105 Mass. 351; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Inhabitants of Warren v. Inhabitants of Thomaston*, 75 Me. 329, 46 Am. Rep. 397.

veys the soil to such middle line.<sup>202</sup> In the case of a conveyance of land bounded by a lake or pond, the same general rule, by the weight of authority, applies, and the conveyance *prima facie* passes the soil so far as the grantor owns, whether this ownership extends to the center of the lake, to the high-water mark, or to an intermediate point.<sup>203</sup>

The effect thus given to conveyances as passing, *prima facie*, the soil under the water, is based not only on the presumption that the parties intend the ownership thereof to be vested in the person who is alone, usually, in a position to make use of it, and who probably will need to do so, but also, in some decisions, upon the ground of public policy, which renders it desirable to prevent the existence of small strips of land along the margin of streams or other bodies of water, the title to which may remain in abeyance for many years, and which may then be asserted merely in order to harass the owner of the adjoining land.<sup>204</sup> Sometimes, however, in the case of a stream, the rule is stated as being merely an application of the principle that, when a monument is referred to, the land conveyed extends to the center of such monument.<sup>205</sup>

<sup>202</sup> *Stanford v. Mangin*, 30 Ga. 355; *State v. Gilmanton*, 9 N. H. 461; *Muller v. Landa*, 31 Tex. 265, 98 Am. Dec. 529; *Canal Fund Com'rs v. Kempshall*, 26 Wend. (N. Y.) 404; *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 83.

<sup>203</sup> *Paine v. Woods*, 108 Mass. 160, 3 Gray's Cas. 329; *Brophy v. Richeson*, 137 Ind. 114; *Castle v. Elder*, 57 Minn. 289; *Hardin v. Jordan*, 140 U. S. 371; *Stoner v. Rice*, 121 Ind. 51; *Clute v. Fisher*, 65 Mich. 48; *Cobb v. Davenport*, 32 N. J. Law, 369; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828. Contra, *Stevens v. King*, 76 Me. 197, 49 Am. Rep. 609; *Kanouse v. Slockbower*, 48 N. J. Eq. 42.

<sup>204</sup> See dissenting opinion by Redfield, J., in *Buek v. Squiers*, 22 Vt. 434; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637.

<sup>205</sup> *Sleeper v. Laconia*, 60 N. H. 201, 3 Gray's Cas. 333; *Child v. Starr*, 4 Hill (N. Y.) 369.

When the land conveyed is described, not as bounded by a stream, but by or on the "bank," "shore," "margin," or "edge" of the stream, or equivalent terms are used, the land under the water is usually regarded as excluded.<sup>206</sup> In such cases the line of low-water mark has usually been adopted as the boundary.<sup>207</sup> The same principle has been adopted in the case of conveyances of land bounded by the margin or shore of a lake.<sup>208</sup>

The fact that the description, while stating that the land is bounded "by" a stream, or that it extends "to" a stream, or that a boundary runs "along" the stream, names an object on the shore as a monument, does not show an intention to exclude the stream, but this is regarded as merely a statement of the point at which the boundary strikes the stream, it being usually impracticable to place monuments actually in the stream.<sup>209</sup>

<sup>206</sup> *Child v. Starr*, 4 Hill (N. Y.) 369, reversing 20 Wend. (N. Y.) 149, 3 Gray's Cas. 315; *Halsey v. McCormick*, 13 N. Y. 296, 3 Gray's Cas. 327; *Rockwell v. Baldwin*, 53 Ill. 19; *Bradford v. Cressey*, 45 Me. 9; *Murphy v. Copeland*, 51 Iowa, 515, 43 Am. Rep. 118; *Lamb v. Ricketts*, 11 Ohio, 311; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51; *Eddy v. St. Mars*, 53 Vt. 462, 28 Am. Rep. 695. Contra, *Sleeper v. Laconia*, 60 N. H. 201, 3 Gray's Cas. 333, 49 Am. Rep. 311.

<sup>207</sup> *Halsey v. McCormick*, 13 N. Y. 296, 3 Gray's Cas. 327; *Lamb v. Ricketts*, 11 Ohio, 311; *Murphy v. Copeland*, 53 Iowa, 409, 43 Am. Rep. 118.

<sup>208</sup> *Axline v. Shaw*, 25 Fla. 305; *Brophy v. Richeson*, 137 Ind. 114; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51. But see *Castle v. Elder*, 57 Minn. 289.

<sup>209</sup> *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637, 3 Gray's Cas. 324; *Low v. Tibbets*, 72 Me. 92, 39 Am. Rep. 303; *Berry v. Snyder*, 3 Bush (Ky.) 266, 96 Am. Dec. 219; *Pike v. Munroe*, 26 Me. 309, 58 Am. Dec. 751; *Cold Spring Iron Works v. Inhabitants of Tolland*, 9 Cush. (Mass.) 492; *Grant v. White*, 63 Pa. St. 271; *Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Kent v. Taylor*, 64 N. H. 489; *County of St. Clair v. Livingston*, 23 Wall. (U. S.) 46, 64.



## § 392. Boundaries on ways.

As before stated, the ownership of land which is subject to use as a highway is, at common law, in individuals, the public having merely the use thereof, while in this country, by force of statute, the ownership of the land—the “fee” as it is called—is quite frequently in the state or municipality in trust for the public. In the latter case, a conveyance of land as bounded “by” or “along” the highway can, of course, vest in the grantee no part of the land occupied by the highway, and he takes merely to the outer edge thereof. When, however, the grantor owns part or the whole of the land subject to the highway use, the question frequently arises whether his conveyance passes land within the highway, and, in deciding this question, the same considerations apply as in the analogous case of a conveyance of land bounded by water, the soil under which belongs to the grantor.

A conveyance of land as bounded “on” or “by” or as running “along” a highway will convey to the center line of the highway, if the grantor owns thereto, unless a contrary intention appear from the conveyance.<sup>210</sup> So, when land abutting on a highway is conveyed by terms of description which make no mention of the highway, as when it is conveyed by a number on a plat, the grantor’s interest in the land within the highway limits presumably passes;<sup>211</sup> and this is so, even

<sup>210</sup> *Paul v. Carver*, 26 Pa. St. 223, 3 Gray’s Cas. 356; *White v. Godfrey*, 97 Mass. 472, 3 Gray’s Cas. 372; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Columbus & W. Ry. Co. v. Witherow*, 82 Ala. 190; *Kittle v. Pfeiffer*, 22 Cal. 484; *Silvey v. McCool*, 86 Ga. 1; *City of Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358; *Thomas v. Hunt*, 134 Mo. 392; *In re Ladue*, 118 N. Y. 213; *Elphinstone*, Interpret. of Deeds, 179. And so a conveyance of land “south of the road” has been held to convey a part of the highway. *Helmer v. Castle*, 109 Ill. 664.

<sup>211</sup> *Berridge v. Ward*, 10 C. B. (N. S.) 400, 3 Gray’s Cas. 334; *Champlin v. Pendleton*, 13 Conn. 23, 3 Gray’s Cas. 342; *Gear v. Barnum*, 37 Conn. 229; *White’s Bank of Buffalo v. Nichols*, 64 N. Y.

though the length of the boundary lines running towards the highway, as given, would carry them only so far as the edge of the highway.<sup>212</sup> On the other hand, a description of the land as bounded by or on the "side," "margin," or "edge" of the highway is usually regarded as showing an intention to exclude the land within the highway limits from the operation of the conveyance,<sup>213</sup> though in some states a different view is taken.<sup>214</sup>

By analogy to the rule applied in the case of boundaries on streams, it would seem that a monument at the side or edge of the highway, when referred to as a starting point for a line running along the highway, should not exclude the soil within the highway limits, but that it might well be regard-

65, 3 Gray's Cas. 373; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104; *Anthony v. City of Providence*, 18 R. I. 699; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Kneeland v. Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719. Contra, *Sutherland v. Jackson*, 32 Me. 80; *Hanson v. Campbell's Lessee*, 20 Md. 223; *Grant v. Moon*, 128 Mo. 43. Compare *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13.

<sup>212</sup> *Oxton v. Groves*, 68 Me. 371, 28 Am. Rep. 75; *Paul v. Carver*, 26 Pa. St. 223, 3 Gray's Cas. 356; *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Gould v. Eastern R. Co.*, 142 Mass. 85; *Moody v. Palmer*, 50 Cal. 31. But see, to the contrary, *City of Chicago v. Rumsey*, 87 Ill. 348.

<sup>213</sup> *Buck v. Squiers*, 22 Vt. 484, 3 Gray's Cas. 345; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Blackman v. Riley*, 138 N. Y. 318; *Tyler v. Hammond*, 11 Pick. (Mass.) 193; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Hughes v. Providence & W. R. Co.*, 2 R. I. 508; *Grand Rapids & I. R. Co. v. Helsel*, 38 Mich. 62. So in the case of a reference to "the line" of the highway. *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Cole v. Haynes*, 22 Vt. 588. Contra, *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719.

<sup>214</sup> *Paul v. Carver*, 26 Pa. St. 223, 3 Gray's Cas. 356; *Cox v. Freedley*, 33 Pa. St. 124, 3 Gray's Cas. 361; *Woodman v. Spencer*, 54 N. H. 507; *Johnson v. Anderson*, 18 Me. 76 (semble); *Salter v. Jonas*, 39 N. J. Law, 469, 23 Am. Rep. 229; *Anthony v. City of Providence*, 18 R. I. 699. Compare *Hobson v. Philadelphia*, 150 Pa. St. 595.

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ed as merely showing the point at which the boundary strikes the highway, since it is not usually practicable to place a monument in the center of the highway. This view has been adopted in at least one state,<sup>215</sup> but usually the naming of a monument at the side or edge of the highway, from which the line is to run along the highway, has been regarded as sufficient to exclude the land within the highway limits.<sup>216</sup> Where the latter view prevails, the same result would necessarily follow when, as the starting point of such line, there is named, not a monument on the side of the highway, but an imaginary point, such as the intersection of the side line with another line.<sup>217</sup>

In applying the foregoing rules, the highway or street referred to is the highway as opened or defined by use, rather than the highway as platted or recorded.<sup>218</sup> A change in the location or limits of the highway after the making of the con-

<sup>215</sup> *Cottle v. Young*, 59 Me. 105; *Low v. Tibbetts*, 72 Me. 92.

<sup>216</sup> *Sibley v. Holden*, 10 Pick. (Mass.) 249, 3 Gray's Cas. 340; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 3 Gray's Cas. 376; *Smith v. Slocomb*, 9 Gray (Mass.) 36; *Peabody Heights Co. of Baltimore v. Sadtler*, 68 Md. 533; *Hunt v. Brown*, 75 Md. 481. And see *Chadwick v. Davis*, 143 Mass. 7; *Peck v. Denniston*, 121 Mass. 17; *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13.

<sup>217</sup> *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 3 Gray's Cas. 373. Contra, *Low v. Tibbetts*, 72 Me. 92.

The words "beginning on the southerly side of" the road, or "at a point" on such side, and like expressions, have been in one state construed as merely indicating the side of the road on which the land lies, and not as locating a corner of the land at the edge of the road. *O'Connell v. Bryant*, 121 Mass. 557, and see *Kneeland v. Van Valkenburgh*, 46 Wis. 434. But more usually a contrary view is taken. *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 3 Gray's Cas. 376; *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13; *Walker v. Pearson*, 40 Me. 152.

<sup>218</sup> *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165; *Cleveland v. Obenchain*, 107 Ind. 591; *Brown v. Heard*, 85 Me. 294; *O'Brien v. King*, 49 N. J. Law, 79; *Blackman v. Riley*, 138 N. Y. 318; *Winter v. Payne*, 33 Fla. 470; *Orena v. City of Santa Barbara*, 91 Cal. 621. But see *Reid v. Klein*, 138 Ind. 484.

veyance in no way affects the boundaries of the abutting land.<sup>219</sup>

In some jurisdictions a conveyance is not regarded as including land which is merely intended to be dedicated as a highway in the future, or which is merely marked on a plat as such, although the land conveyed is described as bounded on such intended highway as if it actually existed.<sup>220</sup> In other jurisdictions it is considered that such a reference to land as a highway raises the same presumption of an intention to convey the land to the center of the proposed highway as if the highway actually existed.<sup>221</sup>

If the owner owns the whole of the bed of the highway, and no land on the other side thereof, his conveyance of land on the highway will, it has been held, convey all the land within the highway limits.<sup>222</sup>

When the land conveyed is described as extending a certain distance from the highway, without other means of determining its location, the line is to be measured, it has been decided, from the center line of the highway.<sup>223</sup>

Whether, when the land is described as bounded on a private way, the same rule applies as in the case of a public way,

<sup>219</sup> *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 3 Gray's Cas. 273; *Brantly v. Huff*, 62 Ga. 532.

<sup>220</sup> *Leigh v. Jack*, 5 Exch. Div. 264, 3 Gray's Cas. 336; *Bangor House Proprietary v. Brown*, 33 Me. 309, 3 Gray's Cas. 354; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Robinson v. Myers*, 67 Pa. St. 9; *Spackman v. Steidel*, 88 Pa. St. 453. But as to the Pennsylvania rule, see *Bllem v. Daubenspreck*, 169 Pa. St. 282; *Hancock v. Philadelphia*, 175 Pa. St. 124.

<sup>221</sup> *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61, 3 Gray's Cas. 367; *In re Ladue*, 118 N. Y. 213; *Anthony v. City of Providence*, 18 R. I. 699; *Johnson v. Arnold*, 91 Ga. 659. See *Peck v. Denniston*, 121 Mass. 17.

<sup>222</sup> *In re Robbins*, 84 Minn. 99, 57 Am. Rep. 40, 3 Gray's Cas. 332; *Johnson v. Arnold*, 91 Ga. 659.

<sup>223</sup> *Dodd v. Witt*, 139 Mass. 63, 3 Gray's Cas. 330.

so as to give to the grantees the land to the center line thereof, in the absence of a contrary intention, is a question on which the cases are not in accord.<sup>224</sup>

### § 393. Appurtenances.

The effect of a conveyance of land in certain cases as creating an easement corresponding to a pre-existing *quasi* easement has been previously considered.<sup>225</sup> As to the effect of a conveyance of land, not as creating an easement, but as conveying an easement already existing, it is well settled that such an easement will pass on a conveyance of the land to which it appertains,—that is, the dominant tenement,—even though there is no reference to the specific easement, or any statement that all the “appurtenances” or “privileges” belonging to the land shall pass therewith.<sup>226</sup>

<sup>224</sup> In Massachusetts it is held that the same rule applies to private as to public ways. *Fisher v. Smith*, 9 Gray (Mass.) 441, 3 Gray's Cas. 360; *Gould v. Eastern R. Co.*, 142 Mass. 85. See, also, *Witter v. Harvey*, 1 McCord (S. C.) 67, 10 Am. Dec. 650. But a contrary intention may, of course, appear from the terms of the conveyance. *Codman v. Evans*, 1 Allen (Mass.) 443; *Crocker v. Cotting*, 166 Mass. 183. And see *Cushing v. Hathaway*, 10 R. I. 514. In Maine the same rule does not apply to private ways. *Bangor House Proprietary v. Brown*, 33 Me. 309, 3 Gray's Cas. 354; *Ames v. Hilton*, 70 Me. 36. As to the law in New York, see *Mott v. Mott*, 63 N. Y. 246.

<sup>225</sup> Ante, § 317.

<sup>226</sup> *Sheppard's Touchstone*, 89; *Co. Litt.* 121b; *Crosby v. Bradbury*, 20 Me. 61; *Shelby v. Chicago & E. R. Co.*, 143 Ill. 385; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Jackson v. Trullinger*, 9 Or. 393; *National Exchange Bank v. Cunningham*, 46 Ohio St. 575; *Winslow v. King*, 14 Gray (Mass.) 323; *Bowling v. Burton*, 101 N. C. 176; *Cope v. Grant*, 7 Pa. St. 488.

In some cases the use of the word “appurtenances” in connection with the conveyance of a building has been referred to as extending the import of the conveyance, as where there was a conveyance of a house or mill “with appurtenances,” in which cases the inclosure and small outbuildings were held to pass. *Ammidown v. Ball*, 8

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The word "appurtenance" is properly confined to things of an incorporeal character, such as easements or profits à *prendre*, and a conveyance of land "with the appurtenances" will not pass land other than that described, on the theory that it is appurtenant thereto, or, as the rule is usually expressed, "land cannot be appurtenant to land."<sup>227</sup> The word "appurtenances" may, however, it appears, be shown not to have, in the particular case, its legal meaning, but to be used in a different sense, such as "usually enjoyed with," and so to pass land other than that specifically described.<sup>228</sup> So, the word "appurtenances" will not usually extend the scope of the conveyance so as to include things of a chattel character, which are not legally part of the land conveyed,<sup>229</sup> but they may, it has been held, be shown to have been intended to be covered by the term.<sup>230</sup>

Allen (Mass.) 293; *State v. Burke*, 66 Me. 127; *Cunningham v. Webb*, 69 Me. 92. But in these cases the effect would, it seems, under the rule previously stated (see note 387), have been the same if the conveyance had contained no reference to the "appurtenances."

<sup>227</sup> Co. Litt. 121b; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Humphreys v. McKissock*, 140 U. S. 304; *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19, 3 Gray's Cas. 282; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Ogden v. Jennings*, 62 N. Y. 526; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Warren v. Blake*, 54 Me. 276, 39 Am. Dec. 748; *Wilson v. Beckwith*, 117 Mo. 61; *Oliver v. Dickinson*, 100 Mass. 114; *Cole v. Haynes*, 22 Vt. 588.

<sup>228</sup> See *Elphinstone*, Interpret. of Deeds, 188; *Hill v. Grange*, 1 Plowd. 164; *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Hearn v. Allen*, Cro. Car. 57; *Thomas v. Owen*, 20 Q. B. Div. 225; *Hill's Lessee v. West*, 4 Yeates (Pa.) 142; *Ammidown v. Granite Bank*, 3 Allen (Mass.) 285.

<sup>229</sup> *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Frey v. Drahos*, 6 Neb. 1; *Scheidt v. Belz*, 4 Ill. App. 431.

<sup>230</sup> *Redlon v. Barker*, 4 Kan. 445; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 132, 30 Am. St. Rep. 301; *Gorham v. Eastchester Electric Co.*, 31 Abb. N. C. 193, 29 N. Y. Supp. 1094.

## IV. COVENANTS FOR TITLE

The conveyance usually contains one or more covenants by the grantor as to the validity of the title sought to be conveyed, on which, in case of failure of title, the grantee has a right of action for damages. The recognized covenants are (1) for seisin, (2) for right to convey, (3) against incumbrances, (4) for quiet enjoyment, (5) of warranty, and (6) for further assurance.

Covenants for seisin and right to convey, which are substantially equivalent, constitute in some states merely a contract that the grantor has seisin of the land, but more usually they are regarded as a declaration that he has the estate which he undertakes to convey.

The covenant against incumbrances is usually in effect a contract that there is no outstanding lien, interest, or right which may affect the value of the land, although a fee-simple estate passes by the conveyance.

The covenants for quiet enjoyment and of warranty are equivalent, and are contracts that the grantee will not be evicted by title paramount, or by the act of the grantor.

The covenant for further assurance is a contract to execute any instrument necessary to perfect the title.

The benefit of covenants for quiet enjoyment, of warranty, and for further assurance runs with the land. In a number of the states of this country, though not in all, the benefit of the other covenants does not so run.

## § 394. General considerations.

In most conveyances of land there are one or more covenants by the grantor as to the title to the premises, under which the grantee may, in case of failure of title, obtain indemnity in damages. These covenants are of certain recognized classes, having, as a rule, fixed legal effects, though these may be varied by the construction placed upon the covenant in the particular case.<sup>231</sup>

<sup>231</sup> See Rawls, Covenants for Title, § 57. The following outline (899)

In the earlier stages of the common law no such personal covenants were recognized, but the feoffment was usually attended with a "warranty." This common-law warranty, which, taking its origin in the obligation of the feudal lord to protect the holding of his tenant, continued, even after the statute of *Quia Emptores*, to be a usual incident of a feoffment, was in its nature a "covenant real,"—that is, compensation for its breach was awarded, not in damages, but in kind, by a judgment in favor of the warrantee or his heirs, against the original warrantor or his heirs, for the recovery of other lands equal in value to those of which the warrantee had been deprived. A warranty, operating, as it did, against the heir of the warrantor, was, after the statute *De Donis* and before the decision in *Taltarum's Case*, utilized for the purpose, in particular cases, of barring estates tail, and in the efforts to extend its effectiveness in this direction the law of the subject was immensely extended and complicated.<sup>232</sup> The remedy on a warranty was available only in connection with freehold estates, and consequently, if the warranty was attached to a term of years, or if the grantee of a freehold estate was evicted for a term, the warrantee could not recover.<sup>233</sup> In the later history of the subject, however, there was a relaxation of this rule to the extent that when, in such a case, the warranty failed as a covenant real, it might be construed as a personal covenant on which an action for damages might be brought.<sup>234</sup>

After the introduction of conveyances under the Statute of Uses, warranty, which was in its origin associated with

of the law of covenants for title is based almost entirely upon this most admirable work.

<sup>232</sup> See Rawle, *Covenants*, c. 1, where the nature of warranty at common law is clearly stated. See, also, 1 Smith, *Lead. Cas. Eq.* (8th Ed.) 213, American notes to *Spencer's Case*.

<sup>233</sup> Rawle, *Covenants*, §§ 12, 113; 1 Smith, *Lead. Cas. Eq.* 214.

<sup>234</sup> *Pincombe v. Rudge*, Hob. 3g; *Williams v. Burrell*, 1 C. B. 402.



the transfer by feoffment, was gradually supplanted by personal covenants, the purpose of which was to give a remedy in damages against the covenantor in case of failure of title, and which were available in connection with leasehold, as well as freehold, estates, and warranty was finally abolished by statute in England in the nineteenth century.<sup>235</sup>

In this country, settled after the common-law warranty had lost, to a considerable extent, its importance in England, that method of securing the grantee against loss from failure of title was never, to any extent, utilized, but the law of personal covenants for title has been developed and extended to a greater extent even than in England, where the particularity with which intending purchasers examine the title has rendered them comparatively superfluous.

By statute in some states, certain covenants for title are implied from the use of particular operative words in a conveyance, usually "grant, bargain, and sell," and occasionally a covenant in form one of warranty merely is by statute declared to imply certain other covenants for title.<sup>236</sup>

The covenants of title considered in the following sections are "general" covenants,—that is, they are in terms sufficient to protect the covenantee against the claims of all persons whomsoever. Covenants may be, however, and frequently are, "special" in character,—that is, they are so expressed as to afford protection against the acts of the covenantor only, or of persons claiming under him.<sup>237</sup>

### § 395. Covenant for seisin.

The covenant by the grantor that he is lawfully seised of the premises, called the "covenant of seisin," has different

<sup>235</sup> See Rawle, Covenants, §§ 9-14.

<sup>236</sup> Rawle, Covenants, §§ 285-287; 1 Stimson's Am. St. Law, § 1501.

<sup>237</sup> Rawle, Covenants, §§ 28, 29, 126.

effects in different jurisdictions. "Seisin" originally, as before stated, meant the possession of land by one having or claiming a freehold estate therein, either by himself or by another in his behalf.<sup>238</sup> This meaning of "seisin" has been adopted in two or three states in determining the effect of the covenant, and the covenant is there regarded as a declaration by the grantor that he is in possession, claiming such title as he undertakes to convey, which is accordingly satisfied by his claim of title, and is not broken by the fact that he has not such title, though it is broken if another is in adverse possession of the land.<sup>239</sup> The covenant, thus limited in effect, may nevertheless be of very great advantage to the grantee in states which still recognize the doctrine that a conveyance of land in the adverse possession of another is void;<sup>240</sup> and this construction of the covenant presumably owes its origin to the recognition by the courts of the probability that it was intended to secure the grantee against the possible failure of the conveyance for this cause.<sup>241</sup> In the majority of states, however, as in England, the covenant is construed with reference to the meaning which the words "seisin" and "seised" acquired after the Statute of Uses,<sup>242</sup> and it amounts to a covenant that the grantor has the estate, in quantity and quality, which he purports to convey.<sup>243</sup> Ac-

<sup>238</sup> Ante, § 15.

<sup>239</sup> *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Cushman v. Blanchard*, 2 Me. 268, 11 Am. Dec. 76; *Wilson v. Widenham*, 51 Me. 566; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Stambaugh v. Smith*, 23 Ohio St. 584; *Wetzell v. Richcreek*, 53 Ohio St. 62.

<sup>240</sup> See post, § 498.

<sup>241</sup> Rawle, Covenants, §§ 47-54.

<sup>242</sup> Ante, § 15.

<sup>243</sup> *Parker v. Brown*, 15 N. H. 186; *Catlin v. Hurlburt*, 3 Vt. 407; *Lockwood v. Sturdevant*, 6 Conn. 385; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379, 3 Gray's Cas. 598; *Real v. Hollister*, 20 Neb. 112; *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 313; *Pringle v. Witten's Ex'rs*, 1 Bay (S. C.) 256, 1 Am. Dec. 612.

cordingly, the covenant is, in the latter class of states, broken in case the fee-simple title to the land which the grantor purports to convey, or to a part thereof, is outstanding in a third person,<sup>244</sup> or if he has not such an interest as he purports to convey, as when, while purporting to convey an estate in fee simple, the grantor has only an estate in fee tail,<sup>245</sup> or one in remainder.<sup>246</sup> So it is broken if a tenant in common purports to convey the whole interest in the land.<sup>247</sup> It has also been regarded as broken by the fact that things annexed to the premises are subject to a right of removal in a third person,<sup>248</sup> and also by the fact that rights properly appurtenant to the land, or which purport to be conveyed therewith, such as a right of flowage, are not vested in the grantor so as to pass with the land.<sup>249</sup> The covenant is not broken by the existence of a lien on the land,<sup>250</sup> or of a right of use or profit in a third person.<sup>251</sup>

§ 396. Covenant for right to convey.

The covenant that the grantor has a right to convey the

<sup>244</sup> *Anderson v. Knox*, 20 Ala. 156; *Zent v. Picken*, 54 Iowa, 535; *Abbott v. Rowan*, 33 Ark. 593; *Cockrell v. Proctor*, 65 Mo. 41; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Wilson v. Forbes*, 13 N. C. 30; *Allen v. Allen*, 48 Minn. 462.

<sup>245</sup> *Comstock v. Comstock*, 23 Conn. 349.

<sup>246</sup> *Mills v. Catlin*, 22 Vt. 106.

<sup>247</sup> *Downer's Adm'r's v. Smith*, 38 Vt. 464; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376.

<sup>248</sup> *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *Mott v. Palmer*, 1 N. Y. 564, *Finch's Cas.* 286.

<sup>249</sup> *Traster v. Nelson's Adm'r*, 29 Ind. 96; *Walker v. Wilson*, 13 Wis. 522; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381.

<sup>250</sup> *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Rawle, Covenants*, § 59.

<sup>251</sup> *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 3 Am. Dec. 272; *Moore v. Johnston*, 87 Ala. 220; *Douglass v. Thomas*, 103 Ind. 187; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Blondeau v. Sheridan*, 31 Mo. 545.

land is usually equivalent to the covenant for seisin, whichever view of the operation of the latter covenant may be taken in the particular jurisdiction.<sup>252</sup> There may, however, be a right to convey, though there be no seisin or title, as when the conveyance is under a power.<sup>253</sup>

### § 397. Covenant against incumbrances.

An "incumbrance," as the term is used in a covenant that the premises are free and clear of all incumbrances, is defined, in a general way, as "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."<sup>254</sup> A lien<sup>255</sup> is an incumbrance, whether it be a mortgage,<sup>256</sup> a judgment lien,<sup>257</sup> a lien for taxes,<sup>258</sup> or any other of the various classes of liens.<sup>259</sup>

<sup>252</sup> *Peters v. Bowman*, 98 U. S. 56; *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Allen v. Sayward*, 5 Me. 227; *Willard v. Twitchell*, 1 N. H. 177.

<sup>253</sup> *Rawle, Covenants*, § 66. See *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Slater v. Rawson*, 6 Metc. (Mass.) 439.

<sup>254</sup> *Rawle, Covenants*, § 75; *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 260; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Lafferty v. Milligan*, 165 Pa. St. 534.

<sup>255</sup> See post, Part 6.

<sup>256</sup> *Bean v. Mayo*, 5 Me. 94; *Brooks v. Moody*, 25 Ark. 452; *Wyman v. Ballard*, 12 Mass. 304; *Corbett v. Wrenn*, 25 Or. 305; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

<sup>257</sup> *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Holman v. Creagmiles*, 14 Ind. 177; *Hall v. Dean*, 13 Johns. (N. Y.) 105.

<sup>258</sup> *Fuller v. Jillett* (C. C.) 2 Fed. 30; *Crowell v. Packard*, 35 Ark. 348; *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Eaton v. Chesebrough*, 82 Mich. 214; *Campbell v. McClure*, 45 Neb. 608; *Cadmus v. Fagan*, 47 N. J. Law, 549; *Plowman v. Williams*, 6 Lea (Tenn.) 268; *Almy v. Hunt*, 48 Ill. 45.

<sup>259</sup> So, an attachment lien (*Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638, and *Norton v. Babcock*, 2 Metc. [Mass.] 510); a vendor's lien (*Thomas v. St. Paul's Methodist Episcopal Church*, 36 Ala. 138).

An easement is, generally speaking, an incumbrance, as in the case of a private right of way,<sup>260</sup> or a right to maintain a drain or artificial watercourse,<sup>261</sup> or a right to flow land.<sup>262</sup> An easement, however, which is created by the conveyance of a *quasi* servient tenement,<sup>263</sup> is not regarded as within a covenant against incumbrances in such a conveyance, and the effect of the conveyance in creating an easement in favor of the grantor is not affected by the fact that it contains a covenant against incumbrances.<sup>264</sup> A natural right in an owner of neighboring land, such as a right to the uninterrupted flow of a stream, is not within the covenant,<sup>265</sup> but a right in a third person to interfere with the natural right to the customary flow of a stream is, it seems, an incumbrance.<sup>266</sup>

In a majority of the states a highway is regarded as an incumbrance,<sup>267</sup> though a different view is taken in others.<sup>268</sup> A railroad right of way is also an incumbrance.<sup>269</sup>

<sup>260</sup> Mitchell v. Warner, 5 Conn. 497; Blake v. Everett, 1 Allen (Mass.) 248; Wilson v. Cochran, 46 Pa. St. 229; McGowen v. Myers, 60 Iowa, 256.

<sup>261</sup> Prescott v. White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; Smith v. Sprague, 40 Vt. 43; McMullin v. Wooley, 2 Lana. (N. Y.) 394.

<sup>262</sup> Scriber v. Smith, 100 N. Y. 471, 53 Am. Rep. 224; Patterson v. Sweet, 3 Ill. App. 550. But see as to the rule in Maine and Massachusetts, as affected by the flowage acts of those states, Rawle, Covenants, § 83.

<sup>263</sup> See ante, § 317.

<sup>264</sup> Harwood v. Benton, 32 Vt. 724; Dunklee v. Wilton R. Co., 24 N. H. 489. See Rawle, Covenants, § 85.

<sup>265</sup> Prescott v. Williams, 5 Metc. (Mass.) 429.

<sup>266</sup> Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432; Morgan v. Smith, 11 Ill. 199. But see Cary v. Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532.

<sup>267</sup> Kellogg v. Ingersoll, 2 Mass. 101; Copeland v. McAdory, 100 Ala. 553; Hubbard v. Norton, 10 Conn. 423; Herrick v. Moore, 19 Me. 313; Butler v. Gale, 27 Vt. 739; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731.

<sup>268</sup> Patterson v. Arthurs, 9 Watts (Pa.) 152; Wilson v. Cochran, 46 Pa. St. 233; Harrison v. Des Moines & Ft. D. Ry. Co., 91 Iowa,

A covenant as to the use of land, or a restriction upon its use, whether enforceable at law or in equity, is a breach of the covenant against incumbrances,<sup>270</sup> as is an obligation upon the owner of the land to maintain a fence.<sup>271</sup> A right to take profits in the shape of timber or minerals from the land is also an incumbrance.<sup>272</sup>

The existence of a right of dower, whether inchoate or consummate, has been usually recognized as a breach of the covenant.<sup>273</sup> A lease for years outstanding in a third person is also an incumbrance,<sup>274</sup> except when the covenantee purchased the land with notice of the lease, in which case it is regarded as a benefit, rather than a detriment, and so not an incumbrance.<sup>275</sup>

114; *Deacons v. Doyle*, 75 Va. 258; *Kutz v. McCune*, 22 Wis. 623, 99 Am. Dec. 85. Compare *Trice v. Kayton*, 84 Va. 217.

<sup>269</sup> *Quick v. Taylor*, 113 Ind. 540; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Farrington v. Turtelott (C. C.)* 39 Fed. 738. Contra, *Smith v. Hughes*, 50 Wis. 627.

<sup>270</sup> *Locke v. Hale*, 165 Mass. 20; *Foster v. Foster*, 62 N. H. 46; *Docter v. Darling*, 68 Hun (N. Y.) 70; *Greene v. Creighton*, 7 R. L. 1; *Halle v. Newbold*, 69 Md. 265.

<sup>271</sup> *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 2 Gray's Cas. 328; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

<sup>272</sup> *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Stambaugh v. Smith*, 23 Ohio St. 584; *Cathcart v. Bowman*, 5 Pa. St. 317.

<sup>273</sup> *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 80; *Runnels v. Webber*, 59 Me. 488; *Bigelow v. Hubbard*, 97 Mass. 195; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Barnett v. Gaines*, 8 Ala. 373; *Russ v. Perry*, 49 N. H. 547; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 260.

<sup>274</sup> *Clark v. Fisher*, 54 Kan. 403; *Fritz v. Pusey*, 31 Minn. 368; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391; *Sawyer v. Little*, 4 Vt. 414; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Edwards v. Clark*, 83 Mich. 246; *Demars v. Koehler*, 60 N. J. Law, 314.

<sup>275</sup> *Rawle, Covenants*, §§ 77, 78; *Lindley v. Dakin*, 13 Ind. 388; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *Demars v. Koehler*, 60 N. J. Law, 314; *James v. Lichfield*, L. R. 9 Eq. 51. And see *Pease v. Christ*, 31 N. Y. 141. But see, to the contrary, *Edwards v. Clark*, 83 Mich. 246.

As stated by the leading authority on the subject, the legal character of the outstanding right or interest is not always sufficient to determine whether it constitutes an incumbrance, within the particular covenant in question, but in a certain class of cases the question must "be determined by reference to the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser, and, to some extent, the local usage and habit of the country."<sup>276</sup> Thus, as just stated, notice to the purchaser of an existing lease may be decisive as to whether it is an incumbrance, and likewise his knowledge of an easement has been held to show that it was not within the scope of the covenant.<sup>277</sup> So, in determining whether a certain incumbrance was intended to be within the covenant, the whole conveyance may, it seems, be considered, and not merely the clause containing the covenant. Thus, when the grantee assumes a mortgage on the land, the existence of such mortgage is not a breach of the covenant, though not expressly excepted therefrom,<sup>278</sup> and even in states where a highway is regarded as an incumbrance, though a conveyance of land as bounded by a highway passes the land to the center of the highway, subject to the highway use, the grantor is not liable under his covenant on account of such highway.<sup>279</sup>

But though the question of notice to the grantee may be important in determining whether an outstanding right is an incumbrance, it is no defense to an action on the covenant that he knew of the incumbrance.<sup>280</sup> Nor is extraneous evi-

<sup>276</sup> Rawle, Covenants, § 85.

<sup>277</sup> *Janes v. Jenkins*, 34 Md. 1; *Kutz v. McCune*, 22 Wis. 623, 99 Am. Dec. 85; *Memmert v. McKeen*, 112 Pa. St. 315. See *Barre v. Fleming*, 29 W. Va. 314.

<sup>278</sup> *Freeman v. Foster*, 55 Me. 508; *Watts v. Weiman*, 2 N. H. 453.

<sup>279</sup> *Frost v. Angier*, 127 Mass. 312; *Patten v. Fitz*, 133 Mass. 456; *Holmes v. Danforth*, 83 Me. 139; *City of Cincinnati v. Brachman*, 85 Ohio St. 289.

<sup>280</sup> Rawle, Covenants, § 88; *Levett v. Withrington*, Latw. 97; *Funk* (907)

dence properly admissible at law to show that there was an intention to except a certain incumbrance from the covenant,<sup>281</sup> though a mistake in this regard may be the subject for a reformation in a court of equity, or in a court of law having equitable powers.<sup>282</sup>

### § 398. Covenants for quiet enjoyment and of warranty.

The covenant that the covenantee shall quietly enjoy the premises conveyed without disturbance, and the covenant to warrant and defend the premises, termed, respectively, the covenants for "quiet enjoyment" and "of warranty," are substantially similar in effect, except when some variation is introduced by the particular language used.<sup>283</sup>

The modern covenant of warranty, by which one covenants that he will warrant and defend the premises unto the grantee against all lawful claims by third persons, is entirely different from the old common-law warranty, and is merely a

*v. Vonelda*, 11 Serg. & R. (Pa.) 112, 14 Am. Dec. 617; *Hubbard v. Norton*, 10 Conn. 422, 431; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Yancey v. Tatlock*, 93 Iowa, 286; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428; *Long v. Moler*, 5 Ohio St. 272.

<sup>281</sup> Rawle, Covenants, § 88, p. 113, note; *Holley v. Youngs*, 27 Ala. 203; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Flynn v. Bourneuf*, 143 Mass. 277, 53 Am. Rep. 135; *Long v. Moler*, 5 Ohio St. 271; *Butler v. Gale*, 27 Vt. 739; *Edwards v. Clark*, 83 Mich. 246; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391. In Indiana such evidence has, however, always been admitted. *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 252; *Pitman v. Conner*, 27 Ind. 337. So in Illinois. *Sidders v. Riley*, 22 Ill. 109.

<sup>282</sup> Rawle, Covenants, § 88, p. 112; *Haire v. Baker*, 5 N. Y. 357; *Taylor v. Gilman*, 25 Vt. 413; *Van Wagner v. Van Nostrand*, 19 Iowa, 427.

<sup>283</sup> Rawle, Covenants, § 114; *Copeland v. McAdory*, 100 Ala. 553; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Mitchell v. Warner*, 5 Conn. 497; *Kramer v. Carter*, 136 Mass. 504.



personal covenant, a breach of which entitles one to the recovery of damages. It is not recognized in England, and appears to have arisen in this country from the fact that the early conveyances contained both personal covenants and a clause in the form of the common-law warranty, and that this latter, as it was no longer utilized as a real covenant, became incorporated in the clause containing the personal covenants, and so became itself a covenant of that character.<sup>284</sup>

A covenant for quiet enjoyment, when accompanying a lease for years, is, as before stated, broken only by an eviction by the lessor or by a third person under title paramount.<sup>285</sup> So, when such a covenant, or a covenant of warranty, occurs in a conveyance in fee, there can be no recovery unless there is an eviction either by the grantor<sup>286</sup> or by a third person under lawful claim of title.<sup>287</sup> Accordingly it is not broken by a tortious disturbance or eviction by a stranger; this being something beyond the control of the grantor, and for which the grantee has his remedy against the wrongdoer.<sup>288</sup> A tortious eviction by the covenantor, however, constitutes a breach of the covenant,<sup>289</sup> though his wrongful en-

<sup>284</sup> Rawle, Covenants, §§ 110-114.

<sup>285</sup> See ante, § 43 (b).

<sup>286</sup> See post, note 289.

<sup>287</sup> *Bostwick v. Williams*, 36 Ill. 35, 85 Am. Dec. 385; *Knapp v. Town of Marlboro*, 34 Vt. 235; *Burrus v. Wilkinson*, 31 Miss. 527; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Johnson v. Nyce's Ex'rs*, 17 Ohio, 66, 49 Am. Dec. 444; *McGrew v. Harmon*, 164 Pa. St. 115; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

<sup>288</sup> *Hayes v. Bickerstaff*, Vaughan, 118; *Noonan v. Lee*, 2 Black (U. S.) 499; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Barry v. Guild*, 126 Ill. 439; *Hoppes v. Cheek*, 21 Ark. 585; *Playter v. Cunningham*, 21 Cal. 229; *Chestnut v. Tyson*, 105 Ala. 149. But a covenant against the acts of a certain person applies to his tortious, as well as his rightful, acts, Rawle, Covenants, § 128; *Foster v. Mapes*, Cro. Eliz. 212.

<sup>289</sup> Rawle, Covenants, § 128; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Akerly v. Vilas*, 23 Wis. 207, 99 Am. Dec. 165.

try on the premises without claiming title, or without doing such acts as amount to an assertion of title, is regarded as a mere trespass not amounting to an eviction.<sup>290</sup> A taking of the land under the power of eminent domain is not within the scope of the covenant, which is regarded as directed against defects of title only.<sup>291</sup>

An eviction constituting a breach of one of these covenants may be actual or constructive, the first involving a withdrawal by the covenantee from the possession of the land, the latter not involving any loss of the possession. To constitute an actual eviction, the dispossession need not be under legal process,<sup>292</sup> nor need there be any judicial decision in favor of the holder of the paramount title,<sup>293</sup> it being sufficient that the claim is actually asserted,<sup>294</sup> that it is valid,<sup>295</sup> and that the covenantee yields thereto.<sup>296</sup>

<sup>290</sup> *Crosse v. Young*, 2 Show. 425; *Claunch v. Allen*, 12 Ala. 155; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 630. See ante, § 51.

<sup>291</sup> *Rawle, Covenants*, § 129; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Brimmer v. City of Boston*, 102 Mass. 19; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

<sup>292</sup> *Rawle, Covenants*, § 132; *Foster v. Pierson*, 4 Term R. 617; *Greenvault v. Davis*, 4 Hill (N. Y.) 645; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333.

<sup>293</sup> *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *Mason v. Cooksey*, 51 Ind. 519; *Dugger v. Oglesby*, 99 Ill. 405.

<sup>294</sup> There can be no eviction unless the adverse claim is actually asserted, and consequently the covenant is not broken if the covenantee yields possession before any assertion of such claim. *Axtel v. Chase*, 83 Ind. 546; *Hester v. Hunnicutt*, 104 Ala. 282; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *McGrew v. Harmon*, 164 Pa. St. 122; *Kellog v. Platt*, 33 N. J. Law, 328; *Morgan v. Henderson*, 2 Wash. T. 367; *Rawle, Covenants*, § 135.

<sup>295</sup> See *Rawle, Covenants*, § 135, and cases cited ante, note 287.

<sup>296</sup> *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *Axtel v. Chase*, 83 Ind. 546; *Gunter v. Williams*, 40 Ala. 561; *Allis v. Nininger*, 25 Minn. 525; *Lambert v. Estes*, 99 Mo. 604; *Clements v. Collins*, 59 (910)

A constructive eviction occurs when, upon the assertion of the superior title, the covenantee, instead of yielding possession to the hostile claimant, buys in such title, or accepts a lease from the holder thereof.<sup>297</sup> A constructive eviction also occurs when the covenantee is unable, upon receiving the conveyance, to obtain possession of the land, owing to the fact that another person, having a superior title thereto, is in possession, it being considered unnecessary, in such a case, that the covenantee should be compelled to take forcible possession in order that he himself may be ejected, or to bring a suit for the land, which would necessarily result adversely to him.<sup>298</sup>

§ 399. Covenant for further assurance.

The covenant by the grantor to make such other assurances as may be necessary to perfect the title is less extensively used in the United States than any of the other covenants for title, though its importance to the purchaser, it is said,

Ga. 124; *Wilson v. Cochran*, 46 Pa. St. 229; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 237; *Kramer v. Carter*, 136 Mass. 504.

<sup>297</sup> Rawle, *Covenants*, § 142 et seq.; *Sprague v. Baker*, 17 Mass. 590; *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark. 629; *McConnell v. Downs*, 48 Ill. 271; *McGary v. Hastings*, 39 Cal. 260, 2 Am. Rep. 456; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333; *Loomis v. Bedel*, 11 N. H. 74; *Clark v. Mumford*, 62 Tex. 531; *Amos v. Cosby*, 74 Ga. 793. See *Tucker v. Cooney*, 34 Hun, 227, 102 N. Y. 719; *Stewart v. Drake*, 9 N. J. Law, 139, *Finch's Cas.* 1100. In one or two states a different view is taken. *Dyer v. Britton*, 53 Miss. 270; *Huff v. Cumberland Valley Land Co.*, 17 Ky. Law Rep. 213, 30 A. W. 660.

<sup>298</sup> Rawle, *Covenants*, § 133 et seq.; *Cloake v. Hooper*, *Freem.* 122; *Grist v. Hodges*, 14 N. C. 200; *Peters v. Bowman*, 98 U. S. 56; *Banks v. Whitehead*, 7 Ala. 83; *Shattuck v. Lamb*, 65 N. Y. 499; *Moore v. Vail*, 17 Ill. 185; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313; *Witty v. Hightower*, 12 Smedes & M. (Miss.) 473; *Murphy v. Price*, 43 Mo. 247; *Heyn v. Ohman*, 42 Neb. 692.

"can hardly be overrated."<sup>299</sup> Under this covenant, the covenantor may be required to do such further acts as may be necessary on his part to perfect the title which the conveyance purports to pass, but the covenantee cannot demand that he do acts which are unnecessary, or which it is impossible for him to do. The remedy under this covenant is more often by a suit for specific performance than by an action of damages, as in the case of the other covenants.<sup>300</sup>

§ 400. The measure of damages.

In an action for a breach of a covenant for seisin or for right to convey, the measure of damages is, it is agreed, the amount of the consideration paid by the grantee, usually with interest, such consideration being presumably the value of the land at the time of the sale, with a view to which the covenant was made.<sup>301</sup> In case the breach is as to part of the premises only, the recovery is a proportionate part of the consideration.<sup>302</sup>

<sup>299</sup> Rawle, Covenants for Title, § 98. See *Cochran v. Pascault*, 54 Md. 1.

<sup>300</sup> Rawle, Covenants, §§ 99-109. The fact that this covenant may be enforced by specific performance, while the other covenants for title cannot, is the reason, as stated by Mr. Rawle, of its great value to the purchaser.

<sup>301</sup> Rawle, Covenants, § 153 et seq.; *Bender v. Fromberger*, 4 Dall. (Pa.) 442; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; *Marston v. Hobbs*, 2 Mass. 423, 3 Am. Dec. 61; *Nichols v. Walter*, 8 Mass. 243; *Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *King v. Gilson's Adm'x*, 32 Ill. 348, 83 Am. Dec. 269; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Dec. 45; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 535; *Shorthill v. Ferguson*, 44 Iowa, 249; *Park v. Cheek*, 4 Cold. (Tenn.) 20. As to interest, see Rawle, Covenants, § 196.

<sup>302</sup> *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Hubbard v. Norton*, 10 Conn. 422; *Bibb v. Freeman*, 59 Ala. 612; *Weber v. Anderson*, 73 Ill. 439; *Wright v. Nipple*, 92 Ind. 310; *Scantlin v. Allison*, 12 Kan. 85; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Adkins* (912)

The measure of damages for a breach of a covenant for quiet enjoyment or of warranty is, by the weight of authority, the same as that for breach of the covenants of seisin or of right to convey,—that is, the value of the land at the time of the conveyance, as measured by the consideration paid, without reference to any increase in value, whether caused by the development of the neighborhood or the improvement of the land itself.<sup>303</sup> In some of the New England states, however, the covenants for quiet enjoyment and of warranty are regarded as intended to indemnify the covenantee for any loss suffered by him, and as consequently entitling him to damages to the extent of the value of the land at the time of the eviction.<sup>304</sup> Such a rule may involve a very great burden upon one who sells land his title to which is defective, though he believes it to be good, he being liable for the cost of all improvements, however great, made by his grantee, as well as for any increase in value arising from growth of population and the like causes.<sup>305</sup>

The covenant against incumbrances is considered as one for indemnity only, and the covenantee can recover no more than what he was compelled to pay in order to extinguish

v. Tomlinson, 121 Mo. 487; *Staats v. Ten Eyck's Ex'rs*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

<sup>303</sup> Rawle, *Covenants for Title*, § 164; *Burton v. Reeds*, 20 Ind. 87; *Weber v. Anderson*, 73 Ill. 439; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Brown v. Dickerson*, 12 Pa. St. 372; *Swafford v. Whipple*, 3 G. Greene (Iowa) 261, 54 Am. Dec. 498; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Elliott v. Thompson*, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630.

<sup>304</sup> *Horsford v. Wright, Kirby* (Conn.) 3, 1 Am. Dec. 8; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Ceconci v. Rodden*, 147 Mass. 64; *Park v. Bates*, 12 Vt. 331, 36 Am. Dec. 347; *Williamson v. Williamson*, 71 Me. 442.

<sup>305</sup> See Rawle, *Covenants*, §§ 165-171.

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the outstanding incumbrance,<sup>306</sup> or, in case he could not so extinguish it, the amount of injury which he may be considered to have suffered from its existence.<sup>307</sup> If no loss has been sustained, however, he may recover nominal damages, since the covenant is regarded as broken as soon as made, if there is any outstanding incumbrance.<sup>308</sup> In those states in which the recovery on a covenant for quiet enjoyment or of warranty is limited to the amount of the consideration paid, the recovery for breach of the covenant against incumbrances is likewise so limited, no matter what expenditure or loss the covenantee may have incurred on account of the incumbrance.<sup>309</sup>

#### § 401. Covenants running with the land.

The benefit of a covenant for title until breach runs with the land.<sup>310</sup> Upon breach, the covenant is changed into a

<sup>306</sup> Rawle, Covenants, § 188 et seq.; *Delavergne v. Norris*, 7 Johns. (N. Y.) 353, 5 Am. Dec. 281; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Amos v. Cosby*, 74 Ga. 793; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *McDowell v. Milroy*, 69 Ill. 498; *Kellogg v. Malin*, 62 Mo. 429; *Corbett v. Wrenn*, 25 Or. 305; *Eaton v. Lyman*, 30 Wis. 41; *Johnson v. Collins*, 116 Mass. 392; *Hartshorn v. Cleveland*, 52 N. J. Law, 473; *Myers v. Brodbeck*, 110 Pa. St. 198. See *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135.

<sup>307</sup> Rawle, Covenants, §§ 190, 191; *Mitchell v. Stanley*, 44 Conn. 312; *Morgan v. Smith*, 11 Ill. 194; *Kostendader v. Pierce*, 37 Iowa, 645; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Mackey v. Harmon*, 34 Minn. 168; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Kellogg v. Malin*, 62 Mo. 429.

<sup>308</sup> *Briggs v. Morse*, 42 Conn. 258; *Stowell v. Bennett*, 34 Me. 422; *Wilcox v. Musche*, 39 Mich. 101; *Smith v. Jefts*, 44 N. H. 482; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; *Noonan v. Ilsley*, 21 Wis. 138; Rawle, Covenants, §§ 188, 189.

<sup>309</sup> Rawle, Covenants, § 193; *Collier v. Cowger*, 52 Ark. 322; *Foots v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Eaton v. Lyman*, 30 Wis. 41; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142.

<sup>310</sup> Rawle, Covenants, § 204.

mere personal right of action, to be enforced by the person entitled to the benefit of the covenant at the time of the breach, or, in case of his death, his personal representative, and which consequently does not pass with the land to his heir, or to his grantee, unless there is an express assignment of the right of action.<sup>311</sup>

Covenants for quiet enjoyment and of warranty are not, it is agreed, broken until there is an eviction thereunder, and consequently they may be enforced by any subsequent owner of the land claiming under the covenantee, whether a grantee, heir, or devisee,<sup>312</sup> though the right of action for a covenant already broken does not so pass with the land. So, a covenant for further assurance is not regarded as broken until damage has been caused by refusal to furnish the assurance, and there is consequently a right of action thereon in favor of a subsequent owner of the land.<sup>313</sup>

The covenants of seisin and of right to convey,<sup>314</sup> and also the covenant against incumbrances,<sup>315</sup> have, however, in the

<sup>311</sup> *Lewes v. Ridge*, Cro. Eliz. 862, 3 Gray's Cas. 590; *Lucy v. Levington*, 2 Lev. 26, 3 Gray's Cas. 591; *Davis v. Lyman*, 6 Conn. 249; *Ladd v. Noyes*, 137 Mass. 151; *Adams v. Conover*, 37 N. Y. 422; *Davidson v. Cox*, 10 Neb. 150; *Provident Life & Trust Co. v. Fiss*, 147 Pa. St. 232; *Clement v. Bank of Rutland*, 61 Vt. 298; *Peters v. Bowman*, 98 U. S. 56; *Rawle, Covenants*, §§ 316, 317.

<sup>312</sup> *Rawle, Covenants*, § 213 et seq.; *Claycomb v. Munger*, 51 Ill. 373; *Redwine v. Brown*, 10 Ga. 311; *Wyman v. Ballard*, 12 Mass. 304; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *King v. Kerr's Adm'rs*, 5 Ohio, 154, 22 Am. Dec. 777; *Lawrence v. Senter*, 4 Sneed (Tenn.) 52; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

<sup>313</sup> *Rawle, Covenants*, § 230; *Colby v. Osgood*, 29 Barb. (N. Y.) 339, *Finch's Cas.* 1103; *Collier v. Gamble*, 10 Mo. 467.

<sup>314</sup> *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379, 3 Gray's Cas. 598; *Mitchell v. Warner*, 5 Conn. 498, *Finch's Cas.* 1094; *Mygatt v. Coe*, 124 N. Y. 212; *Lawrence v. Montgomery*, 37 Cal. 188; *Chapman v. Holmes' Ex'rs*, 10 N. J. Law, 20; *Ballard v. Child*, 34 Me. 355; *Clement v. Bank of Rutland*, 61 Vt. 298.

<sup>315</sup> *Mitchell v. Warner*, 5 Conn. 498, *Finch's Cas.* 1094; *Clark v. Swift*, 3 Metc. (Mass.) 390, 3 Gray's Cas. 611; *Carter v. Denman's*

majority of the states in this country, been regarded as broken as soon as made,—that is, it is considered that, since these involve stipulations that a certain state of things exists at the time of the conveyance, the nonexistence thereof causes an immediate breach. In some states, however,<sup>316</sup> as in England,<sup>317</sup> the courts have not adopted this view, but allow an action to be brought on either of these covenants by any owner of the land who suffers special damage by the breach; and in other states there are statutory provisions to this effect.<sup>318</sup> But even in states in which it is held that there is no right of action on the covenants in favor of an assignee, it seems that he may sue thereon in the name of his grantor, under the equitable rule, largely adopted by courts of law, that the assignee of a chose in action may sue in the name of the assignor,<sup>319</sup> and the same result has been occasionally held to follow from modern statutes extending the right of assignment, and allowing an action in the name of the real party in interest.<sup>320</sup>

Ex'rs, 23 N. J. Law, 260; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Lawrence v. Montgomery*, 37 Cal. 183; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Guerin v. Smith*, 62 Mich. 369; *Blondeau v. Sheridan*, 81 Mo. 545; *Marbury v. Thornton*, 82 Va. 702. See *Stewart v. Drake*, 9 N. J. Law, 139, *Finch's Cas.* 1100.

<sup>316</sup> *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Dehority v. Wright*, 101 Ind. 382; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Schofield v. Iowa Homestead Co.*, 32 Iowa, 318, 7 Am. Rep. 197; *Mecklem v. Blake*, 22 Wis. 495; *Cole v. Kimball*, 52 Vt. 639, 3 *Gray's Cas.* 615. (covenant against incumbrances). See *Allen v. Kennedy*, 91 Mo. 324.

<sup>317</sup> *Kingdon v. Nottle*, 1 Maule & S. 355, 3 *Gray's Cas.* 592; *King v. Jones*, 5 Taunt, 418, 3 *Gray's Cas.* 595; *Kingdon v. Nottle*, 4 Maule & S. 53, 3 *Gray's Cas.* 596.

<sup>318</sup> See *Rawle, Covenants*, § 211; 1 *Stimson's Am. St. Law*, § 1461.

<sup>319</sup> *Rawle, Covenants*, § 226. See *Peters v. Bowman*, 98 U. S. 59; *Cole v. Kimball*, 52 Vt. 643, 3 *Gray's Cas.* 615. As to a suit on a covenant against incumbrances in the name of the assignor, and the difficulties of pleading therein, see *Rawle, Covenants*, § 227.

<sup>320</sup> *Security Bank of Minnesota v. Holmes*, 65 Minn. 531; *Kimball v. Bryant*, 25 Minn. 496; *Boyd v. Belmont*, 58 How. Pr. (N. Y.) 514.



The right of a remote grantee to sue upon a covenant of title as running with the land is not affected by the fact that he also has a right of action on a covenant made directly with himself by his immediate grantor.<sup>321</sup>

In order to avoid the possibility of two or more judgments against the covenantor on account of the same breach in favor of successive owners of the land, the rule has been laid down and generally adopted that neither the covenantee nor a subsequent owner, after parting with the land, can recover on the covenant until he has himself been compelled to pay damages on his own covenant, in favor of one claiming under him, this being regarded as tantamount to an eviction.<sup>322</sup>

The covenantee or other owner of the land cannot, unless in special cases, after having conveyed the land, release the covenant, so as to affect the right of his grantee to sue thereon,<sup>323</sup> and it has been suggested that such a release by the covenantee, even though made by him while owner of the land, does not affect the right of action in favor of a subsequent transferee of the land who takes without notice of the release.<sup>324</sup>

<sup>321</sup> *Withy v. Mumford*, 5 Cow. (N. Y.) 137, 3 Gray's Cas. 607; *Markland v. Crump*, 18 N. C. 101, 27 Am. Dec. 230; Rawle, Covenants, § 216.

<sup>322</sup> *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233, 3 Gray's Cas. 601; *Withy v. Mumford*, 5 Cow. (N. Y.) 137, 3 Gray's Cas. 607; *Chase v. Weston*, 12 N. H. 413; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Clement v. Bank of Rutland*, 61 Vt. 298; *Wheeler v. Sohler*, 3 Cush. (Mass.) 222; *Redwine v. Brown*, 10 Ga. 311; Rawle, Covenants, § 216.

<sup>323</sup> *Abby v. Goodrich*, 3 Day (Conn.) 423; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Chase v. Weston*, 12 N. H. 413.

<sup>324</sup> See *Claycomb v. Munger*, 51 Ill. 373; *Susquehanna & Wyoming Valley Railroad & Coal Co. v. Quick*, 61 Pa. St. 339; *Field v. Snell*, 4 Cush. (Mass.) 504. Contra, see *Littlefield v. Getchell*, 32 Me. 392.

## EXECUTION OF THE CONVEYANCE.

A conveyance must be signed, and, in many jurisdictions, must be sealed. In some jurisdictions it must be witnessed.

An acknowledgment of the conveyance by the grantor before some official is usually required only in order to entitle it to record, though in some states a conveyance, or a particular class of conveyance, must be acknowledged to be valid.

There must be a delivery of the conveyance in order that it may be effective, this being the expression, by word or act, of the grantor's intention that the conveyance shall take effect as a transfer of title. This expression of intention may be valid, though the grantee is not present.

A delivery in escrow is a manual transfer of the instrument to one other than the grantee, subject to a stipulation that the conveyance shall not take effect until a certain condition is fulfilled.

In a number of the states no title is regarded as passing by the conveyance until the grantee assents thereto. In other states, as in England, there is no such rule.

The execution of a conveyance, including delivery thereof, may be by an agent acting under a "power of attorney."

## § 402. Signing.

At common law, a written transfer of land was always sealed, but not signed. In England, the better opinion is that the requirement in the Statute of Frauds that the writing be signed does not apply to a sealed instrument.<sup>325</sup> In this country, however, the state statute requiring a signed

<sup>325</sup> *Cherry v. Heming*, 4 Exch. 681; *Cooch v. Goodman*, 2 Q. B. 580, 597; *Aveline v. Whisson*, 4 Man. & G. 801; 3 Preston, Abstracts, 61; *Challis*, Real Prop. 327. The statute in terms (29 Car. II. c. 3, § 1) provides that all leases, estates, interests of freehold, terms of years, etc., "made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only."

writing for the transfer of an interest in land is usually, if not invariably, construed as requiring the writing to be signed, although it also be sealed.<sup>326</sup> In the absence of a statutory requirement that the instrument be "subscribed" by the grantor, the signature may, it has been held, be in any part thereof.<sup>327</sup>

The signing may be by mark, although the person so signing is able to write,<sup>328</sup> or may be by the hand of another person in the grantor's presence.<sup>329</sup> Even a signature by another, made out of the grantor's presence,<sup>330</sup> is sufficient if adopted by the grantor, as when he subsequently acknowledges or delivers the instrument as his act and deed.

When the conveyance purports to be by more than one grantor, but all the grantors do not sign, the signatures of those that do, followed by delivery by them, will be sufficient

<sup>326</sup> *Adams v. Medsker*, 25 W. Va. 127; *Goodman v. Randall*, 44 Conn. 321; *Shillock v. Gilbert*, 23 Minn. 386; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193.

<sup>327</sup> *Saunders v. Hackney*, 10 Lea (Tenn.) 194; *Newton v. Emerson*, 66 Tex. 142; *Smith v. Howell*, 11 N. J. Eq. 349; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Devereux v. McMahon*, 108 N. C. 134.

<sup>328</sup> *Meazels v. Martin*, 93 Ky. 50; *Devereux v. McMahon*, 108 N. C. 134; *Truman v. Lore's Lessee*, 14 Ohio St. 144; *Mackay v. Easton*, 19 Wall. (U. S.) 619.

<sup>329</sup> *Lewis v. Watson*, 98 Ala. 479; *Jansen v. McCahill*, 23 Cal. 563, 33 Am. Dec. 84; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193, note; *Bird v. Decker*, 64 Me. 550; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *McMurtry v. Brown*, 6 Neb. 368; *Hays v. Hays*, 6 Pa. St. 368.

<sup>330</sup> *Nye v. Lowry*, 32 Ind. 316; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92; *Conlan v. Grace*, 36 Minn. 276; *Pierce v. Hakes*, 23 Pa. St. 231; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Kerr v. Russell*, 69 Ill. 666, 13 Am. Rep. 634; *Newton v. Emerson*, 66 Tex. 142.

to divest their interest,<sup>331</sup> unless their delivery was conditional upon signature by the others.<sup>332</sup>

§ 403. Sealing—Necessity.

At common law, the only recognized mode of authenticating a written instrument was by sealing, and consequently any conveyance in use at the present day which takes effect by the common law, such as a grant of a right in another's land, or a release, must be under seal, in the absence of a statutory provision to the contrary.<sup>333</sup>

In a number of the states, by express provision of statute, seals are no longer necessary, and the presence of a seal on a conveyance does not affect the acquisition of rights thereunder.<sup>334</sup> In other states there is an express requirement that a transfer of an interest in land shall be under seal.<sup>335</sup>

Since, after the passage of the Statute of Uses, a conveyance by bargain and sale might be oral, the mere payment of a consideration being sufficient to raise a use, which the statute would execute,<sup>336</sup> and since, moreover, the Statute of Enrollments, passed in recognition of this fact, and requiring a

<sup>331</sup> *Colton v. Leavey*, 22 Cal. 496; *Jackson v. Sanford*, 19 Ga. 14; *Scott v. Whipple*, 5 Me. 336; *Harrelson v. Sarvis*, 39 S. C. 14.

<sup>332</sup> *Johnson v. Brook*, 31 Miss. 17; *Arthur v. Anderson*, 9 Rich. (S. C.) 234; *Haskins v. Lombard*, 16 Me. 140, 33 Am. Dec. 645. See post, § 406.

<sup>333</sup> *Somerset v. Fogwell*, 5 Barn. & C. 875, 3 Gray's Cas. 230; *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Hewlins v. Shipham*, 5 Barn. & C. 229; *Arnold v. Stevens*, 24 Pick. (Mass.) 109, 35 Am. Dec. 305; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Cagle v. Parker*, 97 N. C. 271.

<sup>334</sup> 1 *Stimson's Am. St. Law*, § 1564 (B). See *Wisdom v. Reeves*, 110 Ala. 418; *Pierson v. Armstrong*, 1 Iowa, 283, 63 Am. Dec. 440; *Jerome v. Ortman*, 66 Mich. 668; *Gibbs v. McGuire*, 70 Miss. 646.

<sup>335</sup> 1 *Stimson's Am. St. Law*, § 1564 (A).

<sup>336</sup> *Challis*, *Real Prop.* 338; *Williams*, *Real Prop.* (18th Ed.) 196; 1 *Hayes*, *Conveyancing* (5th Ed.) 76.

bargain and sale to be by writing under seal and enrolled, has been generally regarded as not in force in this country, it would seem that a seal is unnecessary, in the absence of a state statute to the contrary, in the case of a conveyance taking effect under the Statute of Uses or under a state statute. In a number of the states, however, it has been decided or assumed that, even in the absence of a local statutory requirement, a seal is necessary, this view being sometimes based upon the assumption that a conveyance of land is necessarily a "deed," which, since a deed means a sealed instrument, assumes the very point in question.<sup>337</sup>

Even when a seal is necessary to convey the legal title, an unsealed conveyance will be effective in equity, as vesting an equitable interest in the grantee named.<sup>338</sup>

— Sufficiency.

At common law, an instrument was sealed, usually at least, by impressing some device upon wax, which was made to adhere to the paper;<sup>339</sup> but at the present day an impression made by stamping upon the paper on which the instrument is written,<sup>340</sup> or even a paper wafer or piece of paper gummed

<sup>337</sup> *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *McLaughlin v. Randall*, 66 Me. 226; *Jackson v. Hart*, 12 Johns. (N. Y.) 77; *Robinson v. Noel*, 49 Miss. 253; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375; *Colvin v. Warford*, 20 Md. 357. In *Underwood v. Campbell*, 14 N. H. 393, it seems to be considered that the Statute of Enrollments is in force in New Hampshire.

<sup>338</sup> *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Brinkley v. Bethel*, 9 Heisk. (Tenn.) 786; *Jewell v. Harding*, 72 Me. 124; *Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761; *McCarley v. Tippah County Suprs*, 58 Miss. 483; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375.

<sup>339</sup> 3 Co. Inst. 169.

<sup>340</sup> *Sugden, Powers* (8th Ed.) 232; *Pillow v. Roberts*, 12 Ark. 322; *Allen v. Sullivan R. Co.*, 32 N. H. 446; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52, 3 Gray's Cas. 630; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Pillow v. Roberts*, 13 How. (U. S.) 472. *Contra*, *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Warren v. Lynch*, 5 Johns. (N. Y.) 239. See 1 Am. Law Rev. 638.

on the face of the instrument,<sup>341</sup> is usually regarded as sufficient. By statute in many states, a mere scroll or any other device marked on the paper on which the conveyance is written is sufficient,<sup>342</sup> and in other states a similar view is taken, in the absence of any express statute.<sup>343</sup> So, the writing of the word "Seal" in connection with the signature has been regarded as a sufficient sealing.<sup>344</sup>

A recital in the instrument that it is sealed is not necessary in order to make the sealing effective, if there is actually a seal.<sup>345</sup> In a few decisions, however, a different view has been taken when the alleged seal consisted of merely a scroll or other device which did not of itself show that it was affixed as a seal.<sup>346</sup> A statement in the instrument that it is

<sup>341</sup> *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Turner v. Field*, 44 Mo. 382; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52, 3 Gray's Cas. 630.

<sup>342</sup> 1 Stimson's Am. St. Law, § 1565.

<sup>343</sup> *Jones v. Logwood*, 1 Wash. (Va.) 42; *Hacker's Appeal*, 121 Pa. St. 192; *Trasher v. Everhart*, 3 Gill & J. (Md.) 246; *Hudson v. Poin-dexter*, 42 Miss. 304; *Eames v. Preston*, 20 Ill. 389; *Rolph v. Gist*, 4 McCord (S. C.) 267. Contra, *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *McLaughlin v. Randall*, 66 Me. 228; *Douglas v. Oldham*, 6 N. H. 150; *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251, 3 Gray's Cas. 628.

<sup>344</sup> *Cochran v. Stewart*, 57 Minn. 499; *Whiteley v. Davis' Lessee*, 1 Swan (Tenn.) 383.

The word "Seal" within a scroll has been decided to be sufficient in some cases. *Hastings v. Vaughn*, 5 Cal. 315; *Miller v. Binder*, 28 Pa. St. 489; *English v. Helms*, 4 Tex. 228. Contra, *Beardsley v. Knight*, 4 Vt. 471.

<sup>345</sup> *Wing v. Chase*, 35 Me. 260; *Devereux v. McMahon*, 108 N. C. 134; *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. (Mass.) 417, 428; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502; *Comyna*, Dig. "Fait" (A 2).

<sup>346</sup> *Bohannon v. Hough*, 1 Miss. 461; *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.) 301, 30 Am. Dec. 506; *Corlies v. Vannote*, 16 N. J. Law, 324; *Carter v. Penn.*, 4 Ala. 140. And see *Buckingham v. Orr*, 6 Colo. 587. Compare *Ashwell v. Ayres*, 4 Grat. (Va.) 223.

sealed will not be sufficient as a substitute for a seal.<sup>347</sup> The seal need not, and in fact usually is not, affixed at the same time as or after the signing of the instrument, it being sufficient that the party adopts, expressly or impliedly, the seal already placed on the paper.<sup>348</sup> So, each of the parties executing the instrument need not have a separate seal, one seal being sufficient if adopted by all the parties signing.<sup>349</sup>

#### § 404. Witnesses.

In some states witnesses, usually two in number, are necessary in order to make a conveyance valid as between the parties thereto. In other states, no witnesses are required, while in some, though witnesses are not necessary to render the conveyance valid as between the parties, they are necessary for the purpose of proving the deed for record, in the absence of an acknowledgment by the grantor.<sup>350</sup> The witness need not be present at the actual signing of the instrument by the grantor, provided the latter acknowledges to him that it is his act, and expressly or impliedly requests him to attest the instrument.<sup>351</sup> The witnesses must sign the in-

<sup>347</sup> *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *McPherson v. Reese*, 58 Miss. 749; *Mitchell v. Parham*, Harp. (S. C.) 3; *Davis v. Judd*, 6 Wis. 85; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502.

<sup>348</sup> *Sheppard's Touchstone*, 54, 57; *Reg. v. Inhabitants of St. Paul*, 7 Q. B. 232; *Ball v. Dunsterville*, 4 Term R. 313; *Ashwell v. Ayres*, 4 Grat. (Va.) 283.

<sup>349</sup> *Carter v. Chaudron*, 21 Ala. 38; *Davis v. Burton*, 4 Ill. 41, 36 Am. Dec. 511; *Northumberland v. Cobleigh*, 59 N. H. 250; *Pickens v. Rymer*, 90 N. C. 283, 47 Am. Rep. 521; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Yale v. Flanders*, 4 Wis. 96; *Bowman v. Robb*, 6 Pa. St. 302; *Bradford v. Randall*, 5 Pick. (Mass.) 496; *Lambden v. Sharp*, 9 Humph. (Tenn.) 224.

<sup>350</sup> 1 Stimson's Am. St. Law, § 1566.

<sup>351</sup> *Jackson v. Phillips*, 9 Cow. (N. Y.) 94, 113; *Tate v. Lawrence*, 11 Heisk. (Tenn.) 503; *Clements v. Pearce*, 63 Ala. 284; *Mulloy v. Ingalls*, 4 Neb. 115. See *Little v. White*, 29 S. C. 170; *Poole v. Jackson*, 66 Tex. 380; 1 Stimson's Am. St. Law, § 1567.

strument, their signatures being usually placed under a clause, "Signed, sealed, and delivered in the presence of."<sup>353</sup>

The statutes have usually been construed as requiring that the witness be competent, at the time of his attestation of the conveyance, to testify in regard to its execution in case of litigation between the parties, with the result that his attestation is of no effect for the purpose of validating the conveyance if he is not so competent.<sup>354</sup>

#### § 405. Acknowledgment.

In some states the statute requires a conveyance to be acknowledged by the grantor before an official in order to make it effective even as between the parties. More usually, however, the requirement of acknowledgment is imposed only as a preliminary to the record of a conveyance for the purpose of charging a subsequent purchaser with notice thereof. The acknowledgment has, moreover, in a number of states, the effect of rendering the conveyance admissible in evidence without further proof of its execution.<sup>354</sup>

The statutes require the acknowledgment to be made before an official named, usually a judge, clerk of court, justice of the peace, or notary public, and he must write upon the

<sup>353</sup> The signature of the witness, it has been decided, may be by mark. *Brown v. McCormick*, 28 Mich. 215; *Devereux v. McMahon*, 102 N. C. 284.

<sup>354</sup> So it has been held that one having a pecuniary interest in the conveyance is disqualified. *Winsted Sav. Bank & Building Ass'n v. Spencer*, 26 Conn. 195; *Child v. Baker*, 24 Neb. 188. And a grantor cannot witness the execution of the instrument by his co-grantor.

A wife or husband of a grantor has also been regarded as disqualified. *Third Nat. Bank of Chattanooga v. O'Brien*, 94 Tenn. 33; *Johnston v. Slater*, 11 Grat. (Va.) 321; *Corbett v. Norcross*, 35 N. H. 99. But in some states it has been held that the witness need not be competent to testify at the time of its execution, provided he can testify when called to prove the execution in court. *Frink v. Pond*, 46 N. H. 125; *Doe d. Johnson v. Turner*, 7 Ohio, 216, pt. 2.

<sup>354</sup> 1 Stimson's Am. St. Law, §§ 1570-1572.



instrument his certificate that the acknowledgment was made, and usually it is required that the certificate state that the identity of the party making the acknowledgment was known to him. This certificate must be signed by the official, and, when he has an official seal, must be sealed by him.<sup>355</sup>

—— By married woman.

In many states, a conveyance in which a married woman joins, whether for the purpose of conveying her own property, or in order to release her rights in her husband's property, must, in order to be effective as against her, be acknowledged by her before the officer after a private examination by him to ascertain that she executes it voluntarily and without compulsion from her husband, and the certificate of the officer must state that he so examined her, and that she acknowledged the instrument to be her free and voluntary act. In some of the other states, while a private examination is not necessary, the certificate must contain such a statement as to the free and voluntary nature of her act.<sup>356</sup> The officer is also usually required by the statute to ascertain, before taking the acknowledgment, that she understands the nature of the instrument.<sup>357</sup>

—— Conclusiveness of certificate.

The certificate of acknowledgment is to be construed with reference to the instrument to which it is appended, and consequently omissions or errors therein, not pertaining to the fact of acknowledgment itself, may usually be corrected by

<sup>355</sup> 1 Stimson's Am. St. Law, §§ 1578-1582.

<sup>356</sup> 1 Stimson's Am. St. Law, § 6501.

<sup>357</sup> See *Norton v. Davis*, 83 Tex. 32; *Drew v. Arnold*, 85 Mo. 128; *Tavener v. Barrett*, 21 W. Va. 656; *Spencer v. Reese*, 165 Pa. St. 159; *Mettler v. Miller*, 129 Ill. 630.

reference to the language of the conveyance.<sup>358</sup> Oral evidence, however, is not admissible in order to prove that an essential fact was by mistake omitted from the certificate.<sup>359</sup> In some states, by statute, the certificate is merely *prima facie* evidence of the facts which it recites, and its falsity may be shown by extraneous evidence.<sup>360</sup> But, in the absence of a statutory provision to the contrary, a certificate of acknowledgment is usually regarded as conclusive in regard to the matters as to which the officer is required to certify,<sup>361</sup> though the fact that there was no acknowledgment whatever may be shown in contradiction of the certificate.<sup>362</sup> As between the parties, moreover, evidence is always admissible to show that the acknowledgment was obtained by fraud or imposition,

<sup>358</sup> *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Summer v. Mitchell*, 29 Fla. 179; *Kelly v. Rosenstock*, 45 Md. 389; *Milner v. Nelson*, 86 Iowa, 452; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58; *Fuhrman v. London*, 18 Serg. & R. (Pa.) 386, 15 Am. Dec. 608.

<sup>359</sup> *Elliott v. Piersol's Lessee*, 1 Pet. (U. S.) 328; *Ennor v. Thompson*, 46 Ill. 214; *Cox v. Holcomb*, 37 Ala. 589, 13 Am. St. Rep. 79; *Willis v. Gattman*, 53 Miss. 721; *Wynne v. Small*, 102 N. C. 128; *Harty v. Ladd*, 3 Or. 353.

<sup>360</sup> *Tuten v. Gazan*, 18 Fla. 751; *Romer v. Conter*, 53 Minn. 171; *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248; *Pierce v. Georger*, 103 Mo. 540.

<sup>361</sup> *Pickens v. Knisely*, 29 W. Va. 1; *Petty v. Grisard*, 45 Ark. 117; *Graham v. Anderson*, 42 Ill. 515, 92 Am. Dec. 89; *Pereau v. Frederick*, 17 Neb. 117; *Heilman v. Kroh*, 155 Pa. St. 1; *Mutual Life Ins. Co. of New York v. Corey*, 135 N. Y. 326; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156; *Johnston v. Wallace*, 53 Miss. 333, 24 Am. Rep. 699.

<sup>362</sup> *Meyer v. Gossett*, 38 Ark. 377; *Williamson v. Carskadden*, 34 Ohio St. 664; *Smith v. Ward*, 2 Root (Conn.) 374, 1 Am. Dec. 80; *Morris v. Sargent*, 18 Iowa, 90; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *O'Neill v. Webster*, 156 Mass. 572; *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486; *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920.

in which the grantee participated, or of which he knew,<sup>383</sup> but this cannot be shown as against a person ignorant of the fraud.<sup>384</sup>

— Proof in place of acknowledgment.

In many states the statute provides for the proof of the deed by third persons before an official in case the acknowledgment is omitted, as when the grantor refuses to make it, or dies before making it; and likewise, in some states at least, when the acknowledgment or certificate is defective. In those states in which attesting witnesses are required, they are the proper persons to prove the instrument.<sup>385</sup>

§ 406. Delivery.

Delivery is the grantor's expression, by either word or act, of his intention that the conveyance shall take effect as a transfer of title. Until delivery, a conveyance is inoperative to transfer title, and consequently, even though the instrument is properly signed and sealed, no person can claim any rights thereunder.<sup>386</sup> It is immaterial that the person

<sup>383</sup> Grider v. American Freehold Land Mortg. Co., 99 Ala. 281, 42 Am. St. Rep. 58; Central Bank of Frederick v. Copeland, 18 Md. 305, 81 Am. Dec. 597; Allen v. Lenoir, 58 Miss. 321; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Chivington v. Colorado Springs Co., 9 Colo. 597; Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552.

<sup>384</sup> Ladew v. Paine, 82 Ill. 221; De Arnaz v. Escandon, 59 Cal. 486; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Loudon v. Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Pierce v. Fort, 60 Tex. 464.

<sup>385</sup> 1 Stimson's Am. St. Law, §§ 1590-1606.

<sup>386</sup> Sheppard's Touchstone, 57; Co. Litt. 36a; 2 Bl. Comm. 307; 4 Kent's Comm. 454.

That acts without words are sufficient, see *Merrills v. Swift*, 18 Conn. 257, 3 Gray's Cas. 677; *Hill v. McNichol*, 80 Me. 209; *Bogle v. Bogle*, 35 Wis. 659; *Dukes v. Spangler*, 35 Ohio St. 119; *Fain v. Smith*, 14 Or. 82, 58 Am. Rep. 281; *Ruckman v. Ruckman*, 32 N. J. Eq. 359; *Sneathen v. Sneathen*, 104 Mo. 301, 24 Am. St. Rep. 326.

claiming thereunder is without knowledge of its nondelivery, and has reason to believe that it has been delivered, as when the conveyance has been handed him by one who fraudulently procured it from the grantor's custody,<sup>367</sup> or when the conveyance has been recorded.<sup>368</sup> The question whether certain acts or words constitute a delivery is one of intention, and there is a sufficient delivery if an intention that the conveyance shall immediately become operative clearly appears.<sup>369</sup> This question of intention is usually one of fact, which, in the absence of conclusive evidence upon the subject, is for the jury.<sup>370</sup>

There is considerable confusion in the decisions as to what may constitute a delivery,—a confusion which arises in some cases from a mistaken impression that the "delivery" of a deed refers to the physical disposition of the instrument itself. On the contrary, the delivery does not necessarily involve any manual transfer of the instrument;<sup>371</sup> and provided there is, as stated above, the intention that the deed shall take effect, the fact that the grantor retains possession of the instrument does not affect the validity of the delivery.<sup>372</sup> So, while it is frequently said, both by the older and

<sup>367</sup> *Van Amringe v. Morton*, 4 Whart. (Pa.) 332.

<sup>368</sup> See cases cited post, note 380.

<sup>369</sup> *Xenos v. Wickham*, 13 C. B. (N. S.) 381, per Willes, J.; *Hannah v. Swarnet*, 8 Watts (Pa.) 11, per Gibson, C. J.; *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 728; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377. 3 Gray's Cas. 691; *Burkholder v. Casad*, 47 Ind. 418; *Steel v. Miller*, 40 Iowa, 402.

<sup>370</sup> *Murray v. Stair*, 2 Barn. & C. 82; *Jones v. Swayne*, 42 N. J. Law, 279, 3 Gray's Cas. 732; *Brann v. Monroe*, 11 Ky. Law Rep. 324; *Crain v. Wright*, 36 Hun, 74, 114 N. Y. 307; *Fisher v. Kean*, 1 Watts (Pa.) 278; *Dwinell v. Bliss*, 58 Vt. 353; *Hurlburt v. Wheeler*, 40 N. H. 73.

<sup>371</sup> *Shelton's Case*, Cro. Eliz. 7; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Newton v. Bealer*, 41 Iowa, 334; *Byers v. McGlanahan*, 6 Gill & J. (Md.) 250; *Conlan v. Grace*, 36 Minn. 276; *Farrar v. Bridges*, 5 Humph. (Tenn.) 411.

<sup>372</sup> *Doe d. Garnons v. Knight*, 5 Barn. & C. 671, 3 Gray's Cas. 646; (928)

the later authorities, that the delivery may be made to a third person for the benefit of the grantee,<sup>373</sup> in such case, no doubt, the legal delivery results from the fact that an intention that the instrument shall take effect is thereby shown, and not from any particular virtue in the manual transfer. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if it can be satisfactorily proven.<sup>374</sup> On the other hand, a manual transfer of the deed to a third person without any expression, by word or act, of an intention to make it operative, does not constitute a delivery;<sup>375</sup> nor does such a transfer to the grantee himself, if the trans-

*Xenos v. Wickham*, L. R. 2 H. L. 296; *Moore v. Hazelton*, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; *Blight v. Schenck*, 10 Pa. St. 285, 3 Gray's Cas. 684; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345; *Stevens v. Hatch*, 6 Minn. 64 (Gil. 19); *Scrugham v. Wood*, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; *Austin v. Fendall*, 2 MacArthur (D. C.) 362; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Ledgerwood v. Gault*, 2 Lea (Tenn.) 643; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; 4 Kent's Comm. 455.

<sup>373</sup> *Sheppard's Touchstone*, 57; 4 Kent's Comm. 455; *Doe d. Garbons v. Knight*, 5 Barn. & C. 671, 3 Gray's Cas. 646; *Xenos v. Wickham*, L. R. 2 H. L. 312; *Jones v. Swayze*, 42 N. J. Law, 279, 3 Gray's Cas. 732; *Colyer v. Hyden*, 94 Ky. 180; *Tate v. Tate*, 21 N. C. 22; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Miller v. Meers*, 155 Ill. 284, *Finch's Cas.* 1085; *Eckman v. Eckman*, 55 Pa. St. 269; *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; *Blight v. Schenck*, 10 Pa. St. 285, 3 Gray's Cas. 684; *Church v. Gilman*, 15 Wend. (N. Y.) 656.

<sup>374</sup> *Kane v. Mackin*, 9 Smedes & M. (Miss.) 387; *Linton v. Brown's Adm'rs* (C. C.) 20 Fed. 455; *Diehl v. Emig*, 65 Pa. St. 320; *Vought's Ex'rs v. Vought*, 50 N. J. Eq. 177; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Moore v. Hazelton*, 9 Allen (Mass.) 102; *Regan v. Howe*, 121 Mass. 424. Contra, *Moore v. Collins*, 15 N. C. 384.

<sup>375</sup> *Sheppard's Touchstone*, 57; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Jackson v. Phipps*, 12 Johns. (N. Y.) 413, 3 Gray's Cas. 671; *Merrills v. Swift*, 18 Conn. 257, 3 Gray's Cas. 677.

fer is not with such an intention, but is for another purpose.<sup>376</sup>

The fact that the grantor reserves the right to revoke the conveyance or to resume control of the instrument shows conclusively that there is no delivery, since it negatives an intention that title shall immediately vest in the grantee.<sup>377</sup>

The fact that the grantor has the instrument recorded, while it is usually regarded as raising a presumption of delivery,<sup>378</sup> and, if accompanied by an intent to thereby make the instrument immediately operative, constitutes delivery,<sup>379</sup> is not a delivery if there is no such intent.<sup>380</sup> Upon

<sup>376</sup> *Bovee v. Hinde*, 135 Ill. 137; *Braman v. Bingham*, 26 N. Y. 483; *Dwinell v. Bliss*, 58 Vt. 353. See *Merrills v. Swift*, 18 Conn. 257, 6 Gray's Cas. 677.

<sup>377</sup> *Cook v. Brown*, 34 N. H. 460, 3 Gray's Cas. 709; *Doe d. Garnons v. Knight*, 5 Barn. & C. 671, 3 Gray's Cas. 711; *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 723; *Maynard v. Maynard*, 10 Mass. 456, 3 Gray's Cas. 669; *Taft v. Taft*, 59 Mich. 135; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Rutledge v. Montgomery*, 30 Ga. 899; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Lang v. Smith*, 37 W. Va. 725; *Duer v. James*, 42 Md. 492; *Berry v. Anderson*, 22 Ind. 36; *Huey v. Huey*, 65 Mo. 689.

This does not refer to the control of the paper itself, though the language of some of the cases might give that impression. It refers to the control of the operation of the instrument.

<sup>378</sup> *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Reed v. Douthit*, 62 Ill. 348; *Pool v. Davis*, 135 Ind. 323; *McGee v. Allison*, 94 Iowa, 527; *Den d. Farlee v. Farlee*, 21 N. J. Law, 279; *Rhine v. Robinson*, 27 Pa. St. 30; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Blight v. Schenck*, 10 Pa. St. 235, 3 Gray's Cas. 685; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Laughlin v. Calumet & Chicago Canal & Dock Co.*, 13 C. C. A. 1, 65 Fed. 441; *Hell v. Redden*, 45 Kan. 562; *Patrick v. Howard*, 47 Mich. 40; *McDaniel v. Anderson*, 19 S. C. 211; *Estes v. German Nat. Bank*, 62 Ark. 7; *Lay v. Lay* (Ky.) 66 S. W. 371. *Contra*, *Hill v. McNichol*, 80 Me. 209.

<sup>379</sup> *Kerr v. Birnie*, 25 Ark. 225; *Issitt v. Dewey*, 47 Neb. 196; *Snider v. Lackenour*, 35 N. C. 360; *Fenton v. Miller*, 94 Mich. 204; *Boody v.*

the question whether the signing, sealing, and acknowledgment of a conveyance raise a presumption of delivery, the cases appear to be in conflict;<sup>381</sup> and the same may be said of the effect of the statement in the attestation clause that the conveyance has been delivered.<sup>382</sup> The fact that the parties treat the land as belonging to the grantee has also been regarded as tending to show a delivery.<sup>383</sup>

— Delivery in escrow.

A conveyance may be delivered to a person as an escrow, i. e., a scroll or writing, to be held by him until the performance of a condition by the grantee. Upon the per-

Davis, 20 N. H. 140, 51 Am. Dec. 210. But in Massachusetts the leaving of a deed with the recording officer, without any other act, or any words indicating an intention that this shall constitute a delivery, was held not to be a delivery (*Barnes v. Barnes*, 161 Mass. 381), a manual delivery to such officer thus standing on the same plane as a manual delivery to any third person, without any indication of a purpose that the deed shall take effect. A statute in this state now provides that the record of a conveyance shall be equivalent to a delivery thereof in favor of any bona fide purchaser. Rev. Laws, c. 127, § 5.

<sup>380</sup> *Derry Bank v. Webster*, 44 N. H. 264, 3 Gray's Cas. 723; *Maynard v. Maynard*, 10 Mass. 456, 3 Gray's Cas. 669; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 3 Gray's Cas. 671; *Davis v. Davis*, 92 Iowa, 147; *Hutton v. Smith*, 88 Iowa, 238; *Jones v. Bush*, 4 Har. (Del.) 1; *Hayes v. Davis*, 18 N. H. 600; *Hendricks v. Rasson*, 53 Mich. 575; *Thompson v. Jones*, 1 Head (Tenn.) 574; *Boardman v. Dean*, 34 Pa. St. 252; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412.

<sup>381</sup> That there is a presumption of delivery in such case, see *Kille v. Ege*, 79 Pa. St. 15; *Diehl v. Emig*, 65 Pa. St. 320; *Brann v. Monroe*, 11 Ky. Law Rep. 324. Contra, *Boyd v. Slayback*, 63 Cal. 498, 3 Gray's Cas. 735; *Alexander v. De Kermel*, 81 Ky. 345.

<sup>382</sup> That the statement in the attestation clause reciting delivery is insufficient, see *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 728; *Rushin v. Shield*, 11 Ga. 636. Contra, *Moore v. Hazelton*, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; *Currie v. Donald*, 2 Wash. (Va.) 58.

<sup>383</sup> *Gould v. Day*, 94 U. S. 405; *Corley v. Corley*, 2 Cold. (Tenn.) 520; *Williams v. Williams*, 148 Ill. 426.

formance of such condition, even though it be after the death of the grantor, or after he has become mentally disabled, the instrument takes effect as of the time of the original delivery.<sup>384</sup> Strictly speaking, also, the instrument, it would seem, should date back to the original delivery as against the claims of intervening purchasers and creditors;<sup>385</sup> but in a number of cases in this country the courts, influenced, perhaps, by the tendency to require all rights to appear of record as against subsequent creditors, have held that an intervening creditor takes precedence of the rights of the grantee.<sup>386</sup>

An escrow is, it has been held, utterly invalid to transfer any rights until the performance of the condition, so that, if the person with whom it is deposited wrongfully yields possession thereof to the grantee, it cannot transfer any title, even though the claimant thereunder be an innocent purchaser for value.<sup>387</sup> There are, however, several decisions

<sup>384</sup> Sheppard's Touchstone, 53, 59; *Hall v. Harris*, 40 N. C. 303, 3 Gray's Cas. 681; *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 3 Gray's Cas. 673; *Price v. Pittsburgh, Ft. W. & C. R. Co.*, 34 Ill. 13; *Davis v. Clark*, 53 Kan. 100; *Webster v. Kings County Trust Co.*, 145 N. Y. 275.

<sup>385</sup> Sheppard's Touchstone, 59; 4 Kent's Comm. 454; *Hall v. Harris*, 40 N. C. 303, 3 Gray's Cas. 681; *Shirley's Lessee v. Ayres*, 14 Ohio, 307. See *Whitfield v. Harris*, 48 Miss. 710; *Price v. Pittsburgh, Ft. W. & C. R. Co.*, 34 Ill. 13.

<sup>386</sup> *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Prutsman v. Baker*, 30 Wis. 649, 11 Am. Rep. 592; *Taft v. Taft*, 59 Mich. 195, 60 Am. Rep. 291.

<sup>387</sup> Sheppard's Touchstone, 59; *Smith v. South Royalton Bank*, 32 Vt. 341, 3 Gray's Cas. 698; *Hinman v. Booth*, 21 Wend. (N. Y.) 267, 3 Gray's Cas. 698; *Calhoun County v. American Emigrant Co.*, 93 U. S. 127; *Heney v. Pesoli*, 109 Cal. 53; *Taft v. Taft*, 59 Mich. 195, 60 Am. Rep. 291; *Smith v. South Royalton Bank*, 32 Vt. 341, 3 Gray's Cas. 698, 76 Am. Dec. 179; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *Jackson v. Rowley*, 33 Iowa, 184; *Ober v. Pendleton*, 30 (982)



to the effect that an innocent purchaser from one in possession of the land cannot be affected by the fact that the conveyance to his grantor was an escrow, and this view seems most in conformity to right and justice, and the policy of the recording laws.<sup>388</sup>

A distinction is taken, in some of the cases, between an escrow, or writing not to take effect until the performance of a condition, and an instrument which is committed to a third person, with directions that it be delivered to the grantee on the happening of some event in the future, in which case, it is said, the deed takes effect immediately.<sup>389</sup> A conveyance is so quite frequently committed to a third person, with directions that it be delivered by him to the grantee upon the grantor's death.<sup>390</sup> The only possible distinction between an escrow and such a conveyance seems to be that the latter, if it passes out of the hands of the depositary named, is valid in favor at least of a *bona fide* holder. In some cases, however, it is denied that any distinction of this kind exists.<sup>391</sup>

Ark. 61; *Black v. Shreve*, 13 N. J. Eq. 458; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

<sup>388</sup> *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478, 3 Gray's Cas. 684; *Schurtz v. Colvin*, 55 Ohio St. 274; *Hubbard v. Greeley*, 84 Me. 340; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49. And see *Haven v. Kramer*, 41 Iowa, 382.

<sup>389</sup> *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Gray's Cas. 663; *Bushell v. Pasmore*, 6 Mod. 217.

<sup>390</sup> *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; *Cook v. Brown*, 34 N. H. 460, 3 Gray's Cas. 709; *Hatch v. Hatch*, 9 Mass. 307; *Hathaway v. Payne*, 34 N. Y. 106; *Prutsman v. Baker*, 30 Wis. 649, 11 Am. Rep. 592; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186; *Perkins*, 143, 144; 4 Kent's Comm. 455; *Baker v. Baker*, 159 Ill. 394; *Hoffmire v. Martin*, 29 Or. 240; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

<sup>391</sup> *State Bank at Trenton v. Evans*, 15 N. J. Law, 158, 28 Am. Dec. 400; *Johnson v. Baker*, 4 Barn. & Ald. 440, 3 Gray's Cas. 640. See *Stone v. Duvall*, 77 Ill. 475; *Millett v. Parker*, 2 Metc. (Ky.) 608, 613.

By the weight of authority, an instrument cannot be delivered to the grantee as an escrow,—that is, a manual delivery to the grantee, if it is to take effect as a legal delivery, must do so immediately, or not at all.<sup>392</sup> There are, however, a few cases adverse to this view.<sup>393</sup>

—Effect of delivery.

After the delivery of a conveyance, and the consequent passing of the title thereby, the fact that the grantee returns the written instrument to the grantor, or that it is canceled by agreement, does not have the effect of retransferring the title to the grantor, but for this a new conveyance is necessary.<sup>394</sup> But it has been held that, when the grantee cancels the conveyance, or delivers it up to the grantor to be canceled, with the intention of revesting the title, since he thereby loses all evidence of his title, the title may be regarded as always having remained in the grantor.<sup>395</sup>

<sup>392</sup> Co. Litt. 36a; Sheppard's Touchstone, 59; Whyddon's Case, 2 Cro. Eliz. 520, 3 Gray's Cas. 635; Braman v. Bingham, 26 N. Y. 483; Arnold v. Patrick, 6 Paige (N. Y.) 310, Finch's Cas. 1088; Richmond v. Morford, 4 Wash. 337; Ward v. Lewis, 4 Pick. (Mass.) 518; McCann v. Atherton, 106 Ill. 31; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Miller v. Fletcher, 27 Grat. (Va.) 403, 21 Am. Rep. 356, and cases cited; Campbell v. Jones, 52 Ark. 493; Gaston v. City of Portland, 16 Or. 255; Duncan v. Pope, 47 Ga. 445; Hubbard v. Greeley, 84 Me. 340.

The case, before referred to, of a transfer of possession of the instrument to the grantee otherwise than with an intent to pass title, is to be distinguished. See ante, note 376.

<sup>393</sup> Newlin v. Beard, 6 W. Va. 110; Lee v. Richmond, 90 Iowa, 695; Hudson v. Revett, 5 Bing. 368, 388. That it may be delivered in escrow to the grantee's agent, see Watkins v. Nash, L. R. 20 Eq. 262; Ashford v. Prewitt, 102 Ala. 264, 48 Am. St. Rep. 37.

<sup>394</sup> Ward v. Lumley, 5 Hurl. & N. 37; Strawn v. Norris, 21 Ark. 80; Gilmon v. Davis, 36 Ala. 589; Alexander v. Hickox, 34 Mo. 496, 86 Am. Dec. 118; Jeffers v. Philo, 35 Ohio St. 173; Rifener v. Bowman, 53 Pa. St. 313; Wilke v. Wilke, 28 Wis. 296; Hatch v. Hatch, 9 Mass. 311, 6 Am. Dec. 67; Co. Litt. 225b, Butler's note.

<sup>395</sup> Farrar v. Farrar, 4 N. H. 191; Mussey v. Holt, 24 N. H. 242, (934)

## § 407. Acceptance.

At common law, a deed became effective by delivery, without any assent on the part of the grantee, though he could, after learning of the deed, refuse to accept it. In other words, an acceptance of the deed by the grantee, or even knowledge on his part of its execution, is unnecessary.<sup>556</sup> In some states in this country it has accordingly been held that a conveyance need not be accepted by the grantee, or, which is the same thing, its acceptance will be conclusively presumed, even as against third persons, until the grantee expresses his dissent.<sup>557</sup> In other states, however, it is de-

55 Am. Dec. 234; *Bank of Newbury v. Eastman*, 44 N. H. 431. See *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638. *Respass v. Jones*, 102 N. C. 5 (under local statute); *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Lawrence v. Stratton*, 6 Cush. (Mass.) 163. See, also, *Wallace v. Harnstad*, 44 Pa. St. 492.

<sup>556</sup> *Butler v. Baker*, 3 Coke, 26a; *Degory v. Roe*, 1 Leon. 152, 3 Gray's Cas. 634; *Thompson v. Leach*, 2 Vent. 198, 3 Gray's Cas. 639; *Xenos v. Wickham*, L. R. 2 H. L. 296. See *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 272.

<sup>557</sup> *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 272; *Guggenheimer v. Lockridge*, 39 W. Va. 461; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315, 3 Gray's Cas. 677; *Jones v. Swayze*, 42 N. J. Law, 279, 3 Gray's Cas. 732; *Schlicher v. Keeler*, 61 N. J. Eq. 394; *Moore v. Hazelton*, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; *Myrover v. French*, 73 N. C. 609; *Regan v. Howe*, 121 Mass. 424 (semble); *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Metcalf v. Brandon*, 60 Miss. 685 (semble); *Moore v. Giles*, 49 Conn. 570; *Wuester v. Follin*, 60 Kan. 334 (semble). So it has been held that knowledge by the grantee of the deed is not necessary. *Mather v. Corliss*, 103 Mass. 568; *Everett v. Everett*, 48 N. Y. 218; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Elsberry v. Boykin*, 65 Ala. 336.

In the case of a conveyance in trust, "although the trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part." *Adams v. Adams*, 21 Wall. (U. S.) 185; *Ames, Cas. Trusts* (2d Ed.) 227, and cases cited in notes.

oided that an acceptance by the grantee is necessary,<sup>398</sup> and occasionally it is said that, while an acceptance may be presumed in ordinary cases, this is not so if the conveyance is subject to a condition, or otherwise imposes an obligation upon the grantee.<sup>399</sup> Sometimes, when it is said that an acceptance will be presumed, it is difficult to determine whether this means that there is a conclusive presumption to this effect, or that there is a presumption which may be overthrown by evidence that the grantee had no knowledge of the instrument, or that he failed to indicate his acquiescence therein. The theory that an actual acceptance is necessary involves almost insuperable difficulties when the grantee is

<sup>398</sup> *Welch v. Sackett*, 12 Wis. 243, 3 Gray's Cas. 714; *Oxnard v. Blake*, 45 Me. 602; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 3 Gray's Cas. 671; *Hulick v. Scovill*, 9 Ill. 159; *Cravens v. Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606; *Watson v. Hillman*, 57 Mich. 607; *Meigs v. Dexter*, 172 Mass. 217; *Stallings v. Newton*, 110 Ga. 875; *Alexander v. De Kermel*, 81 Ky. 345; *Knox v. Clark* (Colo. App.) 62 Pac. 334; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Kempner v. Rosenthal*, 81 Tex. 12; *Tuttle v. Turner*, 28 Tex. 759, *Finch's Cas.* 1088; *Day v. Griffith*, 15 Iowa, 104; *Wiggins v. Lusk*, 12 Ill. 132; *Moore v. Flynn*, 135 Ill. 74; *Bell v. Farmer's Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

This view is apparently based, to a great extent, upon the theory that a conveyance is a contract, which it is not, though frequently it results from a contract. Title passes under a devise without the knowledge or consent of the devisee, and there seems no reason why it should not do so in the case of a conveyance *inter vivos*. There are difficulties in the application of the common-law rule, as is well shown in *Welch v. Sackett*, 12 Wis. 270, 3 Gray's Cas. 714, in case the grantee subsequently refuses to take the property, but the same is true in the case of an unaccepted devise. The fact that the rule requiring an acceptance breaks down utterly in the case of a conveyance to a person *not sui juris* is sufficient in itself to raise doubts as to its soundness when applied in other cases.

<sup>399</sup> *Derry Bank v. Webster*, 44 N. H. 264, 3 Gray's Cas. 723; *Jackson v. Bodle*, 20 Johns. (N. Y.) 184; *Elsberry v. Boykin*, 65 Ala. 336; *Johnson v. Farley*, 45 N. H. 505; *Hibberd v. Smith*, 67 Cal. 547. See *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691.

an infant or an insane person, and in such cases the courts invariably, it seems, presume an acceptance,<sup>400</sup> or, in other words, adopt the common-law rule.

The cases requiring the acceptance of a conveyance do not regard such acceptance as a part of the delivery, but hold that it may take place at any subsequent time, even after the death of the grantor, the title remaining, until such acceptance, in the latter, or, presumably, in his heirs or devisees.

§ 408. Execution by agent.

In discussing the subject of those proprietary rights known as "powers," reference was made, for the purpose of distinguishing them, to powers of agency, which are not proprietary rights enforceable against the whole world, but are merely rights of representation, usually based on a contract between the donor and donee of the power,—that is, the principal and the agent,—and which are of no effect as regards third persons until the agent acts under the power. Such a power of agency enters into the subject of the transfer of land by reason of the fact that the owner of land may transfer it, not only by himself executing the instrument of transfer, but also by empowering another to do so in his absence. Such a power or authority, given to another to transfer land, must, so far, at least, as the conveyance is required to be under seal, be itself under seal,<sup>401</sup> and it is, as are other

<sup>400</sup> *Davis v. Garrett*, 91 Tenn. 147; *Parker v. Salmons*, 101 Ga. 160; *Miller v. Meers*, 155 Ill. 284, *Finch's Cas.* 1085; *Winterbottom v. Patissor* 152 Ill. 334; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Eastham v. Powell*, 51 Ark. 530; *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479; *Bjmerland v. Eley*, 15 Wash. 101; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

<sup>401</sup> *Huffcut*, *Agency* (2d Ed.) 37; *Montgomery v. Dorion*, 6 N. H. 250; *Heath v. Nutter*, 50 Me. 378; *Cadell v. Allen*, 99 N. C. 542; *Shuetze v. Bailey*, 40 Mo. 69; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121. There are statutes to the same effect in many states. 1 *Stimson's Am. St. Law*, § 1670.

authorities under seal, usually known as a "power of attorney." Such an execution of a conveyance by an agent must be distinguished from the cases before referred to, in which the manual signing of the instrument by the hand of another is adopted by the grantor as his own act, this being for all purposes his own signature.

According to some decisions, the signature of a conveyance by an attorney or agent must be in the name of the principal, the form "A. by B." thus being correct, and "B. for A." being incorrect.<sup>402</sup> But by the more modern decisions this strictness of view is relaxed, and it is generally regarded as sufficient if it appears from either the signature or from the instrument as a whole that the instrument is the deed, not of the agent, but of the principal;<sup>403</sup> and in some states there is a statutory provision to this effect.<sup>404</sup> The fact that the name of the agent himself does not appear in the signature does not affect the validity of the execution.<sup>405</sup> A conveyance which fails at law, because its execution is by the agent in his own name, instead of in that of his principal, will be sustained in equity as an agreement to convey, and, as such, will be effective, not only between the parties, but as against subsequent purchasers with notice.<sup>406</sup>

<sup>402</sup> *Combe's Case*, 9 Coke, 75; 2 Kent's Comm. 631; *Fowler v. Shearer*, 7 Mass. 14; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Carter v. Chaudron*, 21 Ala. 72; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Morrison v. Bowman*, 29 Cal. 337; *Clarke's Lessee v. Courtney*, 5 Pet. (U. S.) 318, 349; *Townsend v. Corning*, 23 Wend. (N. Y.) 442.

<sup>403</sup> *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108; *McClure v. Herring*, 70 Mo. 18; *Doe d. Tenant v. Roe*, 27 Ga. 418; *Hale v. Woods*, 10 N. H. 471; *Magill v. Hinsdale*, 6 Conn. 464a; *Rogers v. Bracken's Adm'r*, 15 Tex. 564; *Bigelow v. Livingston*, 28 Minn. 57; *Heffernan v. Addams*, 7 Watts (Pa.) 116.

<sup>404</sup> 1 *Stimson's Am. St. Law*, § 1675.

<sup>405</sup> *Forsyth v. Day*, 41 Me. 382; *Berkey v. Judd*, 22 Minn. 287; *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328.

<sup>406</sup> *Wilkinson v. Getty*, 18 Iowa, 157, 81 Am. Dec. 428; *Love v.* (938)

A married woman has power to transfer her rights in land only in the mode named by statute, and consequently, in the absence of express statutory authority, or a declaration that she may transfer her separate estate as if she were sole, she cannot execute the conveyance by an agent or attorney, and, if so executed, it will, as against her, be void both at law and in equity.<sup>407</sup>

Authority to an agent to execute a conveyance for one involves authority in him to acknowledge the instrument for any of the purposes for which an acknowledgment is necessary or proper.<sup>408</sup>

*Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Ramage v. Ramage*, 27 S. C. 39; *McCaleb v. Pradat*, 25 Miss. 257. See *Stark v. Starr*, 94 U. S. 477.

<sup>407</sup> *Wilkinson v. Getty*, 13 Iowa, 157; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347; *Dentzel v. Waldie*, 30 Cal. 138; *Holland v. Moon*, 39 Ark. 120; *Waddell v. Weaver's Adm'rs*, 42 Ala. 293; *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Mexia v. Oliver*, 148 U. S. 664.

<sup>408</sup> *Robinson v. Mauldin*, 11 Ala. 977; *Basshor v. Stewart*, 54 Md. 376; *Bigelow v. Livingston*, 28 Minn. 57; *Richmond v. Voorhees*, 10 Wash. 316. But see *Gosselin v. City of Chicago*, 103 Ill. 623.

## **CHAPTER XX.**

### **TRANSFER BY WILL.**

- 409. General considerations.**
- 410. Signing by testator.**
- 411. Acknowledgment and publication.**
- 412. Competency of witnesses.**
- 413. Attestation and subscription.**
- 414. Holographic and nuncupative wills.**
- 415. Undue influence.**
- 416. Lapsed and void devises.**
- 417. The revocation of a will.**
- 418. Children or issue omitted from will.**
- 419. Revival of will.**
- 420. Republication.**

Any interests in land may be transferred by will, but, apart from specific statutes to that effect, real property not owned by the testator at the time of making the will cannot pass thereunder. Statutes now exist in most, if not all, jurisdictions, allowing one to dispose of real property afterwards to be acquired by him.

Real property disposed of by will passes directly to the devisee, and not to the personal representative, except in a few states, where the statute otherwise provides.

A will must be in writing, signed by the testator, or, in some states, by another in his presence. The will must be attested by witnesses, before whom the testator must acknowledge the instrument or his signature thereto, as the statute may require. The witnesses must be persons competent to testify in regard to the will, and they are usually required to sign their names to the instrument in the testator's presence.

In case a devise fails, owing to the death of a devisee, before the death of the testator, the property included therein passes (940)



by statute, in many states, to the child or issue of such devisee, In many of the states, in the absence of such a statute applicable to the case, the property will pass under a residuary devise.

A will may be revoked by the testator, in whole or in part, by its cancellation or destruction, or by a subsequent will expressly revoking it, or making a different disposition of part or all of the property. The will of a woman is, as a rule, revoked by her marriage, and of a man by his marriage and the birth of issue.

In some states, an earlier will is revived by the revocation of a later will which revoked the former will, and in some states this is the case when there is an intention to that effect. In others, a will once revoked cannot be revived otherwise than by the re-execution thereof.

A will may be republished by its re-execution, or the execution of a codicil.

#### § 409. General considerations.

While, before the Norman Conquest, and for a century thereafter, persons were allowed to make *post obit* gifts of land, to take effect in possession after the death of the donor, the rule was established by the king's court, late in the twelfth century, in favor of the heir, that a transfer of a freehold interest in land, though to take effect only after the death of the transferrer, must be by livery of seisin, and so any transfer of such an interest, answering to our modern will or devise, became impossible, except in the case of certain lands devisable by local custom.<sup>1</sup> Eventually the invention of uses enabled one to devise his land by making a feoffment to uses to be declared by his last will, in which case chancery would enforce the use so declared.<sup>2</sup> The power of thus

<sup>1</sup> 2 Pollock & Maitland, Hist. Eng. Law, 324-329.

<sup>2</sup> 1 Sanders, Uses & Trusts (5th Ed.) 64; Williams, Real Prop (18th Ed.) 167. See ante, § 84.

making a will by the declaration of a use was, however, put an end to by the Statute of Uses, this being in fact one of the purposes of its passage, as recited in the preamble. But the inconvenience of this prohibition of testamentary disposition was so greatly felt that, five years later, the Statute of Wills<sup>2</sup> was passed, by which statute tenants in fee simple were empowered to dispose of all their lands held in socage tenure, and two-thirds of those held by knight service, and, after the change of all tenures into socage tenures,<sup>4</sup> all lands came within the operation of this statute, and were devisable.<sup>5</sup>

A will of real property was in early times, and likewise after the Statute of Wills, regarded as a species of conveyance, to take effect at a future time,—that is, on the death of the testator.<sup>6</sup> This theory had important results upon the law of wills of real property, as distinct from wills of personalty. One most important result of this theory was that, since one could convey only such land as he owned, a will could operate upon such real property only as the testator owned at the time of making the will.<sup>7</sup> And for this reason, if one aliened property covered by his will, and subsequently acquired it by a reconveyance, it did not pass under the will.<sup>8</sup>

This rule that after-acquired real property does not pass under a will has been changed by statute in most, if not all, jurisdictions. In England the Wills Act<sup>9</sup> provided that a

<sup>2</sup> 32 Hen. VIII. c. 1 (A. D. 1540).

<sup>4</sup> Ante, § 13.

<sup>5</sup> See Williams, Real Prop. (18th Ed.) 227; Digby, Hist. Real Prop. c. 8.

<sup>6</sup> 2 Pollock & Maitland, Hist. Eng. Law, 313; Williams, Real Prop. (18th Ed.) 232.

<sup>7</sup> Harwood v. Goodright, 1 Cowp. 87; Brydges v. Chandos, 2 Ves. Jr. 417, 427; Williams, Real Prop. (18th Ed.) 233.

<sup>8</sup> Post, § 417.

<sup>9</sup> 7 Wm. IV. and 1 Vict. c. 26, §§ 3, 24 (A. D. 1837).

testator might dispose of all real and personal estate to which he might be entitled at the time of his death, and that every will should, in the absence of indications of a contrary intention, be construed to take effect, with reference to the real and personal estate comprised in it, as if executed immediately before the death of testator. The effect of these provisions is that a gift in general terms, such as "all my real estate," or "all my property," or "all my land," passes after-acquired interests, unless a contrary intention appears, and that a "residuary devise"—that is, a devise of all one's property not otherwise disposed of—has the same effect.<sup>10</sup>

In some of the states there are statutes substantially similar to those in England,<sup>11</sup> and having a similar operation.<sup>12</sup> In other states the statute provides that after-acquired real property shall pass by the will only when it appears from the will that such was the testator's intention.<sup>13</sup>

Another effect of the theory that a devise was a conveyance was that a residuary devise was regarded as a specific devise of such land as the testator owned at the time of making the will, and did not otherwise dispose of therein,—a matter which will be considered hereafter more particularly in connection with "lapsed and void devises."<sup>14</sup>

A further result of this theory was that a devise of real property, unlike a legacy of personalty, was regarded as passing the land directly to the devisee, without the intervention of the executor or administrator. This rule still prevails

<sup>10</sup> 1 Jarman, Wills, 291, 612.

<sup>11</sup> 1 Stimson's Am. St. Law, §§ 2806, 2809.

<sup>12</sup> See *Webb v. Archibald*, 128 Mo. 299; *Jacobs' Estate*, 140 Pa. St. 268.

<sup>13</sup> 1 Stimson's Am. St. Law, § 2809 (C). See *Church v. Warren Mfg. Co.*, 14 R. L. 539; *Briggs v. Briggs*, 69 Iowa, 617; *Paine v. Forsaith*, 84 Me. 66; *Woman's Union Missionary Soc. of America v. Mead*, 131 Ill. 338; *Kimball v. Ellison*, 128 Mass. 41.

<sup>14</sup> See post, § 416.

in the majority of jurisdictions, though it has been changed by recent statutes in England and a few states.<sup>15</sup>

The king's courts, in the twelfth century, having established the principle that there could be no testamentary gift of land, relinquished the jurisdiction of the property of decedents to the ecclesiastical courts, and thereafter the law of succession to personal property, including chattels real, was developed by these latter courts.<sup>16</sup> As a result, the civil-law conception of a will, not as a conveyance, but as a secret and revocable instrument, which was to take effect at the death of testator only, has always been applied in the case of personalty;<sup>17</sup> and likewise the position of an executor or administrator as the personal representative of the deceased, to whom all his personal property passes on his death, including that disposed of by will, became established at an early date.<sup>18</sup>

In all states the statute requires that a will shall be signed by the testator, or, in the majority of states, by some other person, by the testator's express direction, and in his presence.<sup>19</sup> The testator's own signature may be by means of a mark, even though he is able to write, provided the mark is intended as a signature;<sup>20</sup> and so, in signing, he may use

<sup>15</sup> 2 Woerner, *Administration*, § 337; 11 *Am. & Eng. Enc. Law* (2d Ed.) 1037 et seq.

<sup>16</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 329, 331.

<sup>17</sup> Holdsworth & Vickers, *Law of Succession*, 31; Maine, *Anc. Law* (4th Ed.) 173 et seq.; *Harwood v. Goodright*, Cowp. 87.

<sup>18</sup> 2 Pollock & Maitland, *Hist. Eng. Law*, 334, 345; Digby, *Hist. Real Prop.* (5th Ed.) 380.

<sup>19</sup> 1 Stimson's *Am. St. Law*, § 2640.

<sup>20</sup> Page, *Wills*, § 173; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Robinson v. Brewster*, 140 Ill. 649, 33 *Am. St. Rep.* 265; *Plate's Estate*, 148 Pa. St. 55, 33 *Am. St. Rep.* 805; *Bevelot v. Lestrade*, 153 Ill. 625; *Rook v. Wilson*, 142 Ind. 24, 51 *Am. St. Rep.* 163.

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only his initials, or his Christian name, or even adopt another name than his own.<sup>21</sup> When the signature is by a person other than the testator, the requirements that it be by his direction and in his presence must be strictly complied with,<sup>22</sup> and, apart from statute, one cannot thus sign by another.<sup>23</sup>

In regard to the position of the signature, the rules in the different states are not in accord. Under statutes which follow the English Statute of Frauds in merely requiring that the will be signed, it has been decided that the place of the signature, whether by the testator himself, or by another for him, is immaterial, and that it may be made in the margin, in the body of the will, or elsewhere. Accordingly, the writing of the testator's name in the body of the will, as when he commences it, "I, John B.," is sufficient, under such statutes, as a signature, provided, it seems, it is so intended, or at least another signature is not intended to be added.<sup>24</sup> By the modern English statutes, however, and by those of a number of the states, the testator must "subscribe" the will, or there is some other express requirement that the signature appear at the end of the will.<sup>25</sup> Under such statutes it is usually held that the will is void if the signature is followed

<sup>21</sup> *Knox's Estate*, 131 Pa. St. 220, *Chaplin, Wills*, 217; *In re Savory*, 15 Jur. 1042; 1 *Jarman, Wills*, 79.

<sup>22</sup> *Page, Wills*, §§ 175, 176; *Waite v. Frisbie*, 45 Minn. 361; *Murry v. Hennessey*, 48 Neb. 608; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Greenough v. Greenough*, 11 Pa. St. 489. See *Pool v. Buffum*, 3 Or. 438, 443.

<sup>23</sup> *In re McElwaine*, 18 N. J. Eq. 499; *Robins v. Coryell*, 27 Barb. (N. Y.) 559.

<sup>24</sup> *Lemayne v. Stanley*, 3 Lev. 1, 4 *Gray's Cas.* 188, *Chaplin, Wills*, 224; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538, *Chaplin, Wills*, 224; *Miles' Will*, 4 *Dana (Ky.)* 1; *Adams v. Field*, 21 *Vt.* 256; *Catlett v. Catlett*, 55 *Mo.* 330. See *In re Booth*, 127 *N. Y.* 109, 24 *Am. St. Rep.* 429, *Chaplin, Wills*, 224.

<sup>25</sup> 1 *Jarman, Wills*, 81; 1 *Stimson's Am. St. Law*, § 2640.

by clauses, written before the execution and publication of the will, which undertake to dispose of property, or to appoint an executor or guardian, while it is not void if the signature is followed by mere explanatory notes or directions.<sup>26</sup> The signature may be either before or after the "attestation" clause,<sup>27</sup> the nature of which is explained in another section. If writing is added below the signature subsequently to the execution and publication of the will, it is merely an attempted codicil, not affecting the validity of the will as expressed in the writing before the signature.<sup>28</sup>

#### § 411. Acknowledgment and publication.

The statute sometimes requires testator's signature to be acknowledged by him before witnesses, usually as an alternative to his actual signature of the will in their presence.<sup>29</sup> No particular words of acknowledgment are necessary, it being sufficient that he indicates to the witnesses, either by words or acts, that he regards the signature, which is visible to them, as his act.<sup>30</sup>

There is also, in some states, a requirement that the testator acknowledge, in the presence of witnesses, that the instrument is his last will and testament, this constituting what is known as the "publication" of the will.<sup>31</sup> The publica-

<sup>26</sup> *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409; *In re Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616; *Wineland's Appeal*, 118 Pa. St. 37; *Bigelow, Wills*, 46.

<sup>27</sup> *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Hallowell v. Hallowell*, 88 Ind. 251; *Page, Wills*, § 183.

<sup>28</sup> *In re Jacobson*, 6 Dem. Sur. (N. Y.) 298, *Chaplin, Wills*, 229.

<sup>29</sup> 1 *Stimson's Am. St. Law*, § 2642. See *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409.

<sup>30</sup> *Page, Wills*, § 205; *Allison v. Allison*, 46 Ill. 61; *Turner v. Cook*, 36 Ind. 129; *Smith v. Holden*, 58 Kan. 535; *In re Laudy*, 148 N. Y. 403.

<sup>31</sup> 1 *Stimson's Am. St. Law*, § 2642; *Bigelow, Wills*, 47.

tion, however, like the acknowledgment of the signature, need not be by express declaration, the testator's mere assent to a statement by another, or incidental reference to the instrument as his will, being sufficient, if it plainly informs the witnesses that the instrument is his will.<sup>32</sup> In the absence of a statutory requirement, it is, by the weight of authority, unnecessary that the testator inform the witnesses that the instrument is his will.<sup>33</sup>

§ 412. Competency of witnesses.

The state statutes, with few, if any, exceptions, require the signature, or acknowledgment thereof, to be in the presence of two and sometimes three witnesses,<sup>34</sup> and also, as just stated, publication of the will as such in the presence of witnesses is frequently required. If there be less than the statutory number of competent witnesses, the will is void.<sup>35</sup> The statute usually requires the witness to be "competent" or "credible,"<sup>36</sup> and the term "credible" is construed as meaning the same as "competent."<sup>37</sup> It is sufficient that the competency exists at the date of the will; and the fact that the witness subsequently becomes incompetent

<sup>32</sup> *Gilbert v. Knox*, 52 N. Y. 125; *Grimm v. Tittman*, 113 Mo. 56; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Hildreth v. Marshall*, 51 N. J. Eq. 241.

<sup>33</sup> *White v. Trustees of British Museum*, 6 Bing. 310, 4 Gray's Cas. 250; *Moodie v. Reid*, 7 Taunt. 355; *Barnewall v. Murrell*, 108 Ala. 366; *Dickie v. Carter*, 42 Ill. 376; *Turner v. Cook*, 36 Ind. 129; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Watson v. Pipes*, 32 Miss. 451; *Canada's Appeal from Probate*, 47 Conn. 450; *In re Hulse's Will*, 52 Iowa, 662.

<sup>34</sup> 1 Stimson's Am. St. Law, § 2644.

<sup>35</sup> See *Cureton v. Taylor*, 89 Ga. 490; *Poore v. Poore*, 55 Kan. 637; *Simmons v. Leonard*, 91 Tenn. 133, 30 Am. St. Rep. 375.

<sup>36</sup> 1 Stimson's Am. St. Law, § 2646.

<sup>37</sup> *Page, Wills*, § 191; *Amory v. Fellowes*, 5 Mass. 219; *Combs' Appeal*, 105 Pa. St. 158; *In re Noble's Will*, 124 Ill. 266; *Brown v. Fridgen*, 56 Tex. 124.

to testify does not invalidate the will, though it may necessitate that the will be proven by secondary evidence.<sup>38</sup> In other words, the statutory requirement as to the witnesses necessary to attest the execution of a will is entirely distinct from the question as to how the will shall be proved after the testator's death, though such proof is by means of the attesting witnesses, if they are then competent to testify, and are accessible.<sup>39</sup>

The competency of an attesting witness is, as a general rule, determined by the consideration whether the witness is a person competent to testify in a court of justice in regard to the will, and questions have frequently arisen as to the competency of particular persons at common law, and under modern statutory provisions. At common law, a beneficiary under the will was not a competent witness, because, by the rules prevailing in courts of justice, one interested in litigation could not testify therein.<sup>40</sup> Since this rule had the effect of frequently invalidating a will merely because a witness had a small interest thereunder, an act was passed providing that the testamentary provision in favor of the witness should be void, and that he should be regarded as a competent witness.<sup>41</sup> In this country there are statutes of a more or less similar character in most of the states, it being

<sup>38</sup> *Brograve v. Winder*, 2 Ves. Jr. 636; *Sears v. Dillingham*, 12 Mass. 358, 4 Gray's Cas. 236; *Stewart v. Harriman*, 56 N. H. 25; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121; *Fisher v. Spence*, 150 Ill. 253; *Warren v. Baxter*, 48 Me. 193; *Hopf v. State*, 72 Tex. 281. The statute so provides in a number of states. 1 Stimson's Am. St. Law, § 2647.

<sup>39</sup> *Cheatham v. Hatcher*, 30 Grat. (Va.) 56, 22 Am. Rep. 650; *Trustees of Theological Seminary of Auburn v. Calhoun*, 25 N. Y. 422; *Carlton v. Carlton*, 40 N. H. 14.

<sup>40</sup> 1 Jarman, Wills, 69; *Holdfast v. Dowsing*, 2 Strange, 1253, 4 Gray's Cas. 231.

<sup>41</sup> 25 Geo. II. c. 6; 7 Wm. IV. and 1 Vict. c. 26, § 14.  
(948)



usually declared, as in England, that the devise or bequest to the witness shall be void, but frequently with a provision giving such witness what he would have taken, in the absence of the will, by descent or distribution, to the extent that this does not exceed the devise or bequest.<sup>42</sup> A mere charge upon land in favor of a witness for the payment of debts due him will not, however, in most states, affect his competency.<sup>43</sup> And the statute also, in effect, frequently provides that the witness shall not lose the benefit of such a provision if there are enough witnesses without him.<sup>44</sup>

At common law, a husband or wife is incompetent as a witness in regard to any matter in which the other has a pecuniary interest, and accordingly, in the absence of a statute to the contrary, a husband or wife of a devisee or a legatee is not a competent witness to the will.<sup>45</sup> The modern statutes, however, removing the disability of the husband and wife of a party in interest to testify, have in some states been construed as removing the incompetency as an attesting witness to a will.<sup>46</sup> A statute invalidating a provision in favor of a witness in order to render the witness competent has occasionally been construed to apply to a provision in favor of the husband of a witness.<sup>47</sup> Such a statute has not, however, usually been given such a construction.<sup>48</sup> In a

<sup>42</sup> 1 Stimson's Am. St. Law, §§ 2650, 2651.

<sup>43</sup> 1 Stimson's Am. St. Law, § 2648.

<sup>44</sup> 1 Stimson's Am. St. Law, § 2650; 1 Woerner, Administration, § 41.

<sup>45</sup> *Windham v. Chetwynd*, 1 Burrows, 414, 424; *Fisher v. Spence*, 150 Ill. 253; *Sullivan v. Sullivan*, 106 Mass. 474, 4 Gray's Cas. 243; *Winslow v. Kimball*, 25 Me. 493, 4 Gray's Cas. 239; *Rucker v. Lambdin*, 12 Smedes & M. (Miss.) 230; *Hodgman v. Kittredge*, 67 N. H. 254; *Giddings v. Turgeon*, 58 Vt. 106.

<sup>46</sup> *In re Holt's Will*, 56 Minn. 33; *Lippincott v. Wikoff*, 54 N. J. Eq. 107; *Hawkins v. Hawkins*, 54 Iowa, 443, *Chaplin, Wills*, 304.

<sup>47</sup> *Winslow v. Kimball*, 25 Me. 493, 4 Gray's Cas. 239; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314.

<sup>48</sup> *Sullivan v. Sullivan*, 106 Mass. 474, 4 Gray's Cas. 243, *Chaplin*,

## § 415. Undue influence.

The question whether a certain testamentary disposition was the result of the exercise of "undue influence" upon the testator is the subject of frequent litigation. The courts have not been very successful in defining what constitutes undue influence sufficient to defeat a testamentary provision, but it is stated, in a general way, that it must be such persuasion or importunity as to overpower the will of the testator, without convincing his judgment,<sup>58</sup>—that is, it involves a substitution of another person's will for that of testator.<sup>59</sup> But the mere fact that one persuades the testator to make a will in his favor, or induces him to do so by argument or flattery, does not, of itself, show undue influence,<sup>60</sup> and so "appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like," are legitimate, and do not affect the validity of the will.<sup>61</sup>

The question of undue influence is entirely distinct from that of the mental capacity of the testator to make a will, which will hereafter be considered;<sup>62</sup> but the fact that, though mentally capable of making a will, he is wanting in

<sup>58</sup> *Hall v. Hall*, L. R. 1 Prob. & Div. 481, 4 Gray's Cas. 144; *Coghill v. Kennedy*, 119 Ala. 641; *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712.

<sup>59</sup> *Wingrove v. Wingrove*, 11 Prob. Div. 81, 4 Gray's Cas. 154; *Riley v. Sherwood*, 144 Mo. 354; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276; *Schmidt v. Schmidt*, 47 Minn. 451; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

<sup>60</sup> *McDaniel v. Crosby*, 19 Ark. 533; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96, 106; *Bush v. Lisle*, 89 Ky. 393; *Chaplin, Wills*, 103; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Trost v. Dingler*, 118 Pa. St. 259, 4 Am. St. Rep. 593; 1 Woerner, Administration, § 31.

<sup>61</sup> *Hall v. Hall*, L. R. 1 Prob. & Div. 481, 4 Gray's Cas. 144, *Chaplin, Wills*, 99; *In re Mondorf's Will*, 110 N. Y. 450; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712; *Bevelot v. Lestrade*, 153 Ill. 626.

<sup>62</sup> See post, § 503.

physical and mental vigor, is usually an important consideration in determining the question of undue influence.<sup>63</sup>

The fact that a beneficiary under the will sustains a confidential relation towards testator, such as that of attorney or guardian, does not of itself, according to some authorities, raise a presumption of undue influence sufficient to overthrow the will, though, under such circumstances, much slighter evidence of improper acts on the part of the beneficiary will be required than ordinarily.<sup>64</sup> By some decisions, however, the mere existence of the confidential relation raises a presumption that the will is invalid.<sup>65</sup> That a beneficiary who is not a near relative himself prepared the instrument is usually regarded as tending to show undue influence.<sup>66</sup>

#### § 416. Lapsed and void devises.

As a consequence of the "ambulatory" nature of a will, which prevents its operation until the death of the testator, the death of a devisee or legatee during the testator's lifetime will, in the absence of a statute to the contrary, render the

<sup>63</sup> *Griffith v. Diffenderffer*, 50 Md. 466; *Sullivan v. Foley*, 112 Mich. 1; *Shaller v. Bumstead*, 99 Mass. 112; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

<sup>64</sup> *Downey v. Murphey*, 18 N. C. 32, 4 Gray's Cas. 156; *Parfitt v. Lawless*, L. R. 2 Prob. & Div. 462, 4 Gray's Cas. 146; *Carter v. Dixon*, 69 Ga. 32; *Bancroft v. Otis*, 91 Ala. 279; *Denning v. Butcher*, 91 Iowa, 425; *In re Smith's Will*, 95 N. Y. 516; *Bigelow, Wills*, 89.

<sup>65</sup> *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, note; *Miller v. Miller*, 187 Pa. St. 572; *Hartman v. Strickler*, 32 Va. 225; *Carroll v. Hause*, 48 N. J. Eq. 269, 27 Am. St. Rep. 469; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712; *Meek v. Perry*, 36 Miss. 190, 244; 1 *Woerner, Administration*, § 32.

<sup>66</sup> *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 35; *Coghill v. Kennedy*, 119 Ala. 641; *Montague v. Allan's Ex'r*, 78 Va. 592, 49 Am. Rep. 384; *Bush v. Delano*, 113 Mich. 321; *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218; *In re Barney's Will*, 70 Vt. 352; *Barry v. Butlin*, 1 Curt. Ecc. 637, 4 Gray's Cas. 187; *Bigelow, Wills*, 87, 89. Compare *Carter v. Dixon*, 69 Ga. 32.

gift absolutely void.<sup>67</sup> And so a devise or legacy to a corporation may lapse or become void by the dissolution of the corporation before testator's death.<sup>68</sup> The testator may, however, make a substitutionary gift of that particular property in case the other gift fails owing to the death of the beneficiary, or for other reasons, and this will be carried out by the courts.<sup>69</sup> The fact that the gift is in terms to one "and his heirs" does not, of itself, show any intention to make a substitutionary gift to the heirs, since this is a word merely of limitation, and not of purchase.<sup>70</sup> In some cases, however, the use of the words "and heirs" has been construed as constituting a substitutional gift to the heirs,<sup>71</sup> and this is the effect usually given to a provision for one "or his heirs."<sup>72</sup>

In most of the states there is at the present day a statutory provision naming certain persons who may take in case of the death of the beneficiary during the lifetime of the testator. In many states it is provided that a devise or bequest to a child or other descendant of the testator shall, in case of the death of the devisee or legatee before the testator, pass to the issue of such devisee or legatee.<sup>73</sup> In some, the same provision is made in favor of the issue of any devisee or leg-

<sup>67</sup> 1 Jarman, Wills, 307; 2 Woerner, Administration, § 434.

<sup>68</sup> Page, Wills, § 740; Merrill v. Hayden, 86 Ma. 133; Crum v. Bliss, 47 Conn. 592.

<sup>69</sup> 1 Jarman, Wills, 308; Page, Wills, § 741; Gilmor's Estate, 154 Pa. St. 523; Rivers v. Rivers, 36 S. O. 302.

<sup>70</sup> Maxwell v. Featherston, 83 Ind. 339; In re Wells, 113 N. Y. 396; Kimball v. Story, 108 Mass. 382; Hand v. Marcy, 28 N. J. Eq. 59.

<sup>71</sup> Gilmor's Estate, 154 Pa. St. 523; Gittings v. McDermott, 2 Mylne & K. 69, 73; 2 Woerner, Administration, § 434.

<sup>72</sup> 2 Woerner, Administration, §§ 417, 434; Hand v. Marcy, 28 N. J. Eq. 59; O'Rourke v. Beard, 151 Mass. 9. See Keniston v. Adams, 80 Ma. 290.

<sup>73</sup> 1 Stimson's Am. St. Law, § 2823(A).  
(954)

atee who is a relation of the testator, while, in others, the issue of any devisee or legatee dying before the testator takes the gift, unless a contrary intention appears.<sup>74</sup>

— Effect of residuary clause.

One result of the theory that a devise of land was a present conveyance of the land, and of the rule that a will did not pass after-acquired land, was that a residuary devise of land, however general in its terms, was in its nature specific, as operating only on such land as the testator owned at the time of executing the will, and did not devise to another person, and was equivalent to a devise of such land by name or specific description. Consequently, although a devisee of specific land in the will died before testator, causing a "lapse" of the devise, the land could not pass under the residuary devise, but descended to the heir.<sup>75</sup> A different view has, however, been sometimes taken as to a devise which was originally void, it being held that it would pass under a residuary clause, on the theory that, being in effect a nullity from the beginning, it could not be regarded as excepted from the residuum.<sup>76</sup>

The rule that a residuary devise will not operate upon land included in a devise which has lapsed or has otherwise failed has been changed in England by the provision of the Wills Act that, unless a contrary intention appears from

<sup>74</sup> 1 Stimson's Am. St. Law, § 2823(B), (C). See Page, Wills, §§ 742, 743; 2 Woerner, Administration, § 435.

<sup>75</sup> Williams, Real Prop. (18th Ed.) 233; 1 Jarman, Wills, 609; Prescott v. Prescott, 7 Metc. (Mass.) 141; Williams v. Neff, 52 Pa. St. 326; Deford v. Deford, 36 Md. 163.

<sup>76</sup> Doe, Lessee of Stewart, v. Sheffield, 13 East, 526, 534; Doe d. Ferguson v. Roe, 1 Har. (Del.) 524, 528. That no such distinction between void and lapsed devises exists, see 1 Jarman, Wills, 610, note; Ligan v. Carroll, 3 Har. & McH. (Md.) 333, 338; Deford v. Deford, 36 Md. 163, 179.

the will, real estate comprised in any void or lapsed devise shall be included in the residuary devise.<sup>77</sup> There is a substantially similar provision in a number of states in this country.<sup>78</sup> The operation of such a statute is, however, much restricted by the statutes previously referred to, naming persons to take in case of the death of a beneficiary.

Even in the absence of a statute expressly making the residuary devise operative upon land included in a lapsed devise, the courts of a number of states have held that, since the passage of the statutes making a will pass after-acquired realty, the reason for treating the residuary devise as a specific provision no longer exists, and that consequently it covers all land included in a devise which has lapsed or become void.<sup>79</sup> In some states, however, a different view has been taken, it being held that such a statute as to after-acquired property does not cause land included in a lapsed devise to pass under the residuary clause.<sup>80</sup>

#### § 417. The revocation of a will.

A will remains subject to revocation by the testator at any time. Such revocation may be effected either by cancellation or destruction of the will, or by the execution of another testamentary instrument, either expressly revoking the former will, or making an inconsistent disposition of the property. The Statute of Frauds provides that no devise in writing of lands, tenements, or hereditaments, or any clause

<sup>77</sup> 7 Wm IV. and 1 Vict. c. 26, § 25; 2 Woerner, Administration, § 438.

<sup>78</sup> 1 Stimson's Am. St. Law, § 2822.

<sup>79</sup> Thayer v. Wellington, 9 Allen (Mass.) 283, 296; Molineaux v. Reynolds, 55 N. J. Eq. 187; Cruikshank v. Home for Friendless, 112 N. Y. 337; Drew v. Wakefield, 54 Me. 291. See Johnson v. Holtfield, 82 Ala. 123.

<sup>80</sup> Massey's Appeal, 88 Pa. St. 470; Rizer v. Perry, 53 Md. 112. See 2 Woerner, Administration, § 438.

thereof, shall be revocable otherwise than by some will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses, or by burning, canceling, tearing, or obliterating the previous will.<sup>81</sup> In this country the statutory provisions are usually of a substantially similar character.<sup>82</sup>

— By cancellation or destruction of the instrument.

In order that a will be revoked by cancellation or destruction, it is necessary that the act be done with the intention of revoking the will, *animo revocandi*, as it is expressed.<sup>83</sup> Consequently, the destruction of the will by accident<sup>84</sup> or by mistake, as when testator wrongly believes it to be invalid,<sup>85</sup> or during the insanity of the testator,<sup>86</sup> does not revoke it. On the other hand, the mere intention to revoke is insufficient unless accompanied by some act constituting a legal revocation.<sup>87</sup>

The act of destruction, whether by burning, tearing, or

<sup>81</sup> 29 Car. II. c. 3, § 6. See *Swinton v. Bailey*, 4 App. Cas. 70, 4 Gray's Cas. 328.

<sup>82</sup> 1 Stimson's Am. St. Law, §§ 2672, 2673.

<sup>83</sup> 1 Jarman, Wills, 118; 1 Woerner, Administration, § 48. The statute frequently contains a provision to this effect. 1 Stimson's Am. St. Law, § 2672(C).

<sup>84</sup> *Burtenshaw v. Gilbert*, Cowp. 52; *Burns v. Burns*, 4 Serg. & R. (Pa.) 295.

<sup>85</sup> *Giles v. Warren*, L. R. 2 Prob. & Div. 401, Chaplin, Wills, 348.

<sup>86</sup> *Rich v. Gilkey*, 73 Me. 595; *Brunt v. Brunt*, L. R. 3 Prob. & Div. 37, Chaplin, Wills, 329; *Lang's Estate*, 65 Cal. 19; *Sprigge v. Sprigge*, L. R. 1 Prob. & Div. 608, Chaplin, Wills, 356; *Forbing v. Weber*, 99 Ind. 588; *Deiafield v. Parish*, 25 N. Y. 9.

<sup>87</sup> *Mundy v. Mundy*, 15 N. J. Eq. 290, Chaplin, Wills, 341; *Holt v. Holt*, 63 N. H. 475; *Kent v. Mahaffey*, 10 Ohio St. 204; *Deiafield v. Parish*, 25 N. Y. 9. So, in *Doe d. Reed v. Harris*, 6 Adol. & E. 309, 4 Gray's Cas. 312, Chaplin, Wills, 349, it was decided that throwing the will on the fire, if it was snatched off by another person before more than the envelope was singed, did not constitute a revocation.

other means, must, to constitute a revocation, be carried through to its end, and consequently, if testator desists from his purpose after having partly torn or destroyed the instrument, there is no revocation, provided he would have made the act more complete had he not changed his mind.<sup>88</sup> A partial destruction is sufficient, however, if the testator supposed that the act was carried far enough for the purpose, and the preservation of the will in its mutilated condition by a third person will not affect the validity of the revocation.<sup>89</sup>

The cancellation or destruction, *animo revocandi*, of any essential part of the will, has the effect, unless the statute otherwise provides,<sup>90</sup> of revoking the will, as when the signature is scratched or erased,<sup>91</sup> or so much of the paper as contains the signature is torn off,<sup>92</sup> or the seal is destroyed.<sup>93</sup> The cancellation of a particular phrase or name in the will may revoke that particular provision, without revoking the will as a whole.<sup>94</sup>

<sup>88</sup> *Doe d. Perkes v. Perkes*, 3 Barn. & Ald. 489, 4 Gray's Cas. 310, Chaplin, Wills, 334; *Elms v. Elms*, 1 Swab. & Tr. 155, Chaplin, Wills, 335.

<sup>89</sup> *Bibb v. Thomas*, 2 W. Bl. 1043, 4 Gray's Cas. 307, Chaplin, Wills, 350; *Sweet v. Sweet*, 1 Redf. Surr. (N. Y.) 451, Chaplin, Wills, 342; *White v. Casten*, 46 N. C. 197, Chaplin, Wills, 344; *Lawyer v. Smith*, 8 Mich. 411, Chaplin, Wills, 369.

<sup>90</sup> *Gay v. Gay*, 60 Iowa, 415.

<sup>91</sup> *Semmes v. Semmes*, 7 Har. & J. (Md.) 383, Chaplin, Wills, 353; *Townshend v. Howard*, 36 Me. 235; *Evans' Appeal*, 58 Pa. St. 233, 244; *Olmsted's Estate*, 122 Cal. 224; *In re White's Will*, 25 N. J. Eq. 501; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269.

<sup>92</sup> *Bell v. Fothergill*, L. R. 3 Prob. & Div. 143. But see *Webster v. Yorty*, 194 Ill. 408.

<sup>93</sup> This is so, even though the seal is not necessary to the validity of the will. *Price v. Powell*, 3 Hurl. & N. 341, 4 Gray's Cas. 323; *Avery v. Pixley*, 4 Mass. 460. See *In re White's Will*, 25 N. J. Eq. 501.

<sup>94</sup> *Swinton v. Bailey*, 4 App. Cas. 70, 4 Gray's Cas. 323; *Larkins v. Larkins*, 3 Bos. & P. 16, 4 Gray's Cas. 309; *Bigelow v. Gillott*, 123 (958)



In case the will of a decedent, which he is known to have made, cannot be found, it is presumed to have been destroyed by him with the intention of revoking it.<sup>95</sup> This presumption may, however, be rebutted by evidence to the contrary, as when it is shown that there was no change in the testator's desire to benefit the persons named in the will, or that the will was accessible to others, who might have destroyed it.<sup>96</sup>

— Dependent relative revocation.

"Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force."<sup>97</sup> This principle of "dependent relative" revocation, as it is termed, has been applied in the case of the cancellation of clauses in the will by testator with the intention of substituting other clauses, but without re-executing the will after making such alterations, and the cancellation has been held to be nugatory

Mass. 102, 4 Gray's Cas. 344; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *Miles' Appeal from Probate*, 68 Conn. 237; *Gardner v. Gardner*, 65 N. H. 230. But contra, in some states by statute, see *Law v. Law*, 83 Ala. 432; *Lovell v. Quitman*, 88 N. Y. 277; *Gay v. Gay*, 60 Iowa, 416.

<sup>95</sup> *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Knapp v. Knapp*, 10 N. Y. 276; *Foster's Appeal*, 87 Pa. St. 67, *Chaplin, Wills*, 364; *Harris v. Harris*, 10 Wash. 555; *In re Valentine's Will*, 93 Wis. 46.

<sup>96</sup> *Schultz v. Schultz*, 35 N. Y. 653, *Chaplin, Wills*, 358; *Patten v. Poulton*, 1 Swab. & Tr. 55, *Chaplin, Wills*, 361; *Harris v. Harris*, 10 Wash. 555.

<sup>97</sup> 1 *Jarman, Wills*, 119. See, also, 1 *Williams, Executors* (9th Ed.) 126 et seq.; *Onions v. Tyrer*, 2 Vern. 742, 4 Gray's Cas. 356.

as a revocation.<sup>98</sup> The same principle has been held to apply when the testator destroyed a will under the mistaken impression that a previous will would be thereby validated, and with the intention of setting up such former disposition.<sup>99</sup> The fact, however, that the act of destruction is accompanied by an intention to make another will in the future cannot prevent such act from operating as a revocation.<sup>100</sup>

— Subsequent will.

As stated above, a will can, by force of the statute, be revoked by a subsequent writing only when such writing is executed as a will,—that is, only by a subsequent will.<sup>101</sup> Such revocation may result either from the language of the later instrument revoking the earlier will, or the later will may make a disposition of testator's property, or part thereof, inconsistent with the earlier disposition.<sup>102</sup> If the second will neither in terms revokes the previous will nor is inconsistent therewith, then both are in force, the later being in effect a codicil to the former instrument,<sup>103</sup> and, if the

<sup>98</sup> Winsor v. Pratt, 2 Brod. & B. 650, 4 Gray's Cas. 359; Wolf v. Bollinger, 62 Ill. 368; Doane v. Hadlock, 42 Me. 72; Wilbourn v. Shell, 59 Miss. 205; Gardner v. Gardiner, 65 N. H. 230; In re Penniman's Will, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368.

<sup>99</sup> Powell v. Powell, L. R. 1 Prob. & Div. 209, 4 Gray's Cas. 373.

<sup>100</sup> Semmes v. Semmes, 7 Har. & J. (Md.) 388, 4 Gray's Cas. 333; Townshend v. Howard, 86 Me. 285; Olmstead's Estate, 122 Cal. 224; Banks v. Banks, 65 Mo. 432; Brown v. Thorndike, 15 Pick. (Mass.) 388; 1 Woerner, Administration, § 48.

<sup>101</sup> 1 Stimson's Am. St. Law, § 2673. So it has been held that words written upon another part of the paper, to the effect that the will is revoked or "canceled," though signed by the testator, do not revoke the will, unless witnessed as required in the case of a will. Ladd's Will, 60 Wis. 187, 4 Gray's Cas. 347. But see Warner v. Warner, 37 Vt. 356, 4 Gray's Cas. 337; Evans' Appeal, 58 Pa. St. 238.

<sup>102</sup> 1 Jarman, Wills, 134-139; Bigelow, Wills, 136.

<sup>103</sup> 1 Jarman, Wills, 139; Wetmore v. Parker, 52 N. Y. 450; Gor-  
(960)

later will is only partially inconsistent with the earlier will, the latter remains in force in other respects.<sup>104</sup> The subsequent will may contain no provision other than that revoking the earlier will,<sup>105</sup> and it has the effect of revocation if it so provides, although the attempted disposition therein of the testator's property is for some reason invalid.<sup>106</sup>

The contents of a lost will may be shown for the purpose of establishing a revocation of a previous will.<sup>107</sup> But the mere fact of the execution of a later will, without evidence as to its contents, is not sufficient to show a revocation.<sup>108</sup>

A revocation by a will or codicil of a previous disposition of property is invalid if expressly made upon an assumption of fact which turns out to be mistaken.<sup>109</sup> But the fact that the revocation was the result of mistake cannot be shown by evidence extrinsic to the will,<sup>110</sup> and it has been held that

*don v. Whitlock*, 92 Va. 723; *Smith v. McChesney*, 15 N. J. Eq. 359.

<sup>104</sup> *Freeman v. Freeman*, 5 De Gex, M. & G. 704, 4 Gray's Cas. 297; *Lemage v. Goodban*, L. R. 1 Prob. & Div. 57, 4 Gray's Cas. 302; *Price v. Maxwell*, 28 Pa. St. 23; *Kelly v. Richardson*, 100 Ala. 584; *In re De Laveaga's Estate*, 119 Cal. 651; *Wetmore v. Parker*, 52 N. Y. 450.

<sup>105</sup> *Bayley v. Bailey*, 5 Cush. (Mass.) 245; *Barksdale v. Hopkins*, 23 Ga. 332.

<sup>106</sup> *Ex parte Ilchester*, 7 Ves. 348, 373; *Hairston v. Hairston*, 30 Miss. 276; *Morey v. Sohler*, 63 N. H. 507; *Burns v. Travis*, 117 Ind. 44.

<sup>107</sup> *Caeman v. Van Harke*, 33 Kan. 333; *Wallis v. Wallis*, 114 Mass. 510.

<sup>108</sup> *Hitchins v. Basset*, 2 Salk. 592, 4 Gray's Cas. 295; *In re Sternberg's Estate*, 94 Iowa, 305.

<sup>109</sup> *Campbell v. French*, 3 Ves. 321, 4 Gray's Cas. 358, where a revocation of a provision in favor of certain persons, "they being all dead," was held to be inoperative, they being alive. See, also, *Doe d. Evans v. Evans*, 10 Adol. & E. 228.

<sup>110</sup> *Gifford v. Dyer*, 2 R. I. 99, 4 Gray's Cas. 386; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758, 4 Gray's Cas. 387; *Dunham v. Averill*, 45 Conn. 61; *Hayes v. Hayes*, 45 N. J. Eq. 461.

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even a mistake apparent in the will does not defeat the revocation if it is not based on information received from others, but the matter is within the personal knowledge of testator.<sup>111</sup> A revocation, moreover, which is stated to be based upon certain advice given testator, has been supported, though the advice was mistaken, since it was the advice on which testator acted, and as to that there was no mistake.<sup>112</sup>

— Marriage or birth of issue.

Apart from statute, the will of a man is not revoked by his marriage alone.<sup>113</sup> In some states, however, though there is no express statutory change of this rule, it has been decided that the statutes changing the common-law rights of a married woman as regards her interest in the husband's estate on his death without issue have, by implication, made a change in the rule, and that the husband's marriage does revoke the will.<sup>114</sup>

At common law, the marriage of a woman revokes her will, for the reason, it is said, that, since the marriage destroys her right to make or revoke a will, if marriage did not in itself cause a revocation, the will would stand as a permanent disposition of her property.<sup>115</sup> This rule is a positive rule of law, and evidence is not admissible to show a

<sup>111</sup> *Mendinhall's Appeal*, 124 Pa. St. 387.

<sup>112</sup> *Attorney General v. Lloyd*, 1 Ves. Sr. 32, 4 Gray's Cas. 357; 1 *Jarman, Wills*, 147; *Newton v. Newton*, 12 Ir. Ch. 118, 4 Gray's Cas. 437; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758, 4 Gray's Cas. 387.

<sup>113</sup> 1 *Jarman, Wills*, 111.

<sup>114</sup> *Brown v. Scherrer*, 5 Colo. App. 255, 21 Colo. 481; *Tyler v. Tyler*, 19 Ill. 151; *American Board of Com'rs for Foreign Missions v. Nelson*, 72 Ill. 564; *Morgan v. Ireland*, 1 Idaho, 786. Contra, *Hulett v. Carey*, 66 Minn. 327; *Holtt v. Holtt*, 63 N. H. 475; *Goodsell's Appeal*, 55 Conn. 171.

<sup>115</sup> 1 *Jarman, Wills*, 110; *Hodsden v. Lloyd*, 2 Brown Ch. 534; *Garrett v. Dabney*, 27 Miss. 335. So by statute in a number of states. 1 *Stimson's Am. St. Law*, § 2676(A).

contrary intention on the part of testatrix.<sup>116</sup> In several states it has been held that this rule does not apply when the common-law restriction upon the right of a married woman to make a will no longer exists.<sup>117</sup> An express statutory provision in accordance with the common-law rule has, however, been held not to be impliedly repealed by a statute giving testamentary capacity to married women;<sup>118</sup> and the common-law rule has been regarded as confirmed by a provision, in the statute regarding the revocation of wills, that nothing therein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.<sup>119</sup>

By the common-law rule, generally recognized as in force in this country, in the absence of a statutory change, the marriage of a man, if followed by the birth of a child, revokes his will previously made.<sup>120</sup> This rule is based, it is said, upon a tacit condition, annexed to the will, that, in case of such a total change in testator's circumstances, the will shall be void,<sup>121</sup> and consequently evidence of a contrary intention on the part of the testator is, by the weightiest de-

<sup>116</sup> *Nutt v. Norton*, 142 Mass. 242; *Holitt v. Holitt*, 63 N. H. 498.

<sup>117</sup> *Ward's Will*, 70 Wis. 251; *In re Emery*, 81 Me. 275, *Chaplin, Wills*, 313; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 329; *Webb v. Jones*, 36 N. J. Eq. 163; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359; *Morton v. Onion*, 45 Vt. 145; *In re Tuller's Will*, 79 Ill. 99. *Contra*, *Swan v. Hammond*, 138 Mass. 45.

<sup>118</sup> *Brown v. Clark*, 77 N. Y. 369, *Chaplin, Wills*, 315; *In re Kaufman's Will*, 181 N. Y. 620, *Chaplin, Wills*, 317.

<sup>119</sup> *Shorten v. Judd*, 60 Kan. 73; *Swan v. Hammond*, 138 Mass. 45.

<sup>120</sup> 1 *Jarman, Wills*, 110; *Christopher v. Christopher*, 2 Dickens, 445, 4 *Gray's Cas.* 390.

In New Hampshire it has been held that the marriage and birth of issue no longer effect a revocation, in view of the statute which gives to a widow and child not provided for in the will the same share as if decedent had died intestate. *Holitt v. Holitt*, 63 N. H. 498.

<sup>121</sup> *Kenebel v. Scrafton*, 2 East, 530, 4 *Gray's Cas.* 394.

cisions, not admissible.<sup>122</sup> The rule that marriage and birth of issue revokes the will does not, however, apply if the future wife and the issue of the marriage are provided for by the will,<sup>123</sup> and occasionally, by statute, a provision for the issue alone is sufficient to prevent its application.<sup>124</sup>

The birth of a child does not, apart from statute, affect a man's previous disposition of his property by will.<sup>125</sup>

There are in most of the states express statutory provisions as to the effect of marriage or birth of issue in revoking a will. In some states a will is revoked by marriage and birth of issue, unless provision for such issue is made in the will or by settlement, or they are in such way mentioned in the will as to show an intention not to provide for them. In several states the marriage alone of the testator revokes the will, subject, in some states, to the condition that he leaves a widow for whom he does not provide by marriage settlement or in the will, or does not so mention her in the will as to show an intention not to provide for her. And in some states a will made before the birth of issue, which makes no mention of possible issue, is in effect revoked if the testator leave a child.<sup>126</sup>

#### — Alienation of land.

The conveyance by the testator of land, which would oth-

<sup>122</sup> *Marston v. Roe*, 8 Adol. & El. 14, 4 Gray's Cas. 403; *Chicago, B. & Q. R. Co. v. Wasserman* (C. C.) 22 Fed. 872; *Baldwin v. Spriggs*, 65 Md. 373. See *Nutt v. Norton*, 142 Mass. 242; *Hoitt v. Hoitt*, 63 N. H. 498. Contra, *Wheeler v. Wheeler*, 1 R. I. 364.

<sup>123</sup> *Kenebel v. Scrafton*, 2 East, 530, 4 Gray's Cas. 394; *Marston v. Roe*, 8 Adol. & El. 14, 4 Gray's Cas. 403; *Warner v. Beach*, 4 Gray (Mass.) 162; *Baldwin v. Spriggs*, 65 Md. 373.

<sup>124</sup> 1 Stimson's Am. St. Law, § 2676(C).

<sup>125</sup> *Doe d. White v. Barford*, 4 Maule & S. 10, 4 Gray's Cas. 402; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Goodsell's Appeal from Probate*, 55 Conn. 171. Contra, *McCullum v. McKenzie*, 26 Iowa, 510.

<sup>126</sup> 1 Stimson's Am. St. Law, § 2676.

erwise pass under a will previously made, necessarily withdraws such land from the operation of the will.<sup>127</sup> When there is merely a contract to convey, the vendor is, as before stated,<sup>128</sup> a mere trustee for the purchaser, and the legal title alone passes under his previous devise of the land, the right to the purchase money passing, in the absence of statute, to the personal representative.<sup>129</sup> In some states, however, the statute provides that, on the death of the vendor of land, the unpaid purchase money shall pass under the devise of the land, in place, as it were, of the land.<sup>130</sup>

So far as the common-law rule that the will operates only on land owned by testator at the time of its execution may still remain in force in any jurisdiction, the reconveyance to testator of land conveyed by him after the making of the will cannot render the will operative as to such land.<sup>131</sup> And, apart from any change in the law brought about by the modern statutes, a conveyance by the testator after the making of his will, if it transfers the legal title in fee simple, is effective as a revocation, even though, by the same instrument, another estate is created in favor of himself, as in the case of a declaration of trust in his own favor.<sup>132</sup> Under the statutory rule which now prevails in England, and in most, if not all, of the states, that the will operates on such land as the testator has at the time of his death, a conveyance by testator after making his will cannot prevent the operation of the will upon the land conveyed, if it is recon-

<sup>127</sup> 1 Jarman, Wills, 129.

<sup>128</sup> Ante, § 110.

<sup>129</sup> 1 Jarman, Wills, 129; *Bender v. Luckenbach*, 162 Pa. St. 18; *Skinner v. Newberry*, 51 Ill. 203; *Bruck v. Tucker*, 32 Cal. 426. See ante, § 112.

<sup>130</sup> 1 Woerner, Administration, § 53.

<sup>131</sup> 1 Jarman, Wills (4th Ed.) 147.

<sup>132</sup> *Cave v. Holford*, 3 Ves. 650; *Brydges v. Chandos*, 2 Ves. Jr. 417; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; *Jones v. Hartley*, 2 Whart. (Pa.) 103.

veyed or title is in any way revested in the testator before his death; and in many jurisdictions there is an express provision that a conveyance shall not prevent the operation of the will with respect to such an estate as testator has at the time of his death, unless, in some states, the intention to revoke is expressed in the conveyance.<sup>133</sup>

A conveyance by a testator was held in England, as the law formerly stood, to effect a revocation, although the conveyance was void, either for want of capacity in the grantee, or for want of the proper formalities.<sup>134</sup> This rule is no longer in force in England, on the theory, it is said, that, as a valid conveyance no longer effects a revocation if the title becomes revested in testator, one which is invalid can have no greater effect.<sup>135</sup> In this country there seems to be no explicit decision that an invalid conveyance could in any case constitute revocation, though there are *dicta* to such an effect,<sup>136</sup> and a conveyance which is voidable because procured by fraud has been here held not to cause a revocation.<sup>137</sup>

#### § 418. Children or issue omitted from will.

In most states there is a statutory provision that, if a child living or leaving issue at the testator's death was born after the execution of the will, such child or issue shall take the share to which he or they would have been entitled if tes-

<sup>133</sup> Wills Act, 7 Wm. IV. and 1 Vict. c. 26, § 23; 1 Stimson's Am. St. Law, § 2810.

<sup>134</sup> 1 Jarman, Wills (4th Ed.) 165; Mountague v. Jeoffereys, Moore, 429, 4 Gray's Cas. 682; Hick v. Mors, Amb. 215, 4 Gray's Cas. 685.

<sup>135</sup> 1 Jarman, Wills, 133.

<sup>136</sup> See Walton v. Walton, 7 Johns. Ch. (N. Y.) 258; Graham v. Burch, 47 Minn. 171; Bigelow, Wills, 134. But see Bennett v. Gaddis, 79 Ind. 347.

<sup>137</sup> Graham v. Burch, 47 Minn. 171. Contra in England. Simpson v. Walker, 5 Sim. 1. See 1 Redfield, Wills (4th Ed.) 344.



tator had died intestate. In a number of the states, such a provision applies only in case the child or issue were not provided for otherwise by testator, or were not intentionally omitted.<sup>138</sup> In a number of states, statutes of this character, entitling an omitted child to the share which he would have had if deceased had died intestate, are not restricted in their application to children born after the execution of the will, but apply in the case of any child, usually whether that child was omitted intentionally or unintentionally.<sup>139</sup>

#### § 419. Revival of will.

In the case of a will which is revoked by an express statement to that effect in a subsequent will, or by inconsistent provisions therein, the question has frequently arisen as to the effect of a subsequent revocation of the revoking will. In England it was held by the common-law courts that the effect was to "revive" or put in force again the provisions of the earlier will, if this had not been destroyed, on the theory that, as the second will had no operation until testator's death, if it was revoked it could not operate as a revocation of the earlier will.<sup>140</sup> The ecclesiastical courts, however, held that the question of revival was one of intention purely, to be decided according to the facts and circumstances of the particular case.<sup>141</sup> This question is there set at rest by the Wills Act,<sup>142</sup> which provides "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof,

<sup>138</sup> 1 Stimson's Am. St. Law, § 2843.

<sup>139</sup> 1 Stimson's Am. St. Law, § 2842. See Page, Wills, § 291;

1 Woerner, Administration, § 55.

<sup>140</sup> Goodright v. Glazier, 4 Burrows, 2512, 4 Gray's Cas. 434; 1 Jarman, Wills (4th Ed.) 136.

<sup>141</sup> Moore v. Moore, 1 Phillim. 357; Usticke v. Bawden, 2 Addams, 116.

<sup>142</sup> 7 Wm. IV. and 1 Vict. c. 26, § 22.

or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," it being held thereunder that the cancellation or destruction of the revoking will cannot revive the previous will.<sup>143</sup>

In this country the view of the English ecclesiastical courts, that the question of revival is one purely of intention, has occasionally been adopted,<sup>144</sup> with the presumption, it seems, in the absence of evidence, against a revival in such a case.<sup>145</sup> In a few jurisdictions, however, the view is taken that the revocation of the subsequent will *ipso facto* revives the earlier one;<sup>146</sup> and in some this view is applied to cases in which the second will revoked the first will merely by reason of inconsistency therewith, and not by an express statement to that effect.<sup>147</sup> In one state, at least, the rule which prevails by statute in England has been adopted, in the absence of any local statute on the subject.<sup>148</sup>

There are, in many states, statutory provisions on this subject, it being sometimes provided, as in England, that a will once revoked can be revived only by a re-execution thereof, or by a codicil duly executed, while in others the canceling, destruction, or revocation of the second will does not revive the first will, unless such intent appear in the

<sup>143</sup> 1 Jarman, Wills, § 126; 1 Williams, Executors (9th Ed.) 163.

<sup>144</sup> Pickens v. Davis, 134 Mass. 252, 4 Gray's Cas. 444; In re Gould's Will, 72 Vt. 316; McClure v. McClure, 86 Tenn. 173. See Bohanon v. Walcot, 1 How. (Miss.) 336; Randall v. Beatty, 31 N. J. Eq. 643.

<sup>145</sup> Pickens v. Davis, 134 Mass. 252, 4 Gray's Cas. 444. See 15 Harv. Law Rev. 142.

<sup>146</sup> Taylor v. Taylor, 2 Nott & McC. (S. C.) 482; Peck's Appeal from Probate, 50 Conn. 562; Flintham v. Bradford, 10 Pa. St. 82.

<sup>147</sup> Scott v. Fink, 45 Mich. 241; Cheever v. North, 106 Mich. 390; Colvin v. Warford, 20 Md. 357. See Hawes v. Nicholas, 72 Tex. 481; Peck's Appeal from Probate, 50 Conn. 562.

<sup>148</sup> Harwell v. Lively, 30 Ga. 315.

terms of the revocation, or the first will be duly republished.<sup>149</sup>

### § 420. Republication.

A will may be republished so as to give the words of the will the same effect as if the will had been originally executed at the time of such republication,—that is, so as to make it “speak” as of that time.<sup>150</sup> Under the law as it formerly existed in England, restricting the operation of a devise of lands to such lands as were owned by the testator at the time of execution of the will, and in those states in this country where the same rule still prevails, the effect of a republication is important, as it brings lands acquired between the date of execution and of republication within the operation of a general devise.<sup>151</sup> But since the general change of the law in this respect, the doctrine of republication has lost much of its importance, and it calls for consideration now chiefly in connection with the possibility of giving effect to a will originally invalid, or which has been revoked.<sup>152</sup>

The republication may consist of a re-execution of the instrument with the same formalities as are necessary in the case of an absolutely new will. Accordingly, while, previous to the Statute of Frauds, it might be by means of an oral

<sup>149</sup> 1 Stimson's Am. St. Law, §§ 2678, 2679.

The destruction of a codicil reviving a former revoked will has been decided not to have the effect of rendering the revival inoperative, if there was no intention that it should have that effect. *James v. Shrimpton*, 1 Prob. Div. 431, 4 Gray's Cas. 443.

<sup>150</sup> 1 Jarman, Wills, 159; Williams, Executors (9th Ed.) 170.

<sup>151</sup> *Beckford v. Parnecott*, Cro. Eliz. 493, 4 Gray's Cas. 419; *Barnes v. Crow*, 4 Brown Ch. 2, 4 Gray's Cas. 421.

<sup>152</sup> See *Burge v. Hamilton*, 72 Ga. 568; *Brown v. Riggins*, 94 Ill. 560; *Walton's Estate*, 194 Pa. St. 528; *McCurdy v. Neall*, 42 N. J. Eq. 333; *Skinner v. American Bible Soc.*, 92 Wis. 209.

declaration even in the case of land,<sup>153</sup> since that time signing and attestation are necessary.<sup>154</sup> The making and execution of a codicil to a will has likewise the effect, in the absence of any appearance of a contrary intention, of a republication of the will, and it is immaterial whether the codicil expressly so provides, or whether it is actually annexed to the will.<sup>155</sup> In the absence of an expression of a contrary intention, the republication of a will, whether by re-execution, or by the making of a codicil, is of the will as changed by any pre-existing codicils, they being in effect a part of the will.<sup>156</sup> The mere fact that the will is referred to by its original date does not take the case out of the rule.<sup>157</sup>

<sup>153</sup> *Beckford v. Parnecott*, Cro. Eliz. 493, 4 Gray's Cas. 419.

<sup>154</sup> *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Love v. Johnston*, 34 N. C. 355, 1 Woerner, Administration, § 56.

<sup>155</sup> 1 Williams, Executors (9th Ed.) 164; *Barnes v. Crow*, 4 Brown Ch. 2, 4 Gray's Cas. 421; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *In re Murfield's Will*, 74 Iowa, 479; *Hobart v. Hobart*, 154 Ill. 610; *Pope v. Pope*, 95 Ga. 87; *McCurdy v. Neall*, 42 N. J. Eq. 333.

<sup>156</sup> 1 Williams, Executors (9th Ed.) 171; *Crosbie v. MacDoual*, 4 Ves. 610, 4 Gray's Cas. 426.

<sup>157</sup> *Green v. Tribe*, 9 Ch. Div. 231, 4 Gray's Cas. 423.

## **CHAPTER XXI.**

### **DEDICATION.**

- § 421. The nature of dedication.**
- 422. Mode of dedication.**
- 423. Acceptance.**
- 424. Effect of dedication.**

The dedication of land for public use involves a declaration by the owner, by either word or act, of an intention that the land shall be thereafter used by the public, and to that extent it divests the rights of the owner of the land. By statute, occasionally, a dedication made in a particular manner vests in the public, not a right of user only, but the ownership of the land.

The dedication must usually be accepted in order to impose any liability upon the municipality as the representative of the public, and, by some decisions, in order to render the dedication irrevocable. Such an acceptance will, in some cases, be presumed from user by the public.

#### **§ 421. The nature of dedication.**

A highway may be created by the dedication of land for highway purposes by the owner thereof, this being in effect a declaration, by word or act, of his intention that the land shall be used by the public for highway purposes.<sup>1</sup> Land may likewise be dedicated for use as a park, common, or square.<sup>2</sup> It has also been decided in this country that land

<sup>1</sup> Angell, Highways, § 132 et seq.; Elliott, Roads & S. c. 5.

<sup>2</sup> Baker v. Johnston, 21 Mich. 319; City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 4 Gray's Cas. 799; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Com. v. Rush,

may be dedicated for use by the public as a wharf or landing place,<sup>3</sup> as a cemetery,<sup>4</sup> or for school purposes.<sup>5</sup>

In some jurisdictions in this country the common-law theory of dedication has been greatly extended by decisions that land may be dedicated, not only for use by the public, but for use by a small portion of the public belonging to a particular class, this being presumably due to a desire to uphold gifts which otherwise would fail for want of a sufficient conveyance. Thus, gifts for charitable and religious purposes, though merely oral, have been supported on the theory of dedication.<sup>6</sup>

14 Pa. St. 186; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Rhodes v. Town of Brightwood*, 145 Ind. 21.

<sup>3</sup> *City of Napa v. Howland*, 87 Cal. 84; *Village of Mankato v. Willard*, 13 Minn. 13 (Gil. 1), 97 Am. Dec. 208; *Portland & W. V. R. Co. v. City of Portland*, 14 Or. 188, 58 Am. Rep. 299; *Penny Pot Landing v. City of Philadelphia*, 16 Pa. St. 79; *City of Pittsburgh v. Epping-Carpenter Co.*, 194 Pa. St. 318; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407. Contra, *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Thomas v. Flord*, 63 Md. 346, 52 Am. Rep. 513; *Horn v. People*, 26 Mich. 221; *O'Neill v. Annett*, 27 N. J. Law, 290, 73 Am. Dec. 364.

<sup>4</sup> *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407; *Hagaman v. Dittmar*, 24 Kan. 42; *Pierce v. Spafford*, 53 Vt. 394; *Mowry v. City of Providence*, 10 R. I. 52.

<sup>5</sup> *Carpenteria School Dist. v. Heath*, 56 Cal. 473; *Chapman v. Floyd*, 68 Ga. 455; *Klinker v. School Directors of McKeesport*, 11 Pa. St. 444; *Board of Education of Incorporated Village of Van Wert v. Edson*, 18 Ohio St. 221; *Board of Regents for Normal School Dist. No. 3 v. Painter*, 102 Mo. 464.

<sup>6</sup> *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 3 Gray's Cas. 794; *City of Hannibal v. Draper*, 15 Mo. 634; *Atkinson v. Bell*, 18 Tex. 474; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478. Compare *Home for Care of the Inebriate v. City & County of San Francisco*, 119 Cal. 534; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696.

But the courts have refused to support a dedication for railroad purposes in favor of a private corporation. *Lake Erie & W. R (972)*

A dedication may be made subject to certain reservations or restrictions upon the freedom of use of the land by the public. Thus, a highway may be dedicated, to be used only at certain seasons,<sup>7</sup> or subject to a right in the dedicator or in others to use the land for certain purposes, or at certain times.<sup>8</sup> And the dedication of a highway may be, not for general highway purposes, but for use by pedestrians only, or for a certain class of vehicles.<sup>9</sup>

§ 422. Mode of dedication.

A dedication need not be by any formal act or declaration, but it is sufficient if in any way the owner of the land indicates an intention to devote the land to the public use.<sup>10</sup> The act of dedication is, however, affirmative in character, and the intention to dedicate must be clearly shown. Consequently, the mere acquiescence by the owner of land in the use thereof by the public does not of itself show a dedication.<sup>11</sup>

*Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355; *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514.

<sup>7</sup> *Hughes v. Bingham*, 135 N. Y. 347.

<sup>8</sup> *Mercer v. Woodgate*, L. R. 5 Q. B. 26, 3 Gray's Cas. 790; *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1; *City of Dubuque v. Benson*, 23 Iowa, 248; *Ayres v. Pennsylvania R. Co.*, 52 N. J. Law, 405.

<sup>9</sup> *Stafford v. Coyney*, 7 Barn. & C. 257; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696.

<sup>10</sup> *Quinn v. Anderson*, 70 Cal. 454; *Godfrey v. City of Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Williams v. Willey*, 16 Ind. 362; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; *Wright v. Tukey*, 3 Cush. (Mass.) 290.

<sup>11</sup> *Cunningham v. Hendricks*, 89 Wis. 632; *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561; *Steele v. Sullivan*, 70 Ala. 589; *Cyr v. Madore*, 73 Me. 53; *Hayden v. Stone*, 112 Mass. 346; *Stacey v. Miller*, 14 Mo. 478; *Lewis v. City of Portland*, 25 Or. 133, 42 Am. St. Rep. 772; *Weiss v. Borough of South Bethlehem*, 136 Pa. St. 294; *Worthington v. Wade*, 82 Tex. 26; *Hibberd v. Mellville* (Cal.) 83 Pac. 201; *Irwin v. Dixon*, 9 How. (U. S.) 10; *McKey v. Village of Hyde Park*, 134 U. S. 84.

But the fact that the public is allowed to use the land, when taken in connection with other facts, may be sufficient to show a dedication.<sup>12</sup> The fact that the owner of the land continues to pay taxes thereon,<sup>13</sup> or that he makes conveyances of the land,<sup>14</sup> may tend to rebut any presumption of dedication otherwise arising, and, in the case of land used as a highway, the fact that the owner erects bars and gates thereon are strong evidence in rebuttal of the rights of the public.<sup>15</sup> But while the intention to dedicate must be clearly shown, and the landowner himself may, according to some decisions, testify as to his intention,<sup>16</sup> he cannot, if his acts are such as to show an intention to dedicate, assert, after the making of expenditures by the municipality or individuals on the strength of such acts, that he had no intention to dedicate.<sup>17</sup>

As a general rule, if the owner of land who has laid it off

<sup>12</sup> *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *State v. Birmingham*, 74 Iowa, 407; *Schwerdtle v. Placer County*, 108 Cal. 589; *Tupper v. Huson*, 46 Wis. 646; *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561; *Weiss v. Borough of South Bethlehem*, 136 Pa. St. 294.

<sup>13</sup> *Mansur v. State*, 60 Ind. 357; *City of Topeka v. Cowee*, 48 Kan. 345; *Case v. Favier*, 12 Minn. 89 (Gil. 48); *Bauman v. Boeckeler*, 119 Mo. 189. But payment of taxes is but slight evidence against a dedication. See *Rhodes v. Town of Brightwood*, 145 Ind. 21; *Getchell v. Benedict*, 57 Iowa, 121; *Town of San Leandro v. Le Breton*, 72 Cal. 170; *City of Ottawa v. Yentzer*, 160 Ill. 509.

<sup>14</sup> *Hall v. City of Baltimore*, 56 Md. 187; *Case v. Favier*, 12 Minn. 89 (Gil. 48).

<sup>15</sup> *Jones v. Phillips*, 59 Ark. 35; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22; *Bidinger v. Bishop*, 76 Ind. 244; *State v. Green*, 41 Iowa, 693; *Com. v. Inhabitants of Newbury*, 2 Pick. (Mass.) 51.

<sup>16</sup> *Bidinger v. Bishop*, 76 Ind. 244; *Goodfellow v. Riggs*, 88 Iowa, 540; *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561; *Helm v. McClure*, 107 Cal. 199. Contra, *Perkins v. Fielding*, 119 Mo. 149.

<sup>17</sup> *Bigelow, Estoppel* (5th Ed.) 635; *Angell, Highways*, § 156; *Elliot, Roads & S.* §§ 125, 168.



into lots, with streets and alleys intersecting the same, sells his lots with reference to such streets and alleys, or with reference to a plat on which they appear, this constitutes a dedication to the public of the land covered by such streets or alleys.<sup>18</sup> By some decisions, however, such a sale of lots with reference to a street which has not yet been opened is not regarded as vesting any rights in the public,<sup>19</sup> though the purchasers of such lots would no doubt acquire a right of way in the land so referred to as a highway.<sup>20</sup> A mere description of land, upon the conveyance thereof, as bounded on a certain street, as extended, or as shown on a city map, does not involve a dedication of land for such street.<sup>21</sup>

The question whether a dedication has been made is usually one of fact for the jury under instructions as to what may constitute a dedication.<sup>22</sup>

— Statutory dedication.

In the statutes authorizing the record of a plat of a sub-

<sup>18</sup> *Irwin v. Dixon*, 9 How. (U. S.) 10, 81; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696; *Meier v. Portland Cable Ry. Co.*, 16 Or. 500; *City of Baltimore v. Frick*, 82 Md. 77; *Fossion v. Landry*, 123 Ind. 136; *Quicksall v. City of Philadelphia*, 177 Pa. St. 301; *Bartlett v. City of Bangor*, 67 Me. 460; *Briel v. City of Natchez*, 48 Miss. 423; *Elliott, Roads & S.* (2d Ed.) §§ 117, 118; *Jones, Easements*, § 420.

<sup>19</sup> *In re Eleventh Avenue*, 81 N. Y. 436; *Prescott v. Edwards*, 117 Cal. 298.

<sup>20</sup> See ante, § 320.

<sup>21</sup> *City of Omaha v. Hawver*, 49 Neb. 1; *Sandford v. City of Covington*, 13 Ky. Law Rep. 450, 14 S. W. 497; *Hancock v. City of Philadelphia*, 175 Pa. St. 124.

<sup>22</sup> *Grube v. Nichols*, 36 Ill. 92; *Wood v. Hurd*, 34 N. J. Law, 87; *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *City of Elgin v. Beckwith*, 119 Ill. 367; *Adams v. Iron Cliffs Co.*, 78 Mich. 278, 18 Am. St. Rep. 441; *Morse v. Zeize*, 34 Minn. 35; *McVee v. City of Watertown*, 92 Hun (N. Y.) 306; *Folsom v. Town of Underhill*, 36 Vt. 580.

division of land made by the owner thereof,<sup>23</sup> there is usually a provision that the strips or pieces of land which the owner, as indicated on the plat, intends shall be used by the public for streets, parks, and the like, shall be regarded as dedicated to the public. These statutes usually contain minute requirements in regard to the form and authentication of the plat, and, if these requirements are not complied with, the plat does not constitute a statutory dedication, though it may, in connection with sales of land with reference thereto, or other acts, constitute evidence of a common-law dedication.<sup>24</sup>

#### § 423. Acceptance.

In order that a dedication, or, rather, an offer of dedication, may be effective for the purpose of imposing burdens and liabilities upon the public authorities, it is necessary that it be accepted by the public,<sup>25</sup> and, by numerous decisions, such an acceptance is also necessary for the purpose of rendering the offer of dedication irrevocable by the dedicator.<sup>26</sup>

<sup>23</sup> See ante, § 389.

<sup>24</sup> *Marsh v. Village of Fairbury*, 163 Ill. 401; *Ruddiman v. Taylor*, 95 Mich. 547; *Campbell v. City of Kansas*, 102 Mo. 326; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440; *Pillsbury v. Alexander*, 40 Neb. 242; *Elliott, Roads & S.* § 114.

<sup>25</sup> *City & County of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 545; *City of Denver v. Denver & S. F. Ry. Co.*, 17 Colo. 583; *State v. Atherton*, 16 N. H. 203; *Rhodes v. Town of Brightwood*, 145 Ind. 21; *Booraem v. North Hudson County Ry. Co.*, 39 N. J. Eq. 465; *Downend v. Kansas City*, 71 Mo. App. 529; *Elliott, Roads & S.* (2d Ed.) § 150.

<sup>26</sup> *Holdane v. Trustees of Village of Cold Spring*, 21 N. Y. 474; *Prescott v. Edwards*, 117 Cal. 298; *Riley v. Hammel*, 38 Conn. 574; *City of Chicago v. Drexel*, 141 Ill. 89; *Littler v. City of Lincoln*, 106 Ill. 353; *Clendenin v. Maryland Construction Co.*, 86 Md. 80; *Baker v. Johnston*, 21 Mich. 319; *Hayden v. Stone*, 112 Mass. 346; *City of St. Louis v. St. Louis University*, 88 Mo. 155; *Price v. Inhabitants of Town of Breckenridge*, 92 Mo. 378; *Baldwin v. City of Buffalo*, 35 N. Y. 375; *Simmons v. Cornell*, 1 R. I. 519. *Contra*, (976)

According to some decisions, however, there is a presumption of acceptance if the dedication is purely beneficial in character, imposing no burden on the public,<sup>27</sup> and sometimes the statute is construed as dispensing with the necessity of acceptance.<sup>28</sup> The failure of the public to accept does not in any case affect the rights of the purchasers of lots with reference to the proposed highway or park to assert rights of user therein for the benefit of their property, since the vendor is estopped to deny the existence of such rights in their favor.<sup>29</sup>

The acceptance may be by formal action on the part of the state or municipal authorities,<sup>30</sup> but this is not necessary. Repairs or improvements made by, or under the authority of, officers who have general charge of highways, and power to lay them out, may show an acceptance of the dedication of a highway,<sup>31</sup> though repairs made by a merely sub-

Harrison County Sup'rs v. Seal, 66 Miss. 129; Point Pleasant Land Co. v. Cranmer, 40 N. J. Eq. 81.

<sup>27</sup> Archer v. Salinas City, 93 Cal. 43; Guthrie v. Town of New Haven, 31 Conn. 308; Wayne County v. Miller, 31 Mich. 447; Meier v. Portland Cable Ry. Co., 16 Or. 500; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143.

Such a presumption cannot, it seems, exist in the case of a highway, at least if it is opened, since there are liabilities to repair in connection with an opened highway. Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Wayne County v. Miller, 31 Mich. 447. Compare Meier v. Portland Cable Ry. Co., 16 Or. 500.

<sup>28</sup> Town of Lake View v. Le Bahn, 120 Ill. 92; Osage City v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186; Village of Weeping Water v. Reed, 21 Neb. 261; Carter v. City of Portland, 4 Or. 339; Reid v. Board of Education of Edina, 73 Mo. 295.

<sup>29</sup> Littler v. City of Lincoln, 106 Ill. 353; Henderson's Trustee v. Fahey, 7 Ky. Law Rep. 290; Prescott v. Edwards, 117 Cal. 298; Grogan v. Town of Hayward (C. C.) 4 Fed. 161. See ante, § 389.

<sup>30</sup> Little Rock v. Wright, 58 Ark. 142; City of Eureka v. Armstrong, 83 Cal. 623; White v. Smith, 37 Mich. 291; State v. Ather-ton, 16 N. H. 203; State v. City of Elizabeth, 35 N. J. Law, 359.

<sup>31</sup> Town of Lake View v. Le Bahn, 120 Ill. 92; Town of Fowler

(977)

ordinate officer would not have such an effect.<sup>33</sup> A mere user by the public is sufficient, according to numerous decisions, to justify a finding that there was an acceptance of the dedication.<sup>33</sup> The question whether there has been an acceptance is, like that of the offer of dedication, usually one of fact for the jury.<sup>34</sup>

§ 424. Effect of dedication.

At common law, a dedication for highway purposes does not affect the ownership of the land, but gives the public merely a right to use the land,<sup>35</sup> and such is *prima facie* the result of a dedication for a park, common, or square.<sup>36</sup> The

*v. Linquist*, 138 Ind. 566; *Wright v. Tukey*, 3 Cush. (Mass.) 290; *Kalme v. Harty*, 73 Mo. 316; *Du Bois Cemetery Co. v. Griffin*, 165 Pa. St. 81; *Folsom v. Town of Underhill*, 36 Vt. 580.

<sup>33</sup> *State v. Bradbury*, 40 Me. 154, 3 Gray's Cas. 810.

<sup>34</sup> *Hall v. Kauffman*, 106 Cal. 451; *City of Denver v. Denver & S. F. Ry. Co.*, 17 Colo. 583; *Green v. Elliott*, 86 Ind. 53; *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *Parsons v. Trustees of Atlanta University*, 44 Ga. 529; *Attorney General v. Tarr*, 148 Mass. 309; *Klenk v. Town of Walnut Lake*, 51 Minn. 381; *Holdane v. Village of Cold Spring*, 21 N. Y. 474; *State v. Borough of South Amboy*, 57 N. J. Law, 252; *Stewart v. Conley*, 122 Ala. 179; *Los Angeles Cemetery Ass'n v. City of Los Angeles (Cal.)* 32 Pac. 240. But see *Forbes v. Balenseifer*, 74 Ill. 183; *Gilder v. City of Brenham*, 67 Tex. 345; *White v. Bradley*, 66 Me. 254; *Morse v. Stocker*, 1 Allen (Mass.) 150.

<sup>35</sup> *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *Grube v. Nichols*, 36 Ill. 92; *Flack v. Village of Green Island*, 122 N. Y. 107; *Downend v. Kansas City*, 71 Mo. App. 529; *Folsom v. Town of Underhill*, 36 Vt. 580.

<sup>36</sup> *Wilder v. City of St. Paul*, 12 Minn. 192 (Gil. 116); *Charleston Rice Milling Co. v. Bennett*, 18 S. C. 254; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *City of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542. See ante, § 365.

<sup>37</sup> *City of Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 3 Gray's Cas. 799; *Raleigh County Sup'rs v. Ellison*, 8 W. Va. 308; *Attorney General v. Abbott*, 154 Mass. 323; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207.

statutes in regard to dedication by the recording of a plat frequently provide that the ownership of the land, and not a mere right of user, shall be vested in the public, or in the municipality in trust for the public.<sup>37</sup> Moreover, when land is dedicated for purposes which necessarily exclude the idea of its use by any and every individual, as in the case of a dedication for a school, or for charitable or religious uses, it would seem that, to make the dedication effective, exclusive rights of enjoyment equivalent to ownership must necessarily be vested in the corporation or association which carries out the purpose of the dedication.<sup>38</sup>

Whether the ownership or merely a right of user is vested in the public, the land cannot be aliened by the public authorities to individuals,<sup>39</sup> nor used for purposes other than those for which it was dedicated.<sup>40</sup>

A use of the land by the public authorities for purposes other than those contemplated in the dedication will be restrained upon the application of owners of other land in-

<sup>37</sup> See *City of Pella v. Scholte*, 21 Iowa, 463; *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75); *Gebhardt v. Reeves*, 75 Ill. 301; *Village of Grandville v. Jenison*, 84 Mich. 54; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440; *Elliott, Roads & S.* §§ 115, 149.

<sup>38</sup> See *Campbell v. City of Kansas*, 102 Mo. 326; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407.

<sup>39</sup> *City of Alton v. Illinois Transp. Co.*, 12 Ill. 33, 52 Am. Dec. 479; *Trustees of Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Cummings v. City of St. Louis*, 90 Mo. 259; *Corporation of Seguin v. Ireland*, 58 Tex. 183.

<sup>40</sup> *Board of Regents for Normal School Dist. No. 3 v. Painter*, 102 Mo. 464; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696; *Western Railway of Alabama v. Alabama G. T. R. Co.*, 96 Ala. 272; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Church v. City of Portland*, 18 Or. 73; *Com. v. Rush*, 14 Pa. St. 186.

jured by such use,<sup>41</sup> and a suit for this purpose may be maintained by the dedicator, it seems, in case the ownership of the land is still in him,<sup>42</sup> but not if, under the statute, the ownership is in the public.<sup>43</sup>

In case a right of user only is vested in the public, an abandonment of such user has the effect of leaving the land free from the burden thereof, in the original dedicator or those claiming under him.<sup>44</sup> And when, under the statute, the ownership is vested in the public, if the authorities entirely relinquish the use of the land, or the use for which the land was dedicated becomes impossible, the land reverts to the original dedicator, or to persons claiming under him.<sup>45</sup> An improper use of the land by the public authorities is not, however, sufficient of itself to terminate the rights of the public therein, whatever be the character of such rights.<sup>46</sup>

<sup>41</sup> *Huber v. Gazley*, 18 Ohio, 18, 3 Ohio St. 399; *Corporation of Seguin v. Ireland*, 58 Tex. 183; *Strange v. Hill & W. D. & R. Co.*, 54 Iowa, 669; *State v. Travis County*, 85 Tex. 435; *Church v. City of Portland*, 18 Or. 78; *Price v. Thompson*, 48 Mo. 363; *Lutterloh v. City of Cedar Keys*, 15 Fla. 306.

<sup>42</sup> *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127.

<sup>43</sup> *United States v. Illinois Cent. R. Co.*, 154 U. S. 225. See *Williams v. Milwaukee Industrial Exposition Ass'n*, 79 Wis. 524. *Contra*, *Warren v. City of Lyons City*, 22 Iowa, 351.

<sup>44</sup> *Mahoning County Com'rs v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60; *Town of Freedom v. Norris*, 128 Ind. 377; *Benham v. Potter*, 52 Conn. 248; *Thomsen v. McCormick*, 136 Ill. 135; *Bayard v. Hargrove*, 45 Ga. 342. See ante, § 365.

<sup>45</sup> *Board of Education of the Incorporated Village of Van Wert v. Inhabitants of Village of Van Wert*, 18 Ohio St. 221, 98 Am. Dec. 114; *Kent County Sup'rs v. City of Grand Rapids*, 61 Mich. 144; *City of Newark v. Watson*, 56 N. J. Law, 667; *State v. Travis County*, 85 Tex. 435; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Gebhardt v. Reeves*, 75 Ill. 301.

<sup>46</sup> *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478; *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127.

## **CHAPTER XXII.**

### **INTESTATE SUCCESSION.**

- § 425. General considerations.**
- 426. Descent to issue.**
- 427. Surviving consort as heir.**
- 428. Parent as heir.**
- 429. Descent to collateral kindred.**
- 430. Kindred of the half blood.**
- 431. Representation.**
- 432. Ancestral lands.**
- 433. Illegitimate children.**
- 434. Unborn children.**
- 435. Advancements.**

Upon the death of the owner of an estate of inheritance without leaving a will, it usually passes, subject to the rights of the surviving wife or husband, to persons designated by statute to take in such case by virtue of their relationship to the decedent, known as the latter's "heirs." An estate less than freehold passes, with other personal property, to the personal representative, to be distributed to the next of kin.

In this country, the children of an intestate, including any posthumous child, share his property equally, without reference to age and sex. An illegitimate child may usually, by force of statute, inherit from his mother, and from his father, if acknowledged by him.

If there are no children, the land passes to the parents, surviving consort, brothers and sisters, or other collateral kindred, the statutory provisions in this regard differing in the various states.

The statutes frequently provide that the children or descendants of a person who would have inherited in case he had sur-

vived the intestate shall have his share, by right of "representation."

Gifts made by the intestate, before his death, to one who subsequently becomes his heir, are, if so intended, treated as "advancements," and deducted from his share of the estate.

#### § 425. General considerations.

At common law, the real property belonging to decedents passed, in the absence of a valid will,<sup>1</sup> to persons standing in a position of blood relationship to them, according to certain established rules or "canons" of descent.<sup>2</sup> Personal property, on the other hand, including chattels real, passed to the administrator, appointed by the ecclesiastical court from among the intestate's next of kin, who usually, whether rightly or wrongly, appropriated to his own use all the surplus after payment of debts,<sup>3</sup> until by statute it was provided that such surplus should be distributed, in a certain manner, to the widow and children, or, in default of children, to the next of kin.<sup>4</sup>

In this country, the common-law distinction between real and personal property in this regard is still retained in a majority of states, though in some the executor is empowered, upon receiving authority from the court, to sell real property for the payment of debts.<sup>5</sup> In some states, however, the statute provides that real property shall pass to the personal representative, to be administered by him in the same manner as personal property,<sup>6</sup> and there is a growing

<sup>1</sup> But a will was valid, except by particular custom, only after the Statute of Wills. See ante, § 409.

<sup>2</sup> Litt. §§ 2-8; 2 Bl. Comm. 208 et seq.

<sup>3</sup> 2 Bl. Comm. 515; Holdsworth & V. Law of Succession, 132.

<sup>4</sup> 22 & 23 Car. II. c. 10.

<sup>5</sup> Post, § 462.

<sup>6</sup> 1 Woerner, Administration, §§ 276, 337; 1 Dembits, Land Titles, § 28; 11 Am. & Eng. Enc. Law, 1037 et seq.



tendency to obliterate the distinctions between the two classes of property as regards the powers of the executor or administrator in regard thereto. Generally, moreover, in this country, the persons to whom the real property passes upon the death of the owner intestate are approximately the same as those entitled to the personal property when distributed by the personal representative.

At common law, the right of succession to real property on the death of the owner was determined by the relationship of the claimant to the person who last died seised in deed of the land.<sup>7</sup> This rule has been changed in England by a statutory provision that descent shall be traced from the last purchaser of the land,<sup>8</sup> while in this country, in most, if not all, the states, descent is traced from the person last entitled to the land, regardless of whether he was seised, or whether he obtained the land by purchase or descent.<sup>9</sup>

At common law, as in England at the present day, the male issue inherits before the female, and, when there are two or more males of equal degree, the elder alone inherits, while females inherit all together. These rules, in so far

<sup>7</sup> Litt. § 3; 2 Bl. Comm. 209.

This common-law rule that seisin in deed makes the root of descent, in connection with the rule that persons of the half blood could not inherit, received what was regarded as its typical exemplification in the following case: If, on the death of a father seised in fee simple, leaving a son and a daughter by a first marriage, and a son by a second marriage, the elder son, the heir, entered and obtained seisin, and then died without issue, his half brother could not inherit, but the land passed to the sister, while, if he did not enter, the land would pass to the half brother. Hence the maxim, "*Possessio fratris de feodo simpliciter facit sororem esse haeredem*," and the rule that seisin in deed is necessary to make the root of descent was frequently referred to as the doctrine of "*possessio fratris*." See Litt. § 3; Williams, Seisin, 55; Challis, Real Prop. 187.

<sup>8</sup> 3 & 4 Wm. IV. c. 106, "The Inheritance Act."

<sup>9</sup> 4 Kent's Comm. 388; 1 Dembitz, Land Titles, § 30.

as they give priority to the male issue, and to the eldest of such issue, have been changed in all the states of this country, and all those in the same degree of relationship, whether male or female, share equally in the inheritance, the legislation in this country having followed in this respect, as it has frequently done in other respects, the provisions of the English statute as to the distribution of personal property.<sup>10</sup>

§ 426. Descent to issue.

In all the states, realty descends to all the legitimate children of deceased living at his death, and to the descendants of deceased children, these latter taking *per stirpes*, and not *per capita*,—that is, the descendants of each child taking what their ancestor would have taken had he been alive, without reference to their number.<sup>11</sup> In case all the children of the intestate are dead, the grandchildren and issue of deceased grandchildren inherit in their place. Such descendants take *per stirpes* if they are not all in the same degree of relationship to the intestate, as when some are grandchildren and some are great-grandchildren, while, if they are all in the same degree of relationship, they take in some states *per capita*, though in other states *per stirpes*.<sup>12</sup>

§ 427. Surviving consort as heir.

At common law, the surviving husband was entitled to an estate by curtesy in his wife's real property,<sup>13</sup> while he took an absolute interest in her personal property, including chat-

<sup>10</sup> 4 Kent's Comm. 379; 1 Stimson's Am. St. Law, § 3101 et seq. Occasionally a naked legal title still descends as at common law. As to estates tail, see ante, § 29.

<sup>11</sup> 1 Stimson's Am. St. Law, § 3101.

<sup>12</sup> 1 Stimson's Am. St. Law, §§ 3103, 3137; 1 Dembits, Land Titles, § 33.

<sup>13</sup> Ante, §§ 204-211.

tals real.<sup>14</sup> Apart from his estate by curtesy, her real property did not pass to him, even though otherwise it escheated for failure of heirs. In this country, at the present day, the surviving husband is frequently given a fee-simple interest in his wife's real property. In some, he is, if the wife leaves no issue, given a fee-simple interest in all her realty, while in some he is given one-half or two-thirds of her realty in such case. In a number of states, although there are children, he takes a share by descent, which is greater or less, according to the number of children who are to share in the intestate's property. In some states, moreover, he takes all the realty, if the wife leaves no issue, parent, nor brother or sister, and in most, if not in all, the states, he takes it if she leaves no kindred.<sup>15</sup>

The surviving wife had, at common law, her right of dower only out of his realty, while, by the English statute of distribution, she was given one-third of his personalty, unless he left no issue, in which case she had one-half.<sup>16</sup> In this country the widow is frequently, by statute, given a fee-simple interest in a portion of her husband's realty in certain contingencies, as when he leaves no issue, or no issue, parent, or brother or sister, or when he leaves no kindred, her rights corresponding, in a general way, to those of a surviving husband.<sup>17</sup> In a number of states, moreover, she is given a third or a half in fee simple, even though her husband leaves issue,<sup>18</sup> and this she is frequently allowed to take in lieu of any provisions made for her in his will.<sup>19</sup>

<sup>14</sup> Co. Litt. 351; 2 Bl. Comm. 434.

<sup>15</sup> 1 Stimson's Am. St. Law, §§ 3105, 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 66; 1 Dembitz, Land Titles, § 32.

<sup>16</sup> 2 Bl. Comm. 515.

<sup>17</sup> 1 Stimson's Am. St. Law, §§ 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 67; 1 Dembitz, Land Titles, § 32.

<sup>18</sup> 1 Stimson's Am. St. Law, § 3105.

<sup>19</sup> 1 Stimson's Am. St. Law, § 3262.

**§ 428. Parent as heir.**

At common law, land could never lineally ascend,—that is, it could not pass to the father or grandfather of the decedent upon the latter's death, though it could pass to his uncle, the brother of his father, and might from him pass to the father.<sup>20</sup> This rule has been entirely changed in this country, and the statute frequently provides that the decedent's property shall pass to his father or mother in certain cases. Thus, in some states it is provided that, if the intestate leave no descendants, his property shall pass to his father, or to the father or mother, or to the mother, together with brothers and sisters, though in some states the brothers and sisters of deceased are preferred to either of his parents.<sup>21</sup>

**§ 429. Descent to collateral kindred.**

In case the intestate leaves no issue surviving, and the realty does not pass entirely to the surviving consort, or to one or both of the parents, under the statutes referred to above, it descends among the collateral kindred of the intestate,—that is, to persons not lineally related to him, but related by reason of the fact that they are descended from the same ancestor. Among such collateral kindred the brothers and sisters and their descendants hold the first place, and are sometimes, by the terms of the statute, preferred to the parents of deceased.<sup>22</sup>

As between other collateral kindred not particularly specified in the statute of descent, those standing in an equal degree of relationship to the intestate share the inheritance to the

<sup>20</sup> Litt. § 3. Different explanations of the origin of this rule have been given. See 2 Bl. Comm. 211 et seq.; 2 Pollock & Maitland, Hist. Eng. Law, 287 et seq.; Holdsworth & Vickers, Law of Succession, 152.

<sup>21</sup> 1 Stimson's Am. St. Law, §§ 3107, 3111, 3117; 1 Woerner, Administration, § 68.

<sup>22</sup> 1 Stimson's Am. St. Law, §§ 3107, 3111, 3112, 3121.

exclusion of those in a more distant degree. In calculating the degrees of relationship for this purpose, the common law adopted the rule that the intestate and a particular claimant were to be regarded as in the degree of relationship to one another which corresponded to the number of degrees between their common ancestor and the one of his two descendants who was most distant from him. So, if the claimant and intestate were both grandchildren of the common ancestor, they were regarded as related to one another in the second degree, while, if one was a grandchild and the other a great-grandchild, they were related in the third degree. By the civil-law method of computing relationship, on the other hand, the degrees between the common ancestor and the intestate are added to those between the former and the claimant, in order to ascertain the degree of relationship; and so two grandchildren of a common ancestor are related in the fourth degree, and a grandchild and a great-grandchild in the fifth degree.<sup>23</sup>

In this country, in the majority of the states, the statute provides that the degrees of kindred shall be computed according to the rule of the civil law, though, in a few, that of the common law is adopted.<sup>24</sup> The preference shown for the civil law is in accord with the general tendency to follow the English statute of distributions, which was construed with reference to the civil-law rule.<sup>25</sup>

#### § 430. Kindred of the half blood.

At common law, in order that one might inherit as a collateral kinsman of the intestate, it was necessary that they

<sup>23</sup> 2 Bl. Comm. 206 et seq.

<sup>24</sup> 1 Stimson's Am. St. Law, §§ 8121, 8139; 1 Woerner, Administration, § 72.

<sup>25</sup> See 2 Bl. Comm. 516, and Christian's note; Lloyd v. Tench, 2 Ves. Sr. 212.

both be descended not only from the same person, but from the same marriage of that person,—that is, the claimant must have been a kinsman of the whole, and not of the half, blood. So, one could not inherit from his half brother, even though the land had descended from their common parent to such half brother, and though otherwise the land would escheat for want of heirs.<sup>26</sup> This rule has been changed by statute in most, if not all, the states, but the statutory provisions on the subject are very divergent. In a few states, kindred of the half blood have the same rights of succession as those of the whole blood; and in some they inherit half shares only as against the whole shares passing to those of the whole blood. In a number of states, while the distinction between the whole and half blood no longer exists in connection with land purchased by the intestate, it does exist as to ancestral land, so as to exclude from any share therein collateral kin not of the blood of the ancestor from whom the land was derived. In a few states the half blood does not take except in default of kindred of the whole blood in the same degree of relationship.<sup>27</sup>

§ 431. Representation.

The statutes frequently provide that the descendants of a person deceased shall inherit the share which would have passed to such person had he survived the intestate, the descendants being then said to take “by representation.” Since the statutes expressly give the right of succession to the direct descendants of the intestate, and declare whether they are to take *per stirpes* or *per capita*, the application of the principle of representation is not usually called for in their favor. As regards collateral kindred, there is in some states

<sup>26</sup> Litt. §§ 6-8; 2 Bl. Comm. 227.

<sup>27</sup> 1 Stimson's Am. St. Law, § 3133; 1 Woerner, Administration, § 70; 1 Dembits, Land Titles, § 87.

a general provision that any descendants of one deceased shall take the share which such person would have taken, but, more usually, the right of representation among collaterals is restricted to the descendants of a deceased brother or sister of the intestate, who are thus given the right to stand in the place of the former as regards the inheritance, and share the property of the intestate with any surviving brothers and sisters or descendants of other deceased brothers and sisters. Thus, if the intestate left surviving a brother, and the grandchildren of a deceased sister, though such grandchildren could not otherwise assert any right to share the intestate's property with the surviving brother, since he stands in a closer degree of relationship to the intestate, they can do so by reason of their right of representation. In some states, however, the right of representation is not conceded to all descendants of a deceased brother or sister, but is restricted to the children of such brother or sister, the result of which would be, in the case stated above, that the surviving brother would take all the intestate's property, to the exclusion of the grandchildren of the deceased brother, though the children of the deceased brother would have been entitled.<sup>28</sup> The statutes allowing representation have no application, it seems, except for the purpose of entitling to a share of the inheritance a person or persons who would otherwise take nothing, owing to the existence of persons more closely related to the intestate, and so the descendants of deceased brothers and sisters of intestate, if all in the same generation, take not by representation, but directly as heirs. When the descendants of one deceased take by representation, however many there be of them, they can, all together, take only the share which their ancestor would have taken,—that is, they take *per stirpes*, although, if they had taken in

<sup>28</sup> 1 Stimson's Am. St. Law, §§ 3103, 3132; 1 Woerner, Administration, § 71; 1 Dembits, Land Titles, § 35.

their own right, and not by representation, they would have taken *per capita*.

§ 432. Ancestral lands.

At common law, in case of failure of lineal descendants of the person last seised, the land passed to his collateral relations, provided only they were of the blood of the first purchaser, by whom the land was brought into the family.<sup>29</sup> This rule of the common law survives to some extent in the statutory provisions, found in a number of states, to the effect that, if the land came to the intestate otherwise than by purchase, or, in some states, if it came to him either by descent or by gift or devise from an ancestor, it shall pass, not to his kindred generally, but only to such kindred as are of the blood of the ancestor from whom it was derived by him.<sup>30</sup> Of the same nature is the provision found in many states that, upon the death of a minor unmarried, leaving property inherited from either parent, it shall go to the other children of the same parent.<sup>31</sup> The word "ancestor," used to describe the person from whom the land must have come in order to be within the operation of the provision, refers to any person, whether lineally or collaterally related to the intestate, from whom the land might pass to the latter under the laws of descent, and from whom the land did in fact actually pass directly to the intestate.<sup>32</sup>

§ 433. Illegitimate children.

At common law, a child born out of wedlock was regarded as *filius nullius*, and as consequently bearing no relationship

<sup>29</sup> Litt. § 4; 2 Bl. Comm. § 220.

<sup>30</sup> 1 Stimson's Am. St. Law, § 3107.

<sup>31</sup> 1 Dembitz, Land Titles, § 86; 1 Stimson's Am. St. Law, § 3101.

<sup>32</sup> *Buckingham v. Jacques*, 37 Conn. 402; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Prickett's Lessee v. Parker*, 3 Ohio St. 394; *Brower v. Hunt*, 18 Ohio St. 311; *Morris v. Potter*, 10 R. L. 58.



to any persons other than his own offspring. Consequently he could be the heir neither of his own father or mother, nor of any other person, and no persons could inherit from him except the heirs of his body.<sup>32</sup> This rule has been changed generally in this country by various statutory provisions. In the first place, the state statute frequently provides that the intermarriage of the parents after the birth of the child, or such intermarriage when accompanied by the father's acknowledgment of the child, shall render the child legitimate, and in some states the acknowledgment by the father without intermarriage has this effect. In some states the statute provides, however, that an acknowledgment of the child shall not enable the child to inherit from the kindred of the father.<sup>34</sup>

In most states, by statute, the illegitimate children inherit from the mother equally with the legitimate children, and in some states they inherit also from her kindred, though in a majority of the states, while inheriting from the mother, they do not inherit from her kindred. In a few states they inherit from the mother only in case of default of lawful issue.<sup>35</sup> The property of an illegitimate child will descend to the surviving husband or wife, or to the children, as in the case of any other person dying intestate. In default of such others entitled to inherit, the decedent's property goes usually, under the statute, to his mother and her kindred.<sup>36</sup>

#### § 434. Unborn children.

At common law, a child *en ventre sa mere* at the time of

<sup>32</sup> 1 Bl. Comm. 459; 2 Kent's Comm. 212.

<sup>33</sup> 1 Stimson's Am. St. Law, §§ 6631, 6632.

<sup>34</sup> 1 Stimson's Am. St. Law, § 2151; 1 Woerner, Administration, § 75.

<sup>35</sup> 1 Stimson's Am. St. Law, § 2154; 1 Woerner, Administration, § 75.

the death of the intestate is regarded as living for the purpose of taking from him by descent.<sup>87</sup> This rule is confirmed by statute in many states, but in some the statute applies only to a child of the intestate born after his death, and, in others, only to posthumous children descended from him.<sup>88</sup>

### § 435. Advancements.

An advancement is a giving, by anticipation, to a child or other relative, of a part or the whole of what the donee would receive on the death of the donor intestate, with the result, generally speaking, that the amount thereof is deducted in determining the share of such donee after the donor's death. This doctrine of advancements is based exclusively on statutes, and these differ very considerably in the different states. In some states the statute applies only in the case of an advancement to a child or children of the intestate, so that a gift to a grandchild would not be charged against him as an advancement. In some states a gift to any descendant of the intestate is regarded as an advancement to him, for the purpose of determining his share of the inheritance, and in a number of states a gift to a child or other descendant is, in case such child or descendant dies before the donor, charged against the share which he would have taken, and so deducted from the share taken by his children or descendants. In a few states a gift to any possible heir is regarded as an advancement in case the donee turns out to be the actual heir.<sup>89</sup>

<sup>87</sup> 4 Kent's Comm. 412; Challis, Real Prop. 111; Doe d. Clarke v. Clarke, 2 H. Bl. 399.

<sup>88</sup> 1 Stimson's Am. St. Law, §§ 2844, 3135, 3136; 1 Woerner, Administration, § 74.

<sup>89</sup> 1 Stimson's Am. St. Law, §§ 3163, 3164, 3165; 2 Woerner, Administration, § 559.

The question whether a gift to a possible heir or distributee is to be regarded as an advancement is a question as to the intention of the donor, and, apart from statute, a gift to an adult child, if of substantial value, is usually presumed to be an advancement.<sup>40</sup> In a number of states there are statutory provisions to the effect that the gift, in order to constitute an advancement, must be acknowledged in writing as an advancement by the donee, or must be expressed in the gift or grant to be made as such, or must be so charged by the donor in writing.<sup>41</sup> In some states it is provided that maintaining, educating, or giving money to a minor child, without any view to a portion or settlement for life, is not an advancement.<sup>42</sup> The statute in many states declares that, if the amount of the advancement exceeds the share to which the donee would be entitled on the death of the donor intestate, though he need refund no part of what he has received, he can receive nothing further from the intestate's estate. In case the advancement is not equal to the share to which he is entitled, the donee, in a number of states, is given so much of the intestate's property as will make all the shares equal; and in some states it is provided that the advancement is to be charged against the share to which the donee is entitled in either the real or the personal property, according as the advancement may have been the one or the other, and that, if the advancement would exceed the amount to which he may be entitled out of either class of property, his share in the other class shall be proportionally reduced. In some states it is provided in terms that the donee must, in order to obtain his proper share in the intestate's property, bring the amount of the advancement into "hotch pot,"—

<sup>40</sup> 1 Woerner, Administration, § 555.

<sup>41</sup> 1 Stimson's Am. St. Law, § 3162.

<sup>42</sup> 1 Stimson's Am. St. Law, § 3161.

that is, he must contribute to the common fund the amount of his advancement, and shall then receive therefrom the same amount as if the advancement had not been made.<sup>43</sup>

The statutes in regard to advancements have no application, as a general rule, in the case of a partial intestacy, since it is presumed that the will would have mentioned any gifts which it was intended should be regarded as advancements.<sup>44</sup>

<sup>43</sup> 1 Stimson's Am. St. Law, § 3163.

<sup>44</sup> 1 Woerner, Administration, § 553; 1 Dembits, Land Titles, § 242.

## **CHAPTER XXIII.**

### **ADVERSE POSSESSION OF LAND.**

- § 436. General considerations.**
- 437. Duration and continuity of possession.**
- 438. Tacking.**
- 439. Personal disabilities.**
- 440. Exception in favor of the sovereign.**
- 441. Actual and visible possession.**
- 442. Exclusiveness of possession.**
- 443. Hostile character of possession.**
- 444. Extent of possession.**

By the adverse possession of land belonging to another, for the period prescribed by statute for the bringing of an action to recover land, not only the right to bring such action is barred, but the person in possession is usually regarded as acquiring the ownership of the land in fee simple.

The adverse possession must be continuous and uninterrupted for the statutory period, but it need not be by the same person during all that period, it being sufficient that there be a privity between the persons successively in possession.

If the owner of the land is under a disability at the time of the beginning of the adverse possession, so as to be unable to sue on account thereof, he is, by the statute, given a certain period after the expiration of the disability for the bringing of an action against the person in possession. The statutory period, moreover, does not, in the absence of a specific provision to the contrary, run in favor of a person in possession of land belonging to the sovereign.

The possession, in order to have the effect of barring the right of action, or of transferring the ownership, must be actual, visible, and exclusive, and must be hostile to the owner,

—that is, it must be under a claim of right, and such as to exclude any recognition of the rights of the true owner.

One in adverse possession of part of a tract of land, to all of which he has color of title, is regarded as in constructive possession of the whole tract, as against the owner who is not in possession of any part thereof.

### § 436. General considerations.

There were, even in early times, numerous statutes adopted in England limiting the time within which an action could be brought on account of a disseisin of land, but these differed from the statutes of the present day in that, instead of naming a certain number of years before the institution of the action beyond which no disseisin could be alleged, they named a certain year back of which the pleader could not go.<sup>1</sup> The last statute which adopted this method of fixing the period of limitation was St. Westminster I. c. 39,<sup>2</sup> which forbade the seisin of an ancestor to be alleged in a writ of right prior to the beginning of the reign of Richard I. (A. D. 1189), and for other writs fixed the year 1217. Thus, under this statute, at the time of its passage, the period of limitation for some writs was fifty-eight years, and this period was lengthened, as time went on without any change in the law, so that it exceeded three hundred years when, by 32 Hen. VIII. c. 2,<sup>3</sup> a change was made, and the modern method was adopted of fixing a certain number of years with-

<sup>1</sup> Thus the earliest date at which the seisin of an ancestor could be alleged in a writ of right was the beginning of the reign of Henry I. (A. D. 1100), until this was changed by the Statute of Merton to the beginning of the reign of Henry II. (A. D. 1154). Other dates were fixed for other writs.

<sup>2</sup> 3 Edw. I. (A. D. 1275).

<sup>3</sup> A. D. 1540. The disadvantages of the long period of limitation was, however, to a great extent avoided by the system of levying fines. See Lightwood, *Possession of Land*, 156.

in which the action must be brought. This last statute, however, applied only to the old real actions, and, the action of ejectment having to a great extent taken their place, St. 21 Jac. I. c. 16,<sup>4</sup> was passed, which provided that no person should thereafter make any entry into any lands, tenements, or hereditaments but within twenty years next after his or their right or title shall have accrued. This statute, while not in terms applying to the action of ejectment, did so in effect by barring the right of entry on which the action depended. This statute of James I. is that on which the statutes in this country are more or less modeled. It has been superseded in England by later statutes, which tend to bar an action to recover land after the statutory period has elapsed without reference to the character of the possession of the defendant in the action.<sup>5</sup> In that country the problem is much simplified, however, by the absence of wild and unsettled lands. In this country, many perplexing and difficult questions have arisen under the statutes as to the character of the possession of the land which one must have for the statutory period in order that the rights of the original owner may be barred. A possession for the statutory period which is sufficient to bar an action to recover the land is known as "adverse possession," and one who thus acquires rights in the land as against the former owner is said to acquire title by "adverse possession."

While occasionally the state statutes may expressly provide that a failure to re-enter or bring an action to recover the land within the statutory period shall operate to transfer the title to the person in possession, they almost invariably in terms bar the remedy merely. They have, however, with but few, if any, exceptions, been construed as operating to

<sup>4</sup> A. D. 1623.

<sup>5</sup> 3 & 4 Wm. IV. c. 27; 37 & 38 Vict. c. 57,—*"Real Property Limitation Acts"* of 1833 and 1874.

transfer the title to the wrongful possessor, enabling him to assert his ownership in an action of ejectment or otherwise against the whole world,<sup>6</sup> including the original owner,<sup>7</sup> and as rendering necessary a legal conveyance in order to reassert the ownership in the latter, after the lapse of the statutory period.<sup>8</sup>

The adverse possession which is required in order to divest the title of the true owner, under the construction placed upon the Statute of James as well as upon the state statutes, corresponds in a general way to disseisin at the common law. It may, however, occasionally exist under circumstances which would not have given rise to a disseisin, and the use of the latter term, as well as of the correlative expressions "disseisor" and "disseisee," while permissible and highly convenient, is not always absolutely accurate according to the old law.

#### § 437. Duration and continuity of possession.

The Statute of James barred the right of entry at the end of twenty years after the right or title accrued, and this

<sup>6</sup> *Baker v. Oakwood*, 123 N. Y. 16, *Finch's Cas.* 1053; *Hughes v. Graves*, 39 Vt. 359, 3 *Gray's Cas.* 40; *Harpending v. Reformed Protestant Dutch Church of New York City*, 16 Pet. (U. S.) 456; *Sherman v. Kane*, 86 N. Y. 57; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Schock v. Falls City*, 31 Neb. 599; *Jacks v. Chaffin*, 24 Ark. 534; *Mitchell v. Campbell*, 19 Or. 198; *Gulf, C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 529; *McDuffee v. Sinnott*, 119 Ill. 449; *Sutton v. Pollard*, 96 Ky. 640; *Way v. Hooton*, 156 Pa. St. 8.

<sup>7</sup> *Sharon v. Tucker*, 144 U. S. 533; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Barnes v. Light*, 116 N. Y. 34; *Hall v. Hall*, 27 W. Va. 468, 480.

<sup>8</sup> *Inhabitants of School Dist. No. 4, in Winthrop, v. Benson*, 31 Me. 381, 3 *Gray's Cas.* 38, *Finch's Cas.* 1059; *Riggs v. Riley*, 118 Ind. 208; *Allen v. Mansfield*, 82 Mo. 688; *Bell v. Adams*, 31 N. C. 118; *Bruce v. Washington*, 80 Tex. 368; *Todd v. Kauffman*, 3 *Mackey (D. C.)* 304.



period has been adopted in a number of the states of this country, while in a few a greater period is required to bar the right of action, and in some a much less period.\*

In a number of the states there are statutory provisions for what are known as "short limitations," in effect considerably reducing the ordinary period in cases when the adverse possession is by one claiming under "color of title,"—that is, by one who has, in taking possession, acted on the strength of a conveyance or judicial decree purporting to vest the title in him, but which, for some reason, fails to do so. In some states, such a provision exists in favor of one occupying under a particular class of conveyance or decree, as when it is provided that a junior patent from the state under which one occupies cannot be attacked after a certain number of years, and such a provision is frequently found in favor of a purchaser at certain classes of judicial sales, or at tax sales. The possession under such a "short limitation" act is usually required to be accompanied by the payment of taxes on the land by the person in possession.<sup>10</sup>

The adverse possession must continue without interruption for the statutory period, and, if an interruption occurs, and possession is thereafter resumed, the limitation period commences to run only from the time of such resumption.<sup>11</sup> The interruption of continuity may result from the cessation by the person in possession of his exercise of acts of possession or ownership over the land,<sup>12</sup> but the mere fact that

\* See Wood, Limitations, § 254.

<sup>10</sup> The "short limitation" acts of the several states are well summarized in 2 Deimbitz, Land Titles, § 186.

<sup>11</sup> *Steeple v. Downing*, 60 Ind. 478; *Ross v. Goodwin*, 38 Ala. 390; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Old South Soc. v. Wainwright*, 156 Mass. 115; *Bliss v. Johnson*, 94 N. Y. 235.

<sup>12</sup> *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Stephens v. Leach*, 19 Pa. St. 262; *Nixon v. Porter*, 38 Miss. 401; *Sharp v.*

the acts of possession are not continuous, or that the owner does not continue in actual occupancy, does not necessarily show an interruption of the possession, this depending on the character of the acts necessary to constitute actual possession, and the circumstances of the particular case.<sup>13</sup>

A recognition of the true owner's right to possession is sufficient to break the continuity of the possession.<sup>14</sup> The adverse possession is also interrupted if the owner enters on the land, provided this is done openly and under claim of right, with a clearly asserted purpose of taking possession,<sup>15</sup> as it is by the enforcement of or submission to a judgment in an action of ejectment brought by the owner, though a mere recovery in ejectment, without any action with reference thereto, does not have such an effect.<sup>16</sup>

### § 438. Tacking.

The question quite frequently arises whether one who has not been in possession of the land for the statutory period

Johnson, 22 Ark. 79; Barrell v. Title Guarantee & Trust Co., 27 Or. 79.

<sup>13</sup> Hughes v. Pickering, 14 Pa. St. 297, Finch's Cas. 1040; Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Crispen v. Hannavan, 50 Mo. 536.

<sup>14</sup> Nebraska Ry. Co. v. Culver, 35 Neb. 143; City of St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330; Lovell v. Frost, 44 Cal. 471; Litchfield v. Sewell, 97 Iowa, 247; Ingersoll v. Lewis, 11 Pa. St. 212, 51 Am. Dec. 536; Williams v. Scott, 122 N. C. 545; Warren v. Bowdran, 156 Mass. 280.

<sup>15</sup> Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Bowen v. Guild, 130 Mass. 121, 3 Gray's Cas. 86; Altemas v. Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494; Musser-Sauntry Land, Logging & Mfg. Co. v. Tozer, 56 Minn. 443; Evitts v. Roth, 61 Tex. 81; Campbell v. Wallace, 12 N. H. 362, 37 Am. Dec. 219.

<sup>16</sup> Moore v. Greene, 19 How. (U. S.) 69; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Bishop v. Truett, 85 Ala. 376; McGrath v. Wallace, 85 Cal. 622; Gould v. Carr, 33 Fla. 523; Forbes v. Caldwell, 39 Kan. 14; Mabary v. Dollarhide, 98 Mo. 198, 14 Am. St. Rep. 639.

may add or "tack" to his possession that of another person, previously in possession, in order to make up such period, or, in other words, whether recovery of the land by the original owner is prevented by adverse possession for the statutory period, irrespective of whether this adverse possession was by one person for the whole period, or by different persons in succession. That an heir is entitled to tack his ancestor's possession to his own is generally conceded,<sup>17</sup> and the great weight of authority is to the effect that one in adverse position can transfer his rights, such as they are, to another, by a conveyance of the land, or otherwise, so as to enable such other to tack his predecessor's possession to his own,<sup>18</sup> though there are a few decisions to the effect that the disseisor has no rights thus capable of voluntary transfer.<sup>19</sup> Even a purchaser at execution sale has been allowed to tack the possession of the execution defendant.<sup>20</sup> A merely oral transfer of the previous predecessor's rights is usually regarded as sufficient.<sup>21</sup> It is necessary, however, that there be a trans-

<sup>17</sup> *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 124; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173, 3 Gray's Cas. 117; *Williams v. McAliley*, Cheves (S. C.) 200; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Fugate v. Pierce*, 49 Mo. 441; *Rowland v. Williams*, 23 Or. 515.

<sup>18</sup> *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173, 3 Gray's Cas. 117; *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 124; *Gage v. Gage*, 30 N. H. 420; *Frost v. Curtis*, 172 Mass. 401. And see cases cited post, note 21.

<sup>19</sup> *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347, 3 Gray's Cas. 115; *King v. Smith*, Rice (S. C.) 10; *Garrett v. Weinberg*, 48 S. C. 28.

<sup>20</sup> *Hall v. Hall*, 27 W. Va. 468; *Miller v. Bumgardner*, 109 N. C. 412. See *Doe d. Hester v. Coats*, 22 Ga. 56.

<sup>21</sup> *Hughes v. Pickering*, 14 Pa. St. 297, Finch's Cas. 1040; *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 125; *Faloon v. Simshauser*, 130 Ill. 649; *Davock v. Nealon*, 58 N. J. Law, 21; *Crispen v. Hannavan*, 50 Mo. 536; *Sherin v. Brackett*, 36 Minn. 152; *Com. v. Gibson*, 85 Ky. 666; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499; *Rowland v. Williams*, 23 Or. 515. But see *Sawyer v. Kendall*, 10 Cush.

fer or some sort of contractual connection between the respective possessions in order that they may be tacked, and one who disseises another who is already in adverse possession cannot tack the former's possession to his own.<sup>22</sup> There can, of course, be no tacking if the possession of one person does not immediately follow upon that of the other, since in that case the element of continuity is absent.<sup>23</sup>

It has been held that one claiming as remainderman under a will may tack to his own possession the possession of the testator and the life tenant under the will, since the possession of each is under the same title.<sup>24</sup> The possession of the widow of the owner has been regarded as not so connected with that of the latter as to entitle her to tack his possession to her own after his death.<sup>25</sup> Under statutes, however, by which she is given certain rights of possession even before the assignment of dower, their possessions may be tacked.<sup>26</sup>

(Mass.) 241, 3 Gray's Cas. 121; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

<sup>22</sup> *Sherin v. Brackett*, 36 Minn. 152, Finch's Cas. 1007; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246; *Locke v. Whitney*, 63 N. H. 597; *Smith v. Chapin*, 31 Conn. 531; *City & County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Crispen v. Hannavan*, 50 Mo. 536; *Heflin v. Burns*, 70 Tex. 347; *Jarrett v. Stevens*, 36 W. Va. 445; *Low v. Schaffer*, 24 Or. 239; *Erck v. Church*, 87 Tenn. 580. But see *Scales v. Cockrill*, 3 Head (Tenn.) 432; *Davis v. McArthur*, 78 N. C. 357.

<sup>23</sup> See *Winslow v. Newell*, 19 Vt. 164; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; *Warren v. Fredericks*, 76 Tex. 647; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226. See also, *Hughs v. Pickering*, 14 Pa. St. 297, Finch's Cas. 1040.

<sup>24</sup> *Haynes v. Boardman*, 119 Mass. 414, Finch's Cas. 1042. Contra, *Austin v. Rutland R. Co.*, 45 Vt. 215.

<sup>25</sup> *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Robinson v. Allison*, 124 Ala. 325. But see *Mills' Heirs v. Bodley*, 4 T. B. Mon. (Ky.) 248; *Hickman v. Link*, 97 Mo. 482.

<sup>26</sup> *McEntire v. Brown*, 28 Ind. 347.

## § 439. Personal disabilities.

The statute of limitations invariably extends the period for bringing an action to recover land in case the plaintiff was under disability at the time the right of action accrued. The Statute of James I. contained such an exception in favor of (1) persons under twenty-one years, (2) *femes covert*, (3) persons *non compos mentis*, (4) persons imprisoned, and (5) persons "beyond the seas."

The saving clause in favor of infants is retained in most, if not all, of the state statutes, though the time at which infancy ceases differs in different states. The saving in favor of married women also still exists in the majority of states, though in some it has been expressly abolished, in view of legislation enabling a married woman to sue alone. The saving in favor of persons *non compos mentis* is usually retained, and those in favor of persons imprisoned and of persons "beyond the seas," or, what is regarded as equivalent, "absent from the United States," are also frequently to be found. In some states, moreover, there are exceptions in favor of alien enemies. The statutes differ greatly as to the extent of time after the removal of the disability within which an action may be brought, some naming the full period of limitation, and others naming a much shorter period.<sup>27</sup>

These exceptions in statutes limiting the time for the recovery of land, as well as in those applicable to personal actions only, are usually construed as applicable only to a disability existing at the time of the accrual of the right of action, and the fact that a disability in the owner to sue arises after such accrual does not affect the running of the statute.<sup>28</sup>

<sup>27</sup> The statutory provisions as to disabilities are summarized in Wood, *Limitations* (3d Ed.) § 237.

<sup>28</sup> *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476, *Finch's Cas.* 1047; *Doe d. Caldwell v. Thorp*, 8 Ala. 253; *Currier v. Gale*, 3 Allen (Mass.) 328; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235.

Accordingly, if the right of action has once existed in favor of a person, the fact that it passes by descent to one under the disability of infancy does not extend the time for bringing suit.<sup>29</sup> And if a disability existing at the time of the disseisin or other accrual of the cause of action is once removed, the fact that a subsequent disability intervenes, as when an infant, after arriving at age, marries, such subsequent disability does not operate in her favor.<sup>30</sup>

If the owner of the land is under two or more disabilities at the time of the accrual of the cause of action, he may take advantage of both, or, rather, of the one which endures the longest;<sup>31</sup> but if only one disability exists at that time, he can take advantage of that alone, and the fact that, before such disability terminates, another intervenes, as when an infant *feme sole* marries, does not extend the time for the recovery of the land, or, as it is frequently stated, disabilities cannot be "tacked."<sup>32</sup> Likewise, the disabilities of different persons cannot be tacked, in order to make up the

<sup>29</sup> *Harris v. McGovern*, 99 U. S. 161, affirming 2 Sawy. 515, Fed. Cas. No. 6,125; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Burdett v. May*, 100 Mo. 13; *Ray v. Thurman's Ex'r*, 13 Ky. Law Rep. 3, 15 S. W. 1116; *Lynch v. Cox*, 23 Pa. St. 265; *Jackson v. Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Oates v. Beckworth*, 112 Ala. 356; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 34. Contra, *Everett's Ex'rs v. Whitfield's Adm'rs*, 27 Ga. 123.

<sup>30</sup> *Gherson v. Brooks* (Ark.) 5 S. W. 239; *Kell v. Healey*, 34 Ill. 104, 25 Am. Rep. 434.

<sup>31</sup> *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 423; *Butler v. Howe*, 13 Me. 397; *North v. James*, 61 Miss. 761; *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530.

<sup>32</sup> *Bunce v. Wolcott*, 2 Conn. 27, 3 Gray's Cas. 104; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476, *Finch's Cas.* 1047; *Duckett v. Crider*, 11 B. Mon. (Ky.) 188; *White v. Clawson*, 79 Ind. 188; *Cozzens v. Farnan*, 30 Ohio St. 491, 27 Am. Rep. 470; *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325; *Nutter v. De Rochemont*, 46 N. H. 80; *Thompson v. Smith*, 7 Serg. & R. (Pa.) 209. Contra, *Miller v. Bumgardner*, 109 N. C. 412.

statutory period; and so, if the owner is under a disability from the time of the accrual of the disability till his death, his infant heir cannot tack his own disability to that of his ancestor, in order to extend the statutory period.<sup>33</sup>

§ 440. Exception in favor of the sovereign.

According to the maxim *Nullum tempus occurrit regi*, the adverse possession of land belonging either to the United States or a state cannot, unless the statute otherwise provides, divest the government title.<sup>34</sup> The statutory limitation begins, however, to run in favor of one in hostile possession of public land so soon as its ownership passes to a grantee of the government. In determining the time at which the private ownership begins for this purpose, the decisions are not in accord, some holding that it does not begin until the issue of the patent,<sup>35</sup> while others consider it as beginning so soon as, by payment for the land, the individual has become entitled to a patent.<sup>36</sup>

The question whether the statute runs against a municipal or *quasi* municipal corporation, so that adverse possession of its land for the statutory period will bar recovery by the mu-

<sup>33</sup> *Dowell v. Tucker*, 46 Ark. 438; *Griswold v. Butler*, 3 Conn. 227; *Pim v. City of St. Louis*, 122 Mo. 654; *Henry v. Carson*, 59 Pa. St. 297; *Jackson v. Houston*, 84 Tex. 622.

<sup>34</sup> *Gibson v. Chouteau*, 18 Wall. (U. S.) 92; *Wagnon v. Fairbanks*, 105 Ala. 527; *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678; *Doran v. Central Pac. R. Co.*, 24 Cal. 245; *Twining v. City of Burlington*, 68 Iowa, 284; *Hall v. Gittings' Lessee*, 2 Har. & J. (Md.) 112; *Hall v. Webb*, 21 W. Va. 318. See, as to statutes on the subject, 2 *Dembitz, Land Titles*, § 179.

<sup>35</sup> *Smith v. McCorkle*, 105 Mo. 135; *Steele v. Boley*, 7 Utah, 64; *Stringfellow v. Tennessee Coal, Iron & Railroad Co.*, 117 Ala. 250; *Mathews v. Ferrea*, 45 Cal. 51; *Chiles v. Calk*, 4 Bibb (Ky.) 554.

<sup>36</sup> *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576; *Udell v. Peak*, 70 Tex. 547; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20.

nicipality, has been the subject of much discussion, and the decisions are not in accord on the question. In the majority of the states, land owned by a municipality, and devoted to uses of a purely public character, as when the "fee" of a street or park is vested in the municipality, or land is conveyed to the municipality for a public building, hospital, or the like, the municipality is regarded as merely the agent of the state, and its rights cannot be divested by adverse possession,<sup>37</sup> though in a number of states a different view obtains.<sup>38</sup> But even in the former class of states there is a tendency to distinguish between land devoted to public use and that which is held by the municipality in a "private capacity," and over which it has the power of alienation, the latter being regarded as subject to the bar of the statute.<sup>39</sup>

§ 441. Actual and visible possession.

In order to confer title by adverse possession, it is necessary that there be an actual entry on the land, and the mere fact that one has what purports to be a conveyance of the land, or other paper title, is never sufficient.<sup>40</sup> Nor is an

<sup>37</sup> *Almy v. Church*, 18 R. I. 182; *Cheek v. City of Aurora*, 92 Ind. 107; *Webb v. City of Demopolis*, 95 Ala. 116; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Board of Education of City and County of San Francisco v. Martin*, 92 Cal. 209; *Taraldson v. Incorporated Town of Lime Springs*, 92 Iowa, 187; *Ralston v. Town of Weston*, 46 W. Va. 544; *City of Sullivan v. Tichenor*, 179 Ill. 97. See 2 Dillon, *Mun. Corp.* (4th Ed.) §§ 667-675.

<sup>38</sup> *Oxford Township v. Columbia*, 38 Ohio St. 87; *City of Covington v. McNickle's Heirs*, 18 B. Mon. (Ky.) 262; *City of Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Village of Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438.

<sup>39</sup> See *Simplot v. Chicago, M. & St. P. Ry. Co. (C. C.)* 16 Fed. 350; *Ames v. City of San Diego*, 101 Cal. 390; *City of Chicago v. Middlebrooke*, 143 Ill. 265; *City of Bedford v. Willard*, 133 Ind. 562; 2 Dillon, *Mun. Corp.* (4th Ed.) 675.

<sup>40</sup> *Thayer v. McLellan*, 23 Me. 417; *Walker v. Hughes*, 90 Ga. 52; *Christy v. Spring Valley Water Works*, 97 Cal. 21; *Lipscomb v. (1006)*



entry on the land sufficient, unless it is followed by such acts of dominion over the land as will constitute what the law regards as actual possession of the land. What is sufficient to constitute this actual possession depends upon the character of the land and all the circumstances of the case. It involves, as a general rule, the doing of acts of dominion on the land, sufficiently pronounced and continuous in character to charge the owner with notice that an adverse claim to the land is asserted. Continued residence on the land is no doubt sufficient to show actual possession;<sup>41</sup> and cultivation or otherwise improving the land has been regarded as sufficient in particular cases,<sup>42</sup> and the erection of a fence around the land may, in some cases, be sufficient.<sup>43</sup> On the other hand, a merely occasional and sporadic use of the land, an occasional entry to cut timber or grass, or to appropriate other products or profits of the land, does not constitute actual possession.<sup>44</sup> The question whether, in any particular case, there was an actual possession of the land, is usually one of fact for the jury under the instructions of the court.<sup>45</sup>

McClellan, 72 Ala. 151; *White v. Burnley*, 20 How. (U. S.) 235; *Ward v. Cochran*, 150 U. S. 597, *Finch's Cas.* 1013.

<sup>41</sup> *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. St. 189; *Alabama State Land Co. v. Kyle*, 99 Ala. 474. Under some of the "short limitation" statutes, actual residence is necessary. *Stumpf v. Osterhage*, 94 Ill. 115; *Chiles v. Jones*, 4 Dana (Ky.) 479.

<sup>42</sup> *Butler v. Drake*, 62 Minn. 229; *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. St. 189; *Congdon v. Morgan*, 14 S. C. 587; *Crapo v. Cameron*, 61 Iowa, 447; *Finn v. Wisconsin River Land Co.*, 72 Wis. 546; *Johns v. McKibben*, 156 Ill. 71.

<sup>43</sup> *Moore v. McCown* (Tex. Civ. App.) 20 S. W. 1112; *Brumagim v. Bradshaw*, 39 Cal. 24, 50.

<sup>44</sup> *Basille v. Murray*, 40 Minn. 48; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703; *Cornellius v. Giberson*, 25 N. J. Law, 1; *Williams v. Wallace*, 78 N. C. 354; *Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186; *Wilson v. Blake*, 53 Vt. 305; *Parker v. Parker*, 1 Allen (Mass.) 245.

<sup>45</sup> *Anderson v. Bock*, 15 How. (U. S.) 323; *Truesdale v. Ford*, 37

The possession must, it is said, be "visible" and "notorious," so that the owner may have an opportunity to learn of the adverse claim, and to protect his rights.<sup>46</sup> Actual knowledge of the possession on the part of the true owner is not, however, necessary, it being sufficient that he could have learned thereof by going upon the land and making inquiry.<sup>47</sup> And since the requisites of "actual" possession are usually defined with reference to the sufficiency of such acts to affect the owner with notice of the adverse claim, it would seem somewhat questionable whether there can be any "actual" possession which is not at the same time "visible" and "notorious."

§ 442. Exclusiveness of possession.

In order that one may acquire rights in land by possession for the statutory period, it is necessary that his possession be exclusive.<sup>48</sup> The possession must be exclusive of the owner, since, if the latter is also in possession, the possession of another must be regarded as under license from him, or as merely a trespass,<sup>49</sup> and it must also be exclusive of third

Ill. 210; *Pendill v. Marquette County Agricultural Soc.*, 95 Mich. 491; *Martin v. Rector*, 30 Hun (N. Y.) 138.

<sup>46</sup> *McClellan v. Kellogg*, 17 Ill. 498, Finch's Cas. 1016; *De Frieze v. Quint*, 94 Cal. 658, 28 Am. St. Rep. 151, note; *Beatty v. Mason*, 30 Md. 409; *Thompson v. Pioche*, 44 Cal. 508; *King v. Wells*, 94 N. C. 344; *Fugate v. Pierce*, 49 Mo. 441; *Little v. Downing*, 37 N. H. 355; *Grimes v. Ragland*, 28 Ga. 123, Finch's Cas. 1029.

<sup>47</sup> *Village of Glencoe v. Wadsworth*, 48 Minn. 402; *School Dist. No. 8 of Thompson v. Lynch*, 33 Conn. 330; *Key v. Jennings*, 66 Mo. 367; *Samuels v. Borrowscale*, 104 Mass. 307; *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Alden v. Gilmore*, 13 Me. 178.

<sup>48</sup> *Ward v. Cochran*, 150 U. S. 597, Finch's Cas. 1013; *Stamp v. Henry*, 6 Md. 201, 61 Am. Dec. 301; *Goodson v. Brothers*, 111 Ala. 539; *Collins v. Lynch*, 167 Pa. St. 635; *Cahill v. Palmer*, 45 N. Y. 478.

<sup>49</sup> *Brown v. Chicago, B. & K. C. Ry. Co.*, 101 Mo. 484; *Larwell v. Stevens* (C. C.) 12 Fed. 559; *Bellis v. Bellis*, 122 Mass. 414; *Smith v. Hitchcock*, 38 Neb. 104; *O'Hara v. Richardson*, 46 Pa. St. 385. (1008)

persons,—that is, the exercise of acts of possession by the claimant is insufficient if he allows other persons to do the same.<sup>50</sup>

### § 443. Hostile character of possession.

In order that the possession of one person for the statutory period may defeat the right of the original owner to recover the land, it is necessary that the possession be hostile to such owner, under a claim of right, and such as to exclude any recognition of the rights of the true owner. There are numerous legal relations which, from their nature, are regarded as raising a presumption that the person in possession is holding in subordination to, and in recognition of, the rights of another,—a presumption which, as a rule, can be rebutted only by evidence of a distinct denial of the other's rights.

The possession of a trustee under an express trust is not adverse to his *cestui que trust*,<sup>51</sup> nor is that of an agent adverse to his principal.<sup>52</sup> Likewise, the possession of a tenant in common is not adverse to that of his cotenant.<sup>53</sup> In

<sup>50</sup> *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Gittings v. Moale*, 21 Md. 135; *Kneller v. Lang*, 137 N. Y. 539; *Burrows v. Gallup*, 32 Conn. 493, 37 Am. Dec. 186.

<sup>51</sup> *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Dunn v. Wheeler*, 86 Me. 238; *Miller v. Bingham*, 36 N. C. 423, 36 Am. Dec. 58; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478; *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Angell, Limitations*, § 468 et seq.

<sup>52</sup> *Baucum v. George*, 65 Ala. 259; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 439; *Hoskins v. Byler*, 53 Ark. 532; *Peabody v. Leach*, 18 Wis. 657; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226.

<sup>53</sup> *Holley v. Hawley*, 39 Vt. 534, 94 Am. Dec. 350; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Brewer v. Keeler*, 42 Ark. 239; *Coogler v. Rogers*, 25 Fla. 353; *Rust v. Rust*, 17 W. Va. 901; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579; *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276.

any case, however, though one of these relations exist, the person in possession may repudiate the relation, and claim to hold in his own right, in which case the statute of limitations will begin to run in his favor as if between strangers.<sup>54</sup>

The possession of the grantor in a conveyance after the delivery thereof is regarded as *prima facie* by permission of the grantee, and consequently not adverse to the latter, unless he, by word or act, asserts a claim to the premises in his own behalf.<sup>55</sup>

The possession of the tenant is in subordination to the rights of his landlord, and is not adverse to the latter.<sup>56</sup> The tenant may, however, disclaim to hold under the landlord, and, since this gives the landlord the right immediately to recover possession of the land,<sup>57</sup> the statute of limitations begins to run, provided the disclaimer is known to the landlord, or is so open and notorious that the landlord's knowledge thereof may be presumed.<sup>58</sup>

<sup>54</sup> *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289; *Whiting's Heirs v. Taylor's Heirs*, 8 Dana (Ky.) 403; *Congregational Soc. & Church in Newington v. Town of Newington*, 53 N. H. 595; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478; *Catlin v. Decker*, 38 Conn. 262; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384. As to the acts necessary to constitute an ouster of one co-tenant, so as to render the possession of the other adverse, see ante, § 168.

<sup>55</sup> *Jay v. Whelchel*, 78 Ga. 786; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676; *Sellers v. Crossan*, 52 Kan. 570; *Olwine v. Holman*, 23 Pa. St. 279; *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740. See *Knight v. Knight*, 178 Ill. 553.

<sup>56</sup> *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Galloway's Lessee v. Ogle*, 2 Binn. (Pa.) 468; *Pharis v. Jones*, 122 Mo. 125; *Alabama State Land Co. v. Kyle*, 99 Ala. 474; *Doherty v. Matsell*, 119 N. Y. 646, *Finch's Cas.* 1019; *Whiting v. Edmunds*, 94 N. Y. 309.

<sup>57</sup> See ante, § 52(f).

<sup>58</sup> *McGinnis v. Porter*, 20 Pa. St. 80; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Reusens v. Lawson*, 91 Va. 226; *Swann v. Thayer*, 36 W. Va. 46; *Austin v. Wilson*, 46 Iowa, 362; (1010)

The holding over by a tenant after the termination of the term is regarded as not adverse to the landlord, but rather as in subordination to his rights, in the absence of any disclaimer on the part of the tenant.<sup>59</sup> But while, in this case, the common-law principle that a tenant by sufferance is not a disseisor is applied, it is not usually applied in the case of a holding over by a tenant *pur autre vie*, the grantee of a tenant for life, to whom the remainderman or reversioner does not stand in the relation of landlord.<sup>60</sup>

Since the possession of a mortgagor is perfectly consistent with his recognition of the rights of the mortgagee, such possession, before any breach of the condition of the mortgage, is not adverse, so that its continuance for the statutory period of limitation will bar the mortgagee's rights, unless these are openly denied by the mortgagor, and the mortgage repudi-

Ponder v. Cheeves, 104 Ala. 307; Sanscrainte v. Torongo, 87 Mich. 69; Doherty v. Matsell, 119 N. Y. 646, Finch's Cas. 1019.

<sup>59</sup> Whaley v. Whaley, 1 Speer (S. C.) 225; Gwynn v. Jones' Lessee, 2 Gill & J. (Md.) 173; Schuylkill & D. Improvement & Railroad Co. v. McCreary, 58 Pa. St. 304; Alderson v. Marshall, 7 Mont. 283; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691; Holman v. Bonner, 63 Miss. 131; Watson v. Smith's Lessee, 10 Yerg. (Tenn.) 476; Angell, Limitations, §§ 441, 442. In New York the statute provides that the holding of a tenant shall not be adverse till twenty years after the expiration of the term. See Whiting v. Edmunds, 94 N. Y. 309.

<sup>60</sup> Jones v. Johnson, 81 Ga. 293; Jackson v. Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; Henley v. Wilson, 77 N. C. 216; Rosenau v. Childress, 111 Ala. 214. And see Safford v. Stubbs, 117 Ill. 389.

So it is frequently said that the statutory period does not begin to run against the remainderman until the death of the life tenant, implying that then it necessarily does so. See cases cited post, note 65. For the contrary view, that it does not run against a tenant *pur autre vie* holding over, see Bannon v. Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Day v. Cochran, 24 Miss. 261. The English cases decided under the Statute of James were not in accord in this respect. See Doe d. Souter v. Hull, 2 Dowl. & R. 38, 3 Gray's Cas. 60; Doe d. Parker v. Gregory, 2 Adol. & El. 14, 3 Gray's Cas. 63; Lightwood, Possession of Land, 162.

ated.<sup>61</sup> The possession of the mortgagee likewise is regarded, except in so far as it is necessary for his security, as in behalf of the mortgagor, to whom he must account for the rents and profits,<sup>62</sup> and is consequently not adverse, in the absence of a denial of the mortgagor's rights.<sup>63</sup>

The possession of a licensee is not adverse to that of the licensor, unless and until he asserts a claim to the land hostile to the rights of the latter.<sup>64</sup>

A possession cannot be regarded as hostile to one who, owing to the fact that he has no right of possession, cannot sue to protect it, and consequently, as a rule, until the death of a tenant for life, the statute does not begin to run against a remainderman in favor of a third person.<sup>65</sup>

<sup>61</sup> *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Norris v. He*, 152 Ill. 190, 43 Am. St. Rep. 233; *Chouteau v. Riddle*, 110 Mo. 366; *Boyd v. Beck*, 29 Ala. 703; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Flynn v. Lee*, 31 W. Va. 437; *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491; *Tripe v. Marcy*, 39 N. H. 439; *Creigh's Heirs v. Henson*, 10 Grat. (Va.) 231; *Martin v. Jackson*, 37 Pa. St. 504, 67 Am. Dec. 439.

<sup>62</sup> See post, § 520.

<sup>63</sup> *Warder v. Enslin*, 73 Cal. 291; *Green v. Turner*, 38 Iowa, 113; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Kip v. Hirsh*, 53 N. Y. Super. Ct. 1; *Cholmondeley v. Clinton*, 2 Jac. & W. 1.

<sup>64</sup> *Cameron v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 100; *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 N. H. 433; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Curtis v. La Grande Hydraulic Water Co.*, 20 Or. 34; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Sanitary Dist. of Chicago v. Allen*, 178 Ill. 330.

<sup>65</sup> *Angell, Limitations*, § 371 et seq.; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Anderson v. Northrop*, 30 Fla. 612; *Mettler v. Miller*, 129 Ill. 630; *Rosenau v. Childress*, 111 Ala. 214; *Pratt v. Churchill*, 42 Me. 471; *Bagley v. Kennedy*, 31 Ga. 721; *Lindley v. Groff*, 37 Minn. 338; *Pinckney v. Burrage*, 31 N. J. Law, 21; *Davis v. Dickson*, 92 Pa. St. 365; *Moseley v. Hankinson*, 25 S. C. 519; *Wallingford v. Hearl*, 15 Mass. 471; *Watkins v. Green*, 101 Mich. 493; *Higgins v. Crosby*, 40 Ill. 260.

In Illinois, under the short limitation act, however, it is held that, (1019)

One who goes into possession of land under a transfer of the land from the owner, which is invalid because oral merely, may assert the bar of the statute against the owner if his possession continues for the statutory period, since his possession is under a claim of right which is necessarily exclusive of any rights in the transferee.<sup>66</sup> Likewise the possession of one who enters under an executory contract for a conveyance is usually regarded as adverse to his vendor from the time of the payment of the purchase money,<sup>67</sup> and generally a grantee's possession is regarded as adverse to the rights of the grantor, whatever be the defects in the grant.<sup>68</sup>

— Mistake in locating boundary.

The question has frequently arisen whether, when an owner of land, by mistake as to the boundary line of his land,

if the possession is by one not claiming merely as assignee of the life estate, but as the owner of fee, it is adverse to the remainder man, since, though the latter cannot sue for possession, he can prevent the running of the statute by paying the taxes. *Nelson v. Davidson*, 160 Ill. 254. Moreover, in that state, the remainderman, to be protected, must claim under an instrument which appears of record, or of which the person in possession has notice. *Lewis v. Barnhart*, 145 U. S. 56.

<sup>66</sup> *Sumner v. Stevens*, 6 Metc. (Mass.) 337; *Schafer v. Hauser*, 111 Mich. 622, 66 Am. St. Rep. 403; *Vandiveer v. Stickney*, 75 Ala. 225; *Clark v. Gilbert*, 39 Conn. 94; *Stewart v. Duffy*, 116 Ill. 47; *Rannels v. Rannels*, 52 Mo. 109; *Trotter v. Neal*, 50 Ark. 340; *Stoddill v. Willcox*, 94 Ga. 690; *Bartlett v. Secor*, 56 Wis. 527; *Campbell v. Braden*, 96 Pa. St. 388.

<sup>67</sup> *Furlong v. Garrett*, 44 Wis. 111; *Watts v. Witt*, 39 S. O. 356; *East Tennessee, V. & G. Ry. Co. v. Davis*, 91 Ala. 615; *Adams v. Fullam*, 43 Vt. 592; *Catlin v. Decker*, 38 Conn. 262.

<sup>68</sup> *Nowlin v. Reynolds*, 25 Grat. (Va.) 137; *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744; *Mattison v. Ausmuss*, 50 Mo. 551; *Carmody v. Chicago & A. R. Co.*, 111 Ill. 69; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 239, 68 Am. Dec. 723; *Case v. Green*, 53 Mich. 615; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

takes possession of another's land, and holds it for the statutory period, he thereby acquires the title as against the real owner. In some states, in such a case, the possession is regarded as adverse, without reference to the fact that it is based on mistake, it being sufficient that actual and visible possession is taken under claim of right.<sup>69</sup> In other states the fact that, in such case, the possession of the other's land is under mistake, is regarded as material, and a distinction is asserted to the effect that, if such possession up to the boundary as located is with the intention of claiming to such boundary even though the boundary be incorrect, the possession is adverse, while, if it is with the intention of claiming thereto only if the boundary is correct, the possession is not adverse.<sup>70</sup>

Of these two views the former seems to be decidedly preferable, from the standpoint of both principle and convenience of application. Of the latter it may be said, not only does it confer a premium upon conscious wrongdoing, but it

<sup>69</sup> *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680, 3 Gray's Cas. 76; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Metcalfe v. McCutchen*, 60 Miss. 145; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358; *Tex v. Pflug*, 24 Neb. 666, 8 Am. St. Rep. 231; *Levy v. Yerga*, 25 Neb. 764, 13 Am. St. Rep. 525; *Seymour, Sabin & Co. v. Carll*, 31 Minn. 81; *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736; *Greene v. Anglemire*, 77 Mich. 168; *Crary v. Goodman*, 22 N. Y. 170; *Tolman v. Sparhawk*, 5 Metc. (Mass.) 469; *Grim v. Murphy*, 110 Ill. 271 (semble); *Dyer v. Eldridge*, 136 Ind. 654. See *Bishop v. Bleyer*, 105 Wis. 330.

<sup>70</sup> *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *Taylor v. Fomby*, 116 Ala. 621; *Ayers v. Reidel*, 84 Wis. 276, *Finch's Cas.* 1016; *Grube v. Wells*, 34 Iowa, 148, 3 Gray's Cas. 82; *Mills v. Penny*, 74 Iowa, 172, 7 Am. St. Rep. 474; *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138; *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 35 Am. St. Rep. 366; *McCabe v. Bruere*, 153 Mo. 1; *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, note; *Caufield v. Clark*, 17 Or. 473, 11 Am. St. Rep. 845; *King v. Brigham*, 23 Or. 262; *Chance v. Branch*, 58 Tex. 490.



introduces into the law of adverse possession a requirement that is never asserted in connection therewith except in the case of mistake in locating a boundary. Under such a rule, generally applied, a man would never be in adverse possession of land unless he had the intention of claiming the land in case his title turned out to be defective. As a matter of fact, a person who believes that he owns certain land, or land up to a certain boundary, has no thought as to what he will do in case he is mistaken in his belief. Furthermore, assuming that there is an intention in the mind of the possessor, such an intention is necessarily difficult, and frequently impossible, of determination, with any approach to accuracy.<sup>71</sup>

§ 444. Extent of possession.

As a general rule, one can acquire by adverse possession so great an extent of land only as is covered by his acts of actual possession, continued through the statutory period.<sup>72</sup> It is, however, a well-recognized principle in this country that one having "color of title"—that is, claiming under what purports to be a valid muniment of title, although he actually occupies a part only of the tract conveyed—is to be regarded as in constructive possession of the whole tract for the purpose of barring the entry of the owner after the lapse of the statutory period.

<sup>71</sup> "Adopt the rule that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession, \* \* \* the inquiry no longer is whether visible possession, with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseisin, but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored." *French v. Pearce*, 3 Conn. 429, 3 Gray's Cas. 76, per Hosmer, C. J.

<sup>72</sup> *Proprietors of Kennebeck Purchase v. Springer*, 4 Mass. 416, *Finch's Cas.* 1021; *Ferguson v. Peden*, 33 Ark. 150; *Garrison v. Sampson*, 15 Cal. 93; *Bristol v. Carroll County*, 95 Ill. 84; *Barber v. Robinson*, 78 Minn. 193; *Allen v. Mansfield*, 108 Mo. 343; *Ege v. Medlar*, 82 Pa. St. 86; *Langdon v. Templeton*, 66 Vt. 173.

This rule is founded on the theory that one who has notice of an adverse occupancy of part of his land under a claim of title based on written evidence thereof is chargeable with notice that the claim is limited only by the terms of the conveyance. The rule applies not only when possession is taken under a conveyance which is invalid, either for want of title or capacity in the grantor, or for want of proper formalities in the execution of the instrument,<sup>73</sup> but also when it is taken under a void or voidable decree of court,<sup>74</sup> and generally when there is what is known as a "paper title." There is, however, considerable question as to whether a conveyance void on its face constitutes "color of title" for this purpose, or for the purpose of the short limitation acts.<sup>75</sup> A conveyance which does not contain any sufficient description of the land sought to be conveyed is necessarily insufficient as color of title for the purpose of constructive possession.<sup>76</sup>

<sup>73</sup> *Noyes v. Dyer*, 25 Me. 468; *Stull v. Rich Patch Iron Co.*, 92 Va. 253; *Finch's Cas.* 1023; *Ellington v. Ellington*, 103 N. C. 54; *Hecock v. Van Dusen*, 80 Mich. 359; *Fugate v. Pierce*, 49 Mo. 447; *Miesen v. Canfield*, 64 Minn. 513; *Swift v. Mulkey*, 17 Or. 532; *Wright v. Mattison*, 18 How. (U. S.) 50; *Carter v. Chevalier*, 108 Ala. 563.

<sup>74</sup> *Bynum v. Thompson*, 25 N. C. 578; *Reedy v. Camfield*, 159 Ill. 254.

<sup>75</sup> That a conveyance void on its face does not give color of title, see *Frique v. Hopkins*, 8 Mart. (La.) 110; *Redfield v. Parks*, 132 U. S. 239; *Larkin v. Wilson*, 28 Kan. 513. Contra, *Reddick v. Long*, 124 Ala. 260; *Miesen v. Canfield*, 64 Minn. 513; *Barger v. Hobbs*, 67 Ill. 592; *Wilson v. Atkinson*, 77 Cal. 485.

Sometimes the view is taken that a conveyance defective on its face will be sufficient as color of title if the defect is such that a person unlearned in the law would have reason to consider the instrument valid. *Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351; *Avent v. Arrington*, 105 N. C. 377, 390.

<sup>76</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525, 3 Gray's Cas. 38; *Bellows v. Jewell*, 60 N. H. 420; *Davis v. Stroud*, 104 N. C. 484; *Ohio & M. Ry. Co. v. Barker*, 125 Ill. 303; *Reddick v. Long*, 124 Ala. 260.

In order that this principle, giving one constructive possession beyond the limits of his actual occupancy, may apply, not only the land not actually occupied, but also that occupied, must belong to the same person, and the owner of land is not affected with notice as of a constructive possession of his land by the fact that it is included in a conveyance with other land not belonging to him, if such other land alone is occupied by the claimant.<sup>77</sup>

The fact that the true owner of land is in actual possession of part of the land prevents the application, in favor of another, of the rule of constructive possession by color of title as to the land not occupied by the true owner.<sup>78</sup> The rule, moreover, cannot be applied in favor of one person as against another who has previously obtained constructive possession of the same land,—that is, in the case of overlapping conveyances, neither of which is valid, the grantee who first takes actual possession of part of the land included in his conveyance obtains constructive possession of the land covered by both conveyances, to the exclusion of the subsequent acquisition of merely constructive possession of such land by the other.<sup>79</sup>

The land in actual possession must adjoin that of which

<sup>77</sup> *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190, 3 Gray's Cas. 99; *Word v. Box*, 66 Tex. 596; *Korner v. Rankin's Heirs*, 11 Grat. (Va.) 420; *Garrett v. Ramsey*, 26 W. Va. 345; *Turner v. Stephenson*, 72 Mich. 409; *Hicklin v. McClear*, 18 Or. 126; *Hole v. Rittenhouse*, 25 Pa. St. 491.

<sup>78</sup> *Hunnicut v. Peyton*, 102 U. S. 333; *Hall v. Powel*, 4 Serg. & R. (Pa.) 456, 3 Am. Dec. 722; *Semple v. Cook*, 50 Cal. 26; *Langdon v. Templeton*, 66 Vt. 173; *Clalborne v. Elkins*, 79 Tex. 380; *Bradley v. West*, 60 Mo. 33. But that this is the case only if such actual possession by the true owner existed before the constructive possession by the claimant, see *Stull v. Rich Patch Iron Co.*, 92 Va. 253, *Finch's Cas.* 1023.

<sup>79</sup> *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677, 3 Gray's Cas. 91; *Frisby v. Withers*, 61 Tex. 124; *Garrett v. Ramsey*, 26 W. Va. 345.

constructive possession is claimed,<sup>80</sup> and the two tracts of land must, according to some decisions, be included within one description in the instrument under which the claim is made, and, if they are described as separate tracts, it is immaterial that the descriptions are both in one conveyance.<sup>81</sup>

In some states there is a restriction upon the application of the rule of constructive possession, to the effect that it will apply only when the land claimed by reason of constructive possession is such, in character and extent, that its use in connection with the land actually occupied would be in accord with the custom of the country.<sup>82</sup> In other states no such restriction upon the application of the rule is recognized, it being only necessary that the actual possession be of a visible character, however small it may be in extent in comparison with the land claimed.<sup>83</sup>

<sup>80</sup> *Herbst v. Merrifield*, 133 Mo. 267; *Wilson v. McEwan*, 7 Or. 87; *Georgia Pine Inv. & Mfg. Co. v. Holton*, 94 Ga. 551; *Brown v. Bocquin*, 57 Ark. 97; *West v. McKinney*, 92 Ky. 638.

<sup>81</sup> *Morris v. McClary*, 43 Minn. 346; *Grimes v. Ragland*, 28 Ga. 123, *Finch's Cas.* 1029; *Griffin v. Lee*, 90 Ga. 224; *Den d. Carson v. Mills*, 18 N. C. 546, 30 Am. Dec. 143; *Doe d. Loflin v. Cobb*, 46 N. C. 406, 62 Am. Dec. 173; *Montgomery v. Gunther*, 81 Tex. 320; *Farrar v. Eastman*, 10 Me. 191; *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485. *Contra*, *Dills v. Hubbard*, 21 Ill. 328.

<sup>82</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276; *Simpson v. Downing*, 23 Wend. (N. Y.) 316, 3 *Gray's Cas.* 94; *Pepper v. O'Dowd*, 39 Wis. 538 (stat.); *Thompson v. Burhans*, 61 N. Y. 52; *Palne v. Hutchins*, 49 Vt. 314. See *Murphy v. Doyle*, 37 Minn. 113; *Turner v. Stephenson*, 72 Mich. 409.

<sup>83</sup> See *Hicks v. Coleman*, 25 Cal. 122, 35 Am. Dec. 108; *Doe d. Lenoir v. South*, 32 N. C. 237; *Grigsby v. May*, 34 Tex. 240.

## **CHAPTER XXIV.**

### **PRESCRIPTION FOR INCORPOREAL THINGS.**

- § 445. General considerations.**
- 446. Tacking.**
- 447. Personal disabilities.**
- 448. Continuity of user.**
- 449. Exclusiveness of user.**
- 450. Hostile character of user.**
- 451. Specific rights.**
- 452. Rights in the public.**

The adverse user of another's land, as if in enjoyment of an easement or right of profit therein, will, if continued for the statutory period of limitation, usually create a corresponding easement or right of profit in the land, this being known as prescription.

The user need not be by one person for the whole period, but may be by different persons in privity with one another.

The prescriptive period does not run, as against an owner of land, who is under a disability at the time of the beginning of such user, until the termination of the disability.

The user must be continuous for the prescriptive period, and is not sufficient if actually interrupted by the owner of the land, though mere protests by him against the user do not effect an interruption.

The user must be such as to give a right of action to the owner of the land against the person exercising the user, and for this reason rights to the passage of light or to support, and rights to the percolation of water from adjoining land, cannot usually be thus acquired.

The public may, by the user of private land for purposes of passage during the statutory period, acquire highway rights therein.

## § 445. General considerations.

Though the Statute of Westminster I., establishing a date back of which the pleader could not go,<sup>1</sup> applied to actions for the recovery of the land only, and not to those for the recovery of incorporeal things, "the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the statute to incorporated hereditaments, and, among others, to easements."<sup>2</sup> Subsequently, when, by the Statute of 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16, the time for bringing a writ of right or a possessory action to recover land was reduced to sixty and twenty years, respectively, it might have been expected that the judges would, as in the case of the earlier act, apply the analogy of these acts to incorporeal things. This, however, it seems, they did not do,<sup>3</sup> but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years; this doctrine of a lost grant being in reality prescription, under another name, shortened in analogy to the period of limitation fixed by the Statute of James.<sup>4</sup> In the case of prescription, as it existed by analogy to the early statute, the exercise of the right from the date named conferred an unimpeachable title. Whether this presumption of a lost grant, on the other hand, had a like effect,—that is, whether

<sup>1</sup> Ante, § 436.

<sup>2</sup> Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 35, 104.

<sup>3</sup> Gale, *Easements*, 170, citing the statements to that effect in *Angus v. Dalton*, 4 Q. B. Div. at pages 170, 199, per Thesiger and Brett, L. J., and in 6 App. Cas. at page 778, per Fry, J. But that the periods fixed by these statutes was applied in determining the period of "immemorial user" for the purpose of prescription, see *Yard v. Ford*, 3 Saund. 175, note; Gale, *Easements*, 169; *Coolidge v. Learned*, 3 Pick. (Mass.) 504, *Finch's Cas.* 1036.

<sup>4</sup> Gale, *Easements*, 171. See *Coolidge v. Learned*, 3 Pick. (Mass.) 504, *Finch's Cas.* 1036.

it was a conclusive presumption, or could be rebutted by evidence that there was no such grant,—is a question on which there was great doubt. In practice it seems to have been the custom for the court to instruct the jury to find the existence of such a grant, even though there was evidence to show that it did not exist. Eventually the Statute of 2 & 3 Wm. IV. c. 71 (A. D. 1832), termed the "Prescription Act," was passed, "with the view," it is said, "of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries."<sup>5</sup>

In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised a right in another's land for such a statutory period, adversely and under claim of right, is regarded as having such right.<sup>6</sup> And while, quite frequently, it is said that from such user a grant will be presumed, the presumption is in effect a positive rule of law, and evidence that no grant was made would be immaterial.<sup>7</sup> In some states there are statutes providing for the acquisition of rights in another's

<sup>5</sup> Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 105.

<sup>6</sup> *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 3 Gray's Cas. 164; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, Finch's Cas. 1037; *Mueller v. Fruen*, 36 Minn. 273; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Cobb v. Davenport*, 32 N. J. Law, 369; *Nicholls v. Wentworth*, 100 N. Y. 455; *Legg v. Horn*, 45 Conn. 409; *Krier's Private Road*, 73 Pa. St. 109.

<sup>7</sup> *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, Finch's Cas. 237; *Tracy v. Atherton*, 36 Vt. 503, 3 Gray's Cas. 202; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law, 605, 3 Gray's Cas. 213; *Wallace v. Fletcher*, 30 N. H. 434; *Okeson v. Patterson*, 29 Pa. St. 22; *Ward v. Warren*, 32 N. Y. 265; *Carter v. Tincum Fishing Co.*, 77 Pa. St. 310; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312. There are suggestions to the contrary in *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Lanier v. Booth*, 50 Miss. 410.

land by their exercise under claim of right for a period named.<sup>8</sup>

While it is well recognized that no rights can be acquired by prescription to maintain a public nuisance, the cases are not in accord on the question whether one's right to set up a prescriptive right of user, as against the private owner of land, is defeated by the fact that such user constitutes, in itself, a public nuisance.<sup>9</sup>

#### § 446. Tacking.

As successive adverse possessions of land by different persons may be tacked in order to make up the statutory period, so successive adverse users by different persons may be tacked for the same purpose,<sup>10</sup> provided there is a privity or contractual connection between them.<sup>11</sup>

#### § 447. Personal disabilities.

The statutory exceptions in the statutes of limitations in favor of persons under legal disability are applied by analogy, in the case of prescription, when the owner of the

<sup>8</sup> Jones, Easements, § 160.

<sup>9</sup> That the fact that it is a public nuisance defeats any right by prescription, see *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.) 18 Fed. 753; *Bowen v. Wendt*, 103 Cal. 236; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Nolan v. City of New Britain*, 69 Conn. 668; *Kissel v. Lewis*, 156 Ind. 233; *Veazie v. Dwinel*, 50 Me. 479. That its character as a public nuisance does not have that effect, see *Perley v. Hilton*, 55 N. H. 444; *Borden v. Vincent*, 24 Pick. (Mass.) 301; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray (Mass.) 110; *Inhabitants of New Salem v. Eagle Mill Co.*, 123 Mass. 8; *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; *Charnley v. Shawano Water Power & River Improvement Co.*, 109 Wis. 563.

<sup>10</sup> *Bradley's Fish Co. v. Dudley*, 37 Conn. 126; *Ross v. Thompson*, 78 Ind. 90; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Dodge v. Stacy*, 39 Vt. 558.

<sup>11</sup> *Holland v. Long*, 7 Gray (Mass.) 486; *Bryan v. City of East St. Louis*, 12 Ill. App. 390.



land is under disability, and they are usually applied to the same extent, and subject to the same restrictions. So, while the statutory period does not begin to run during the disability of the landowner, if this existed when the right of action on account of the user of the land accrued,<sup>12</sup> a disability thereafter arising will not, by the weight of authority, extend the statutory period,<sup>13</sup> and one disability cannot be tacked to another.<sup>14</sup>

#### § 448. Continuity of user.

The user of the land, in order to create a right by prescription, must be continuous for the statutory period.<sup>15</sup> Accordingly, if the owner of the land, in the exercise of his right of ownership, interrupts the exercise of the user, as when he renders the exercise of a claim of passage impossible, the continuity is broken,<sup>16</sup> but the mere doing of acts on the land which render the exercise of the claim less convenient does not necessarily have that effect.<sup>17</sup> The fact that the owner of the land, during the statutory period, protests or remonstrates against the exercise of the asserted right, with-

<sup>12</sup> *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193; *Melvin v. Whiting*, 13 Pick. (Mass.) 185, 3 Gray's Cas. 186; *Edson v. Munsell*, 10 Allen (Mass.) 557.

<sup>13</sup> *Tracy v. Atherton*, 36 Vt. 503, 3 Gray's Cas. 203; *Mebane v. Patrick*, 46 N. C. 23; *Wallace v. Fletcher*, 30 N. H. 434; *Edson v. Munsell*, 10 Allen (Mass.) 557. Contra, *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193. See *Melvin v. Whiting*, 13 Pick. (Mass.) 184, 185, 3 Gray's Cas. 186.

<sup>14</sup> *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744, 3 Gray's Cas. 198.

<sup>15</sup> *Watt v. Trapp*, 2 Rich. Law (S. C.) 136; *Peters v. Little*, 95 Ga. 151; *Nicholls v. Wentworth*, 100 N. Y. 455; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Bodfish v. Bodfish*, 105 Mass. 317.

<sup>16</sup> *Sears v. Hayt*, 37 Conn. 406; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 423; *Plimpton v. Converse*, 42 Vt. 712.

<sup>17</sup> *McKenzie v. Elliott*, 134 Ill. 156; *Webster v. City of Lowell*, 142 Mass. 324.

of the latter, express or implied.<sup>27</sup> Furthermore, the user must have been such as to give rise to a right of action on the part of the owner, since, if he cannot interfere with the user, he should not be deprived thereby of any rights in the land.<sup>28</sup> But provided a right of action exists on account of the user of the land, the fact that there is, by such user, merely an infringement of the right of property, and no actual damage to the land, does not prevent the running of the prescriptive period.<sup>29</sup>

A user commencing by permission or license may become adverse by the landowner's withdrawal thereof, or by a repudiation of the owner's rights by the licensee.<sup>30</sup> Likewise, when the owner undertakes to confer upon another a perpetual interest in the land, but fails to do so in a valid manner, as when he makes an oral grant of an easement, the exercise of the easement by such other in accordance with

<sup>27</sup> *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Morse v. Williams*, 62 Me. 445; *Demuth v. Amweg*, 90 Pa. St. 181; *Dexter v. Tree*, 117 Ill. 532; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764; *Thomas v. England*, 71 Cal. 456; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568; *Conyers v. Scott*, 94 Ky. 123; *Lanier v. Booth*, 50 Miss. 410; *Wiseman v. Lucksinger*, 84 N. Y. 31, 33 Am. Rep. 479; *Esling v. Williams*, 10 Pa. St. 126.

<sup>28</sup> *Richard v. Hupp* (Cal.) 37 Pac. 920; *Whiting v. Gaylord*, 66 Conn. 337; *Mitchell v. City of Rome*, 49 Ga. 19; *Emery v. Raleigh & G. R. Co.*, 102 N. C. 210, 11 Am. St. Rep. 727; *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Turner v. Hart*, 71 Mich. 123, 15 Am. St. Rep. 243; *Burnham v. Kempton*, 44 N. H. 78; *Klein v. Gehrung*, 25 Tex. (Supp.) 232; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Carlisle v. Cooper*, 19 N. J. Eq. 256.

<sup>29</sup> *Dana v. Valentine*, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187.

<sup>30</sup> *Eckerson v. Crippen*, 110 N. Y. 585; *Huston v. Bybee*, 17 Or. 140; *Pittman v. Boyce*, 111 Mo. 337; *Thoenke v. Fiedler*, 31 Wis. 386.

the terms of the invalid grant cannot be regarded as permissive and in subordination to the rights of the landowner, but is in effect adverse to such rights.<sup>31</sup>

The user of a public highway by an individual cannot be effective as against the owner of the land on which the highway is located, so as to create a prescriptive right to a way in an individual using the highway, since the owner of the land cannot, while it is used as a highway, prevent passage thereon by such individual.<sup>32</sup> But such user may become adverse upon the abandonment of the highway.<sup>33</sup>

The fact that the land is in the possession of a tenant of the owner of the fee will not, it seems, prevent the creation of the right by lapse of time as against the latter, if he could, by reason of his reversionary rights, have brought suit, at any time within the statutory period, against the person exercising the user.<sup>34</sup> It has been decided that uninclosed woodland may be the subject of an adverse user for the purpose of a right of way.<sup>35</sup>

<sup>31</sup> *Jewett v. Hussey*, 70 Me. 433; *Arbuckle v. Ward*, 29 Vt. 43; *McKenzie v. Elliott*, 134 Ill. 156; *Legg v. Horn*, 45 Conn. 415; *Talbott v. Thorn*, 91 Ky. 417; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Parish v. Kaspere*, 109 Ind. 586. But see *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479.

<sup>32</sup> *Webster v. City of Lowell*, 142 Mass. 324; *Wheeler v. Clark*, 58 N. Y. 267; *Whaley v. Stevens*, 27 S. C. 549.

<sup>33</sup> *Black v. O'Hara*, 54 Conn. 17.

<sup>34</sup> *Cross v. Lewis*, 2 Barn. & C. 686, 3 Gray's Cas. 131; *Reimer v. Stuber*, 20 Pa. St. 458, 3 Gray's Cas. 198. See *Ward v. Warren*, 82 N. Y. 265; *Gale, Easements*, 192, 199. And compare *Pentland v. Keep*, 41 Wis. 490.

In *Ballard v. Demmon*, 156 Mass. 449, a disability to sue on account of an outstanding term for years was regarded as similar in effect to a personal disability, and so sufficient to affect the running of the prescriptive period only if the term existed at the time the right of action on account of the user of the land accrued.

<sup>35</sup> *Worrall v. Rhoads*, 2 Whart. (Pa.) 427; *Reimer v. Stuber*, 20 Pa. St. 458, 3 Gray's Cas. 198. This has, however, been changed by statute in Pennsylvania. *Kurts v. Hoke*, 172 Pa. St. 165. That

The fact that the person claiming the right, during the statutory period, offered to purchase the easement, may show that the user is not adverse,<sup>36</sup> but does not necessarily do so,<sup>37</sup> it being a question for the jury on all the circumstances.

It is frequently stated that the hostile user of the land must be known to the owner;<sup>38</sup> but, provided the user is of such a character as to involve a plain assertion of the right to use the land, it seems exceedingly doubtful whether the claimant's rights could be affected by the failure of the owner to notice such user, owing to his absence from the neighborhood, or to other causes.<sup>39</sup>

#### § 451. Specific rights.

A right of way over another's land may be acquired by prescription,<sup>40</sup> and the doctrine is more frequently applied in this connection than in any other. Rights to appropriate the water of a stream in excess of one's natural rights may also be thus acquired as against lower riparian proprietors.<sup>41</sup>

there is a presumption that the use of such land is not adverse, see *Sims v. Davis*, Cheves (S. C.) 1; *Gibson v. Durham*, 3 Rich. Law (S. C.) 85.

<sup>36</sup> *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

<sup>37</sup> *Kana v. Bolton*, 36 N. J. Eq. 21.

<sup>38</sup> *Wallace v. Fletcher*, 30 N. H. 434; *Peterson v. McCullough*, 50 Ind. 35; *Cobb v. Davenport*, 32 N. J. Law, 369; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *American Co. v. Bradford*, 27 Cal. 360; *Richard v. Hupp* (Cal.) 37 Pac. 920; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Hannefin v. Blake*, 102 Mass. 297.

<sup>39</sup> See, to this effect, *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744, 3 Gray's Cas. 198; *Perrin v. Garfield*, 37 Vt. 304; *Ward v. Warren*, 82 N. Y. 265. See, also, *Cook v. Gammon*, 93 Ga. 298.

<sup>40</sup> *Aaron v. Gunnels*, 68 Ga. 528; *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415; *Garnett v. City of Slater*, 56 Mo. App. 207; *Arnold v. Cornman*, 50 Pa. St. 361; *Talbott v. Thorn*, 91 Ky. 417; *Cheney v. O'Brien*, 69 Cal. 199; *Everedge v. Alexander*, 75 Ga. 858.

<sup>41</sup> *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Horn v. Miller*, 142 Pa. St. 557; *Whitney v. Wheeler Cotton Mills*, 151 (1028)

The right to dam or obstruct the water of a stream so as to flood the land of another may also be thus acquired,<sup>42</sup> as may the right to pollute the water.<sup>43</sup> A right of *profit a prendre* may be established by the taking of profits for the prescriptive period.<sup>44</sup> So one may, by prescription, have a right to the maintenance of a fence by the owner of adjoining land,<sup>45</sup> or to conduct a business on one's land which pollutes the atmosphere, to the injury of the land adjoining,<sup>46</sup> and one may so acquire the right to extend eaves of a roof, or a cornice, over other land.<sup>47</sup>

There are, on the other hand, some easements which cannot be acquired by prescription, owing to the fact that the

Mass. 396; Coonradt v. Hill, 79 Cal. 587; Olney v. Fenner, 2 R. L. 211, 57 Am. Dec. 711; Shreve v. Voorhees, 3 N. J. Eq. 25; Kuhlman v. Hecht, 77 Ill. 570; Fankboner v. Corder, 127 Ind. 164; Barnes v. Haynes, 13 Gray (Mass.) 188, 74 Am. Dec. 629; Smith v. Putnam, 62 N. H. 369; Krier's Private Road, 73 Pa. St. 109; Ferrell v. Ferrell, 1 Bart. (Tenn.) 329; Boyd v. Woolwine, 40 W. Va. 282.

<sup>42</sup> Williams v. Nelson, 23 Pick. (Mass.) 141; Emery v. Raleigh & G. R. Co., 102 N. C. 210, 11 Am. St. Rep. 727; Mueller v. Fruen, 86 Minn. 273; Vail v. Mix, 74 Ill. 127; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243; Alcorn v. Sadler, 71 Miss. 634; Hammond v. Zehner, 21 N. Y. 118; McGeorge v. Hoffman, 133 Pa. St. 381; Haas v. Choussard, 17 Tex. 588; Perrin v. Garfield, 37 Vt. 304.

<sup>43</sup> Crossley v. Lightowler, 2 Ch. App. 478; Crosby v. Bessey, 49 Me. 539; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Gladfelter v. Walker, 40 Md. 1; Gould, Waters (3d Ed.) §§ 345, 346.

<sup>44</sup> See Melvin v. Whiting, 10 Pick. (Mass.) 295, 13 Pick. 185, 3 Gray's Cas. 184, 186; Carter v. Tinicum Fishing Co., 77 Pa. St. 310; Cobb v. Davenport, 32 N. J. Law, 369.

<sup>45</sup> Castner v. Riegel, 54 N. J. Law, 498; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Adams v. Van Alstyne, 25 N. Y. 232.

<sup>46</sup> Sturges v. Bridgman, 11 Ch. Div. 852, 2 Gray's Cas. 57; Dana v. Valentine, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61.

<sup>47</sup> Cherry v. Stein, 11 Md. 1; Grace Methodist Episcopal Church v. Dobbins, 153 Pa. St. 294, 34 Am. St. Rep. 706. But prescription can give no right to have branches overhang adjoining land. Lemmon v. Webb [1894] 3 Ch. 1.

owner of the land is not in a position to prevent the exercise of the user claimed, or to sue on account thereof, and consequently the fact that he does not do so is no evidence of acquiescence on his part. On this principle it has been decided that the appropriation of an excessive quantity of water from a watercourse for the statutory period by a lower riparian proprietor does not give him any right to continue such appropriation as against an upper proprietor who may thereafter desire to use water therefrom, since the latter had no means of preventing such excessive appropriation other than appropriating the water himself.<sup>48</sup> One cannot acquire by prescription a right to water percolating from other land to his land, since the owner of the land from which it percolates is not in a position to prevent its percolation.<sup>49</sup> Nor can the owner of a lower tenement acquire by length of user, as against the upper tenement, a right to the flow of surface water.<sup>50</sup> So, the owner of the upper tenement, who has, by the common law, no natural right to have surface water flow from his land on the lower tenement, cannot acquire such right by the fact that the owner of the latter does not prevent such flow until the prescriptive period has elapsed, since such flow gives no right of action.<sup>51</sup> In case, however,

<sup>48</sup> *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, 2 Gray's Cas. 119; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Thurber v. Martin*, 2 Gray (Mass.) 394, 2 Gray's Cas. 155; *Pratt v. Lamson*, 2 Allen (Mass.) 275, 288; *Parker v. Hotchkiss*, 25 Conn. 321.

<sup>49</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Village of Delhi v. Youmans*, 50 Barb. (N. Y.) 316. See *Chatfield v. Wilson*, 28 Vt. 49.

<sup>50</sup> *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Broadbent v. Ramsbotham*, 11 Exch. 602.

<sup>51</sup> *Parks v. City of Newburyport*, 10 Gray (Mass.) 28; *White v. Chapin*, 12 Allen (Mass.) 516; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. Compare *Ross v. Mackeney*, 46 N. J. Eq. 140.

the owner of the upper tenement causes the water to flow on the lower tenement in a particular channel, the lower proprietor can prevent such action, and consequently his failure so to do may be regarded as acquiescence therein, which confers the right if continued for the statutory period.<sup>52</sup> Where the civil-law rule, giving the proprietor of the upper tenement a natural right to have his surface water flow off on the lower tenement, controls, he may lose this right by submitting to the obstruction of such flow for the prescriptive period.<sup>53</sup>

One cannot, in this country, by the maintenance of windows in one's building overlooking adjacent land for the statutory period, acquire an easement of light and air in such land, since this involves no injury to the land, or diminution of the value of the beneficial interest therein, and consequently gives no right of action to the landowner.<sup>54</sup> Likewise, the right of support for a building by another building or by adjacent land cannot, by the weight of authority in this country, be acquired by prescription, since not only is the exercise of the right not one which causes injury to the supporting land or building, but the dependence of a building on such support is a fact which is in most cases not discoverable until the support is withdrawn.<sup>55</sup> In Eng-

<sup>52</sup> *White v. Chapin*, 12 Allen (Mass.) 516; *Schnitzius v. Bailey*, 43 N. J. Eq. 409. See *Leidlein v. Meyer*, 95 Mich. 586.

<sup>53</sup> *Louisville & N. Ry. Co. v. Mossman*, 90 Tenn. 157.

<sup>54</sup> *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Hubbard v. Town*, 33 Vt. 295, Finch's Cas. 840; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111; *Lahere v. Luckey*, 23 Kan. 534; *Mullen v. Stricker*, 19 Ohio St. 185, 2 Am. Rep. 379; *Haverstick v. Sipe*, 33 Pa. St. 368; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 578; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311. *Contra*, *Clawson v. Primrose*, 4 Del. Ch. 643.

<sup>55</sup> *Richart v. Scott*, 7 Watts (Pa.) 460; *Mitchell v. City of Rome*,

land, on the other hand, the right of support may be thus acquired.<sup>56</sup> There are several decisions in this country that a right in the use of a party wall may be acquired by prescription,<sup>57</sup> but this view, while clearly correct when it involves the placing of beams or other parts of a building in or on a wall upon adjoining land, is, it seems, in other cases not involving any occupation of the space above such land, not reconcilable with the principle that the user, to be adverse, must be actionable,<sup>58</sup> nor with the decisions above referred to, that a right of support for buildings from adjoining land or buildings cannot be acquired by prescription.

#### § 452. Rights in the public.

A right to use land for highway purposes may usually be acquired by the public by its use for such purposes under a claim of right for the statutory period of limitation as to land. Such mode of acquisition of highway rights is ordinarily referred to as "prescription,"<sup>59</sup> and is generally based on the theory that such user of the land raises the presumption of a dedication, or of an appropriation of the

49 Ga. 19, 15 Am. Rep. 669; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Handlan v. McManus*, 42 Mo. App. 551; *Sullivan v. Zeiner*, 98 Cal. 346. See *Gilmore v. Driscoll*, 122 Mass. 199, 207. But see *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Lasala v. Holbrook*, 4 Palge (N. Y.) 169, 25 Am. Dec. 524.

<sup>56</sup> *Dalton v. Angus*, 6 App. Cas. 740; *Lemaitre v. Davis*, 19 Ch. Div. 281.

<sup>57</sup> *Schile v. Brockhaus*, 80 N. Y. 614; *Barry v. Edlavitch*, 84 Md. 95; *Dowling v. Hennings*, 20 Md. 179; *Brown v. Werner*, 40 Md. 15; *McVey v. Durkin*, 136 Pa. St. 418.

<sup>58</sup> See *McLaughlin v. Cecconi*, 141 Mass. 252; *Whiting v. Gaylord*, 66 Conn. 337.

<sup>59</sup> If prescription is to be regarded as necessarily based on the presumption of a grant, the term is not accurate as applied to the case of a highway, since highway rights are created, not by grant, but by dedication. See Angell, *Highways*, § 131. The fiction of a grant can, however, not be regarded as an integral part of the law of prescription in this country at the present day.



land by a statutory proceeding.<sup>60</sup> In some states there are statutory provisions in regard to the effect of user by the public as establishing a highway.<sup>61</sup> In a few states, even apart from statute, the mere user of the land by the individuals constituting the public, without any adoption of the way by the public authorities, is insufficient to create a highway.

The user of the land by the public must not be by permission merely of the owner of the land, but must be under a claim of right,<sup>62</sup> and the fact that the owner of the land maintains gates across the way is regarded as strong evidence that the use by the public is merely permissive.<sup>63</sup> The fact, moreover, that the land is vacant and uninclosed has been regarded as strong, and sometimes as conclusive, proof that the user was permissive.<sup>64</sup> The user must be in a fixed and definite line for the whole of the statutory period.<sup>65</sup>

<sup>60</sup> *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662, 3 Gray's Cas. 808; *Onstott v. Murray*, 22 Iowa, 457; *Willey v. Portsmouth*, 35 N. H. 303; *Howard v. State*, 47 Ark. 431; *Com. v. Cole*, 26 Pa. St. 187; *Daniels v. People*, 21 Ill. 439; *Schwerdtle v. Placer County*, 108 Cal. 589; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; 3 Kent's Comm. 451; *Elliott, Roads & S. c.* 6.

<sup>61</sup> See *Freshour v. Hihn*, 99 Cal. 443; *Strong v. Makeever*, 102 Ind. 578; *Elfelt v. Stillwater St. Ry. Co.*, 53 Minn. 68; *Speir v. Town of New Utrecht*, 121 N. Y. 420; *Stewart v. Frink*, 94 N. C. 487; *Com. v. Kelly*, 8 Grat. (Va.) 632; *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511.

<sup>62</sup> *Plummer v. Ossipee*, 59 N. H. 55; *Hougham v. Harvey*, 40 Iowa, 634; *White v. Willey*, 59 Hun, 618, 13 N. Y. Supp. 205; *Sharp v. Mynatt*, 1 Lea (Tenn.) 375; *City of Ottawa v. Yentzer*, 160 Ill. 509.

<sup>63</sup> *Harper v. State*, 109 Ala. 66; *Smithers v. Fitch*, 82 Cal. 153; *Johnson v. Stayton*, 5 Har. (Del.) 448; *Shellhouse v. State*, 110 Ind. 509; *Jones v. Phillips*, 59 Ark. 35.

<sup>64</sup> *City of Ottawa v. Yentzer*, 160 Ill. 509; *Hutto v. Tindall*, 6 Rich. Law (S. C.) 336; *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480; *Graham v. Hartnett*, 10 Neb. 517; *State v. Horn*, 35 Kan. 717. See *Ely v. Parsons*, 55 Conn. 83.

<sup>65</sup> *Friel v. People*, 4 Colo. App. 259; *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264; *Schroeder v. Village of Onokama*, 95 Mich. 25; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489.

## CHAPTER XXV.

### ACCRETION.

§ 453. General considerations.

454. Apportionment of accretions.

455. Islands.

The owner of land upon a stream or body of water is entitled to such other land as may be added thereto by "accretion,"—that is, by the gradual and imperceptible formation of land adjacent thereto by alluvial deposits. Such owner, on the other hand, loses so much of his land as may be gradually washed away, or upon which the water may gradually encroach. A sudden and perceptible change does not affect the ownership of a particular part of the soil.

An island formed by alluvial deposits belongs to the owner of the land on which it is formed.

§ 453. General considerations.

When the line between water and the land bordering thereon is changed by the gradual deposit of alluvial soil upon the margin of the water, or by the gradual recession of the water, the owner of the land becomes entitled to the new land thus formed;<sup>1</sup> and, conversely, in case land bordering

<sup>1</sup> *Rex v. Yarborough*, 3 Barn. & C. 91; *Gifford v. Yarborough*, 5 Bing. 168, 3 Gray's Cas. 9; *Coulthard v. Stevens*, 84 Iowa, 241, 35 Am. St. Rep. 304, and note; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195; *Saunders v. New York Cent. & Hudson River R. Co.*, 144 N. Y. 75; *Linthicum v. Coan*, 64 Md. 439, 454; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206; *Gill v. Lydick*, 40 Neb. 508; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267, and note; *Chl-* (1034)

on water is gradually washed away, or the water otherwise encroaches upon the land, the owner loses the land which has thus been encroached on by the water, unless he retains its ownership as having previously been entitled to the land under the water.<sup>2</sup> These principles may be otherwise expressed by the statement that, if a person owns the land under a particular body of water, or under a particular portion thereof, or land adjoining such water, he continues to own the land answering to such description, although, owing to a gradual change in the location of the water, the land so described does not remain the same. So, if a stream bounded on both sides by land belonging to A., who also owns the bed of the stream, gradually changes its bed so as to encroach upon the land of B., the land covered by the stream in its new location ceases to belong to B., and becomes the property of A.<sup>3</sup> And if the middle line of a stream is the boundary between the lands of different owners, it remains the boundary, although the line itself changes as a result of a gradual change in the location of the stream.<sup>4</sup> A different rule has, however, been applied in the case of land bounded on a private pond belonging exclusively to another, it being held that the boundary is in such case a fixed line, and does not follow changes in the margin of the water.<sup>5</sup>

*cago Dock & Canal Co. v. Kinzie*, 93 Ill. 415; *Minto v. Delaney*, 7 Or. 337; *Fillmore v. Jennings*, 78 Cal. 634.

<sup>2</sup> *In re Hull & Selby Ry. Co.*, 5 Mees. & W. 327, 3 Gray's Cas. 15; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Wilson v. Shively*, 11 Or. 215; *Bouvier v. Stricklett*, 40 Neb. 792; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Town of East Hampton v. Kirk*, 84 N. Y. 218; *Gould, Waters*, § 155.

<sup>3</sup> *Foster v. Wright*, 4 C. P. Div. 438, 3 Gray's Cas. 17; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48.

<sup>4</sup> *Nebraska v. Iowa*, 143 U. S. 359; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48; *Gerrish v. Clough*, 48 N. H. 9.

<sup>5</sup> *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270, 3 Gray's Cas.

river is in the riparian proprietors, to the effect that their boundary lines are to be extended from the old shore line to the new line at right angles to the center line of the river.<sup>16</sup> Whatever be the general rule adopted in this regard in a particular jurisdiction, it will, it seems, be varied in particular cases in view of peculiar circumstances which may arise.<sup>17</sup>

### § 455. Islands.

An island, when formed in a stream or body of water by the deposit of alluvial matter therein, belongs to the owner of the land beneath the water, on which the island is formed, whether such owner be the state or an individual.<sup>18</sup> So, if the island is on both sides of a line dividing the lands of different owners, the island belongs to both owners.<sup>19</sup> An

<sup>16</sup> *Miller v. Hepburn*, 8 Bush (Ky.) 326, 3 Gray's Cas. 26.

In Illinois it has been decided that the thread or middle line of the river is to be divided proportionately between the riparian proprietors, and the boundary lines are to be extended to the division points so made. *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866.

<sup>17</sup> *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143.

This question of the apportionment of alluvion between the different riparian owners is analogous to that of the apportionment of the "flats" or shore among the owners of the uplands, in cases in which the state has relinquished the ownership of such flats. See *Gould, Waters*, § 162; *Com. v. City of Roxbury*, 9 Gray (Mass.) 451, reporter's note 521; *Wonson v. Wonson*, 14 Allen (Mass.) 85; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701.

<sup>18</sup> *Perkins v. Adams*, 132 Mo. 131; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *St. Louis v. Ruts*, 138 U. S. 226; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 212; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112.

<sup>19</sup> *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; 3 Kent's Comm. 423.

island formed by a sudden change in the course of a stream, or by a sudden encroachment of the sea, the soil remaining as before, except that it is separated by a channel from the main land, does not change its ownership.<sup>20</sup>

<sup>20</sup> Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544; Bonewits v. Wygant, 75 Ind. 41; Gould, Waters, § 166.

## CHAPTER XXVI

### ESTOPPEL.

§ 456. Transfer of after-acquired title.

457. Estoppel by representation.

In this country, a conveyance of land, with a covenant of warranty, and occasionally with other covenants, is regarded as passing any title or interest, within the scope of such conveyance, which the grantor may thereafter acquire. Such a doctrine has never been recognized in England except in the case of feoffments, fines, and recoveries, and, to a limited extent, leases.

The doctrine of estoppel by representation, so far as it may prevent the owner of land, who represents, either expressly or tacitly, the title to be in another, from thereafter denying the truth of the representation, in effect transfers the title. In some states the doctrine is applicable in connection with land only when the representation was fraudulent, and then only in equity.

§ 456. Transfer of after-acquired title.

At common law, a transfer of land by feoffment, fine, or common recovery operated to transfer to the transferee all estates or interests which might be subsequently acquired by the transferrer, in case he did not, at the time of making the assurance, have such an estate as he purported to transfer.<sup>1</sup>

<sup>1</sup> Bigelow, Estoppel (5th Ed.) 385, 414-419; Rawle, Covenants for Title (5th Ed.) § 243; Doe d. Christmas v. Oliver, 10 Barn. & C. 181, 3 Gray's Cas. 739; Sturgeon v. Wingfield, 15 Mees. & W. 224, 3 Gray's Cas. 745.

A lease had a partially similar effect, in that, if the lessor did not have any title at the time of making the lease, a title subsequently obtained by him passed thereunder, though this was not the case if he had some title at the date of the lease.<sup>2</sup> Other conveyances than those mentioned had no such effect of passing an after-acquired title at common law, nor have they in England at the present day.<sup>3</sup> It is, however, recognized in England, as in this country, that, if a conveyante purports to transfer a certain estate, whether this appears from recitals, covenants, or any other part of the conveyance, the grantor himself is estopped thereafter to deny that such an estate did pass, or to claim the land under a title subsequently acquired by him.<sup>4</sup>

To support this view, there is not, it is evident, any necessity for holding that the subsequently-acquired title passes to the grantee, the estoppel being merely personal as against the grantor, and being but an application of the common-law principle that a party to a deed cannot contradict or disprove any declaration or averment therein. In this country, however, there are many decisions to the effect not only that the

<sup>2</sup> Co. Litt. 47b; Bigelow, Estoppel, 390, 420; Williams, Real Prop. (18th Ed.) 476; Doe d. Strode v. Seaton, 2 Crompt. M. & R. 728; Trevivan v. Lawrence, 1 Salk. 276.

<sup>3</sup> Williams, Real Prop. (18th Ed.) 476; Rawle, Covenants for Title (5th Ed.) §§ 244, 246, 262; Bigelow, Estoppel, 423 et seq.; 2 Smith, Lead. Cas. 839; Right v. Bucknell, 2 Barn. & Adol. 278, 3 Gray's Cas. 741; General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc., 10 Ch. Div. 15.

<sup>4</sup> Rawle, Covenants for Title (5th Ed.) §§ 245, 255; Bigelow, Estoppel, 395; Goodtitle v. Balley, Cowp. 601; 2 Smith, Lead. Cas. Eq. 854; Right v. Bucknell, 2 Barn. & Adol. 278, 3 Gray's Cas. 741; Van Rennselaer v. Kearney, 11 How. (U. S.) 297; Clark v. Baker, 14 Cal. 629, 76 Am. Dec. 449; Taggart v. Risley, 4 Or. 235; Wells v. Steckelberg, 52 Neb. 597; Reynolds v. Cook, 83 Va. 817, 5 Am. St. Rep. 317; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491.

grantor in a conveyance is estopped to deny that it passed the estate which it purported to pass, but also that it actually passes, by way of estoppel, any title which the grantor may thereafter acquire in the land, if this is within its apparent scope, and especially if it contains certain covenants of title.<sup>5</sup> There are, moreover, in a number of states, statutory provisions to this effect.<sup>6</sup>

For most purposes, the question whether there is merely a personal estoppel on the grantor to assert the after-acquired title, or whether such title actually passes under the conveyance, is immaterial. The distinction between the two views is, however, important in two respects: First, as between the grantor and grantee, the effect of the application of the rule, without exception, that a conveyance containing covenants of title operates to pass an after-acquired estate, would be that a covenantee would be compelled to take such an estate, and would not have the option of refusing so to do, and of recovering full damages on the covenant. Recognizing the injustice of such a result, it has usually been held that the covenantee has such an option, and is not compelled to accept the after-acquired estate in partial or total satisfaction of the covenant.<sup>7</sup> The other and more important result of the distinction is that, if the covenant effects merely a personal estoppel on the covenantor, a person to whom he subsequently conveys the after-acquired estate is not affected thereby, while, if the covenant operates as an actual

<sup>5</sup> Rawle, Covenants for Title (5th Ed.) § 248, and the numerous cases there cited; Bigelow, Estoppel, 429; 2 Smith, Lead. Cas. Eq. 838; 11 Am. & Eng. Enc. Law, 418.

<sup>6</sup> 1 Stimson, Am. St. Law, § 1454; Rawle, Covenants for Title (5th Ed.) § 249.

<sup>7</sup> Rawle, Covenants for Title (5th Ed.) § 258; Bigelow, Estoppel, 435; *Blanchard v. Ellis*, 1 Gray (Mass.) 193, 3 Gray's Cas. 755; *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96; *Burton v. Reeds*, 20 Ind. 87; *Noonan v. Hsley*, 21 Wis. 139.



transfer of the subsequently-acquired estate, it does so as against any person to whom the covenantor attempts to convey such estate;<sup>8</sup> and this it does, it has been held in some cases, although such subsequent grantee is a purchaser for value, and without actual notice of the prior transfer, or any convenient means of acquiring notice. These decisions can more conveniently be considered hereafter in connection with the recording acts, to the spirit and policy of which they seem to be opposed.<sup>9</sup>

Many of the decisions which adopt the view that the conveyance operates to transfer the after-acquired title are based upon the theory that circuity of action is thereby avoided, the title itself being given to the grantee, instead of compelling him to sue for damages caused by the want of such title. But, as before stated, so far as the estoppel of the grantor himself is concerned, the presence of a covenant is immaterial;<sup>10</sup> and, as shown by an able writer, even when there are covenants, the estoppel frequently operates, although there is no right of action on a covenant.<sup>11</sup> This theory, therefore, however satisfactory it may be in many cases, does not serve to explain the decisions as a whole, and, as

<sup>8</sup> Rawle, *Covenants for Title* (5th Ed.) § 259; Bigelow, *Estoppel*, 413 et seq.

<sup>9</sup> Post, § 476.

<sup>10</sup> See authorities cited ante, note 4.

<sup>11</sup> Rawle, *Covenants for Title* (5th Ed.) § 251, where the following cases in which the estoppel has been held to act in the absence of any liability on the covenants are enumerated: (1) When the estoppel is sought to be enforced against a purchaser of the subsequently-acquired title, and not against the grantor himself; (2) when a married woman is estopped (in some states) to claim after-acquired property, though not liable on the covenant; (3) when the state is held to be estopped, though not liable on the covenant; (4) when the grantor is estopped, though exempt from liability on the covenant, owing to a discharge in bankruptcy; and (5) when he is estopped, though the claim on the covenant is barred by limitations.

stated by the same authority, the only satisfactory theory on which they can be explained is that they are merely applying under common-law forms, the equitable principle that, where one purports to convey a good title to another, and afterwards acquires the same land under another title, he may be compelled to convey to such other the title so acquired,—a rule which, however, was never enforced in equity as against a *bona fide* purchaser from the grantor of the land so subsequently acquired.<sup>12</sup>

In pursuance of the theory, frequently asserted, that the estoppel arises in a particular case from the presence of a covenant in the conveyance, and to prevent circuitry of action, the cases sometimes distinguish as between particular covenants in this respect. Thus, a covenant of warranty is always regarded as effective for this purpose,<sup>13</sup> frequently as a result of a mistaken application of the doctrine of warranty at common law, and the same effect has been given to a covenant for quiet enjoyment,<sup>14</sup> while it has, in some states, been denied to a covenant for seisin or for good right to convey.<sup>15</sup>

There can be no estoppel as to an after-acquired title when the conveyance undertakes to transfer merely such an estate or

<sup>12</sup> Rawle, *Covenants for Title* (5th Ed.) § 264.

<sup>13</sup> *Doe d. Potts v. Roe*, 3 *Houst. (Del.)* 369, 11 *Am. Rep.* 757; *Childs v. McChesney*, 20 *Iowa*, 431, 89 *Am. Dec.* 545; *Knight v. Thayer*, 125 *Mass.* 25; *Morris v. Jansen*, 99 *Mich.* 436; *Moore v. Rake*, 26 *N. J. Law*, 574; *Broadwell v. Phillips*, 30 *Ohio St.* 255; *Johnson v. Brauch*, 9 *S. D.* 116; *Raines v. Walker*, 77 *Va.* 95; *Foster v. Hackett*, 112 *N. C.* 546; *Walton v. Follansbee*, 131 *Ill.* 147.

<sup>14</sup> *Smith v. Williams*, 44 *Mich.* 240; *Long Island R. Co. v. Conklin*, 29 *N. Y.* 572. See *Taggart v. Risley*, 4 *Or.* 235.

<sup>15</sup> *Allen v. Sayward*, 5 *Me.* 227, 17 *Am. Dec.* 221; *Doane v. Willcutt*, 5 *Gray (Mass.)* 333, 66 *Am. Dec.* 369; *Chauvin v. Wagner*, 18 *Mo.* 531. Contra, *Wightman v. Reynolds*, 24 *Miss.* 675. And see *Irvine v. Irvine*, 9 *Wall. (U. S.)* 612.

interest as the grantor has,<sup>16</sup> and the fact that such a conveyance contains covenants for title does not change its character in this respect.<sup>17</sup> If the conveyance is not of a limited interest merely, or of such interest only as the grantor has, the fact that the covenant is special—that is, against the acts only of the grantor and those claiming under him—does not affect its operation by way of estoppel.<sup>18</sup>

§ 457. Estoppel by representation.

In connection with the law of land there is frequent occasion for the application of the familiar principle that one who, by his words or actions, represents a certain state of facts to be true, and thereby induces another to act to his detriment, is precluded from thereafter denying the existence of such a state of facts. So it has frequently been decided that if one, having title to land, openly disclaims any rights therein,<sup>19</sup> or fails to assert his rights,<sup>20</sup> and thereby causes one, ignorant of the true state of the title, to purchase the land from a third person, he cannot thereafter assert any claim to

<sup>16</sup> *Quivey v. Baker*, 37 Cal. 465; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Harriman v. Gray*, 49 Me. 537; *Fay v. Wood*, 65 Mich. 390; *Gibson v. Chouteau*, 39 Mo. 536; *Perrin v. Perrin*, 62 Tex. 477; *Jourdain v. Fox*, 90 Wis. 99.

<sup>17</sup> *Rawle, Covenants for Title* (5th Ed.) § 250; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Hanrick v. Patrick*, 119 U. S. 156, 175; *Holbrook v. Debo*, 99 Ill. 372; *Stephenson v. Boody*, 139 Ind. 60.

<sup>18</sup> *Kimball v. Blaisdell*, 5 N. H. 533, 3 Gray's Cas. 761; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Coal Creek Min. & Mfg. Co. v. Ross*, 12 Lea (Tenn.) 1. But see *Bennett v. Davis*, 90 Me. 457.

<sup>19</sup> *Dickerson v. Colgrove*, 100 U. S. 578; *Keys v. Test*, 33 Ill. 316; *Blodgett v. McMurtry*, 34 Neb. 782; *Coogler v. Rogers*, 25 Fla. 853; *Mayer v. Ramsey*, 46 Tex. 371.

<sup>20</sup> *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Hatch v. Kimball*, 16 Me. 146; *Brown v. Union Depot St. Ry. & Transfer Co. of Stillwater*, 65 Minn. 508; *Guffey v. O'Relley*, 88 Mo. 418, 57 Am. Rep. 424; *Thompson v. Sanborn*, 11 N. H. 201, 35 Am. Dec. 490; *Marines v. Goblet*, 31 S. C. 153, 17 Am. St. Rep. 22.

the land. Likewise, it has been decided that the true owner of land who stands by and sees another, under the belief that he has the unincumbered title to the land, make expenditures for improvements thereon; may be under such a duty to inform the person in possession of the true state of the title as to be thereafter estopped from asserting any rights in the land.<sup>21</sup> The mere failure to assert one's title, without any active misrepresentation in regard thereto, will not, however, have the effect of an estoppel, if the title appears of record, since one purchasing or improving the land is in such case charged with notice of the true state of the title.<sup>22</sup> An estoppel of this character, since it is based on a representation that one has not the title to land, and not that he has title, has of course no effect upon a title afterwards acquired by the person making the representation.<sup>23</sup>

This class of estoppel, though frequently spoken of as "equitable" estoppel, is ordinarily recognized and enforced in courts of law as well as in equity. But though the principles governing in this class of cases were not clearly recognized and formulated under that name until the nineteenth century,<sup>24</sup> before this there existed in equity a doctrine which was equivalent to the modern doctrine of estoppel by representation, to

<sup>21</sup> *Kirk v. Hamilton*, 102 U. S. 68; *Bryan v. Pinney* (Ariz.) 31 Pac. 548; *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17; *Thomas v. Pullis*, 56 Mo. 211; *Dellest v. Kemble*, 23 N. J. Eq. 58; *Redmond v. Excelsior Sav. Fund & Loan Ass'n*, 194 Pa. St. 643, 75 Am. St. Rep. 714.

<sup>22</sup> *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 337; *Tongue's Lessee v. Nutwell*, 17 Md. 212, 79 Am. Dec. 649; *Mayo v. Cartwright*, 30 Ark. 407; *Campbell v. Jacobson*, 145 Ill. 389; *Staton v. Bryant*, 55 Miss. 261; *Knouff v. Thompson*, 16 Pa. St. 357; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307.

<sup>23</sup> *Gluckauf v. Reed*, 22 Cal. 468; *Davidson v. Dwyer*, 62 Iowa, 332; *Donaldson v. Hibner*, 55 Mo. 492.

<sup>24</sup> *Pickard v. Sears*, 6 Adol. & E. 469 (A. D. 1837).

the effect that one who knowingly makes a false representation to one who acts on it is bound to make that representation good;<sup>25</sup> and a similar principle was also involved in the equitable rule that the fraudulent failure of one to make known his title to a person about to purchase the land from another would have the effect of changing the ordinary rule of priorities, and of postponing his claim to that of the purchaser.<sup>26</sup>

There has been very great difference of opinion as to whether the misrepresentation, whether by conduct or by express statement, must be fraudulent in order to give rise to an estoppel of this character. The decided weight of authority is to the effect that it need not be such;<sup>27</sup> but apart from the question of the existence of such a requirement in other cases, it is by some authorities asserted that, in order that one may, by reason of misrepresentations, be estopped to assert his title to land, he must have been guilty of fraud, since the application of the doctrine of estoppel by representation involves in effect a transfer of land, and that is, by the Statute of Frauds, required to be in writing.<sup>28</sup> Moreover, while, as a general rule, an estoppel by representation is as available at law as in equity, it is, by the decisions of some states, not available at law when the title to land is involved, on the ground that at law the Statute of Frauds must control, and that in equity only can the case be regarded as taken out of the statute by the fraud, actual or constructive, involved in the misrepresentation.<sup>29</sup> The view

<sup>25</sup> *Evans v. Bicknell*, 6 Ves. 174; *Bigelow, Estoppel*, 557.

<sup>26</sup> 2 *Pomeroy, Eq. Jur.* §§ 686, 731; *Ewart, Estoppel*, § 257.

<sup>27</sup> *Bigelow, Estoppel*, 629, note; *Ewart, Estoppel*, §§ et seq.; 2 *Pomeroy, Eq. Jur.* §§ 805, 806; 11 *Am. & Eng. Enc. Law* (2d Ed.) 431.

<sup>28</sup> *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Huyck v. Bailey*, 100 Mich. 223; *May v. Hanks*, 62 N. C. 310; 2 *Pomeroy, Eq. Jur.* § 807.

<sup>29</sup> *Doe d. McPherson v. Walters*, 16 Ala. 714; *Standifer v. Swann*,

is, however, taken in most jurisdictions,<sup>80</sup> that an estoppel may be asserted at law as well as in equity.

In equity the person in favor of whom the owner is estopped to claim the land is entitled to a conveyance of the land by the owner,—that is, the owner may be compelled to make good his representations;<sup>81</sup> this, as before stated, being a well-settled equitable doctrine before the legal development of the law of estoppel under that name.<sup>82</sup> In determining, therefore, the rights of the person to assert the estoppel as against persons other than the person who was originally guilty of the misrepresentation, the former should, it seems, be regarded as standing in the position of any other person having an equity to a conveyance. Consequently, the estoppel should be enforceable as against any subsequent owner of the land, as would any other equity, until the land passes to a *bona fide* purchaser for value.<sup>83</sup> This view has been sometimes applied,<sup>84</sup> though frequently the subject has been confused by undertaking to determine whether the subsequent owner of the land is a “privy” of a person originally estopped.

78 Ala. 88; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533; *Winslow v. Cooper*, 104 Ill. 235; *Suttle v. Richmond, F. & P. R. Co.*, 76 Va. 284.

<sup>80</sup> *Kirk v. Hamilton*, 102 U. S. 68; *Bigelow v. Foss*, 59 Me. 164; *Davis v. Davis*, 26 Cal. 23; *Shaw v. Beebe*, 35 Vt. 204; *Brown v. Bowen*, 30 N. Y. 519; *Beaupland v. McKeen*, 28 Pa. St. 124; *Levy v. Cox*, 22 Fla. 546; *Bigelow, Estoppel*, 715.

<sup>81</sup> *Citizens' Bank of Louisiana v. First Nat. Bank of New Orleans*, L. R. 6 H. L. 360; *Beatty v. Sweeney*, 26 Mich. 217; *Favill v. Roberts*, 50 N. Y. 222.

<sup>82</sup> *Ante*, note 25.

<sup>83</sup> See *Ewart, Estoppel*, 196, on which the view here presented is based.

<sup>84</sup> *Rutz v. Kehn*, 143 Ill. 558; *Southard v. Sutton*, 68 Me. 575; *Thistle v. Buford*, 50 Mo. 278; *Ions v. Harbison*, 112 Cal. 260; *Rambox v. Stowell*, 103 Cal. 588; *Maxon v. Lane*, 124 Ind. 592; *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 534; *Hodges v. Eddy*, 41 Vt. 485, 98 Am. Dec. 612.

## CHAPTER XXVII.

### ESCHEAT AND FORFEITURE.

§ 458. Escheat.

459. Forfeiture.

Upon the death of the owner of land intestate, and without legal heirs, the land passes to the state by "escheat."

Land may be forfeited to the state in particular cases, as when an alien acquires land in violation of law, or, occasionally, when a corporation so does.

Land may be forfeited to an individual for breach of an express or implied condition subsequent.

§ 458. Escheat.

At common law, as before stated, an escheat of land occurred in favor of the feudal lord in case the tenure terminated by reason of the failure of inheritable blood, such failure arising from the corruption of the blood of the tenant by attainder of felony, as well as from the death of the tenant without any ascertainable heir.<sup>1</sup> In this country, in those states in which tenure is to be regarded as nonexistent,<sup>2</sup> the feudal conception of escheat cannot obtain, though even there the right of the state to land the owner of which dies intestate without heirs would no doubt be sustained as an attribute of sovereignty. Any question upon the subject, however, is avoided in most, if not in all, the states by statutory provisions that, upon the failure of other heirs, the

<sup>1</sup> 2 Bl. Comm. 244 et seq.; ante, § 19.

<sup>2</sup> Ante, § 14.

land shall pass to the state.<sup>3</sup> This right of the state to land in default of heirs is ordinarily spoken of as "escheat."

An "escheat" of this character may occur in states where aliens are forbidden to hold lands, as a result of the absence of all heirs other than aliens, and likewise owing to the inability of one, otherwise entitled to inherit, to trace his descent except through an alien.<sup>4</sup> But the term "escheat" is not, it seems, properly applicable to the forcible acquisition by the state of land which an alien has, in violation of law, undertaken to acquire by purchase, though the term is frequently so used, this being in the nature of the enforcement of a forfeiture by the state, rather than an escheat.<sup>5</sup>

§ 459. Forfeiture—To state.

At common law, upon his attainder of high treason, one forfeited to the crown all his freehold estates, and, in case of petit treason and felony, his freehold estates for life, and his chattel interests absolutely.<sup>6</sup> In this country the effect of a conviction of crime is rarely to forfeit all the land of the wrongdoer, the statutes of most states providing explicitly that no conviction of crime shall work forfeiture of estate or corruption of blood, though in two or three there may, it seems, be a forfeiture of estate during the life of the offender.<sup>7</sup>

If an alien undertakes to acquire land in violation of the law of the particular state, he may, unless protected by the terms of a treaty with his government, be deprived of such land, and a forfeiture to the state be compelled.<sup>8</sup>

<sup>3</sup> 1 Stimson's Am. St. Law, §§ 400, 1151-1154, 3125.

<sup>4</sup> See post, § 505.

<sup>5</sup> See 2 Bl. Comm. 274, 293; 2 Kent's Comm. 61; *Read v. Read*, 5 Call (Va.) 207.

<sup>6</sup> 4 Bl. Comm. 381-385.

<sup>7</sup> 1 Stimson's Am. St. Law, §§ 143, 1162.

<sup>8</sup> Post, § 505.



During the American Revolution, many of the colonial governments confiscated the lands of persons supporting the royal cause,<sup>9</sup> and, during the Civil War, acts confiscating the property of persons aiding the Confederate cause were passed by congress, the confiscation, however, in the case of land, being limited to the term of the offender's natural life.<sup>10</sup> The confiscation of enemies' property is, at the present day, not generally approved by writers on international law, and is not practiced in wars of an international character.<sup>11</sup>

Occasionally the statute, in restricting the power of a corporation to acquire land, provides, expressly or impliedly, that land acquired by the corporation in violation of law shall be forfeited to the state.<sup>12</sup> In the absence of such a provision for forfeiture, though the state may annul the transfer or dissolve the corporation, it does not have any right to the land which the corporation thus wrongfully acquired.<sup>13</sup>

Land used for purposes which violate the internal revenue laws in certain ways become subject to forfeiture, by express provision of statute, to the United States government.<sup>14</sup>

At common law, the proceeding on the part of the state to enforce a forfeiture as well as an escheat was by "office found" or "inquest of office," this being a proceeding, by the aid of a jury, which was made use of in any cases in

<sup>9</sup> Sabine, *Loyalists of American Revolution*, 75 et seq.

<sup>10</sup> *Jenkins v. Collard*, 145 U. S. 546.

<sup>11</sup> Taylor, *International Law*, § 540; Lawrence's *Wheaton, Internat. Law*, 596 et seq.

<sup>12</sup> See *Leasure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 139 Pa. St. 457.

<sup>13</sup> *National Bank of Commerce v. Licking Valley Land & Mining Co.*, 15 Ky. Law Rep. 211, 22 S. W. 381; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 139 Pa. St. 457; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621; *Fayette Land Co. v. Railroad Co.*, 93 Va. 274.

<sup>14</sup> Rev. St. U. S. § 3406.

which the crown asserted a claim to lands or goods.<sup>15</sup> There is, in some states, a statutory proceeding for the enforcement of such rights, but an inquest of office as at common law, or, it seems, an action of ejectment, would be sufficient to try the rights of the state to the land in any such case.

—— To individual.

A tenant of a particular estate usually holds it subject to certain implied conditions. At common law, a life tenant held the land subject to an implied condition that he should not make a feoffment thereof in fee simple, since this divested the whole fee-simple title, and by so doing he forfeited his estate. This ground of forfeiture is now obsolete, since a modern conveyance passes only such interest as the grantor has.<sup>16</sup> A life tenant may, however, at the present day, forfeit his interest by the commission of acts of waste, the statute frequently containing a provision to this effect.<sup>17</sup> A tenant under a lease may also forfeit his tenancy by his disclaimer of his landlord's title, and, in some states, by the use of the premises for an illegal purpose.<sup>18</sup> A forfeiture of an estate for breach of a condition is enforced by the grantor of the estate or his successor in interest by means of a re-entry or an action of ejectment.<sup>19</sup>

The question of the forfeiture of an estate in land for breach of an express condition subsequent has been before considered.<sup>20</sup>

<sup>15</sup> 3 Bl. Comm. 353.

<sup>16</sup> Ante, § 32.

<sup>17</sup> 1 Stimson's Am. St. Law, § 1232.

<sup>18</sup> Ante, § 52.

<sup>19</sup> Ante, § 74.

<sup>20</sup> Ante, §§ 74-77.

## CHAPTER XXVIII.

### TRANSFER UNDER JUDICIAL PROCESS OR DECREE.

- § 460. Sales and transfers under execution.
- 461. Sales in equity at the instance of creditors.
- 462. Sales of decedents' lands.
- 463. Sales of lands of infants and insane persons.
- 464. Sales and transfers for purpose of partition.
- 465. Equitable decrees transferring title.
- 466. Adjudications of bankruptcy.

An estate in land may in some cases be transferred by an officer acting under process from a court, or by a judicial decree confirmatory of a transfer made by an officer of the court, and occasionally by a decree alone. Such transfers occur in the case of (1) sales of estates in land under execution at the instance of creditors; (2) sales by order of a court of equity at the instance of creditors; (3) sales of lands of decedents, usually for the payment of debts and legacies; (4) sales of lands of infants and insane persons; (5) sales and transfers for purpose of partition; (6) equitable decrees, under state statutes, transferring title; (7) adjudications of bankruptcy, by which title passes to the bankrupt's trustee.

#### § 460. Sales and transfers under execution.

The land of a debtor was first made subject to the claims of creditors by an early statute,<sup>1</sup> which provided that one who had recovered a judgment might elect to have the sheriff deliver to him the chattels of the debtor and one-half his land, the writ under which this was done being termed a "writ of *elegit*," because it recited that the creditor had elected (*elegit*) to pursue that remedy. Formerly the creditor had merely the right to retain the land taken under this writ

<sup>1</sup> 13 Edw. I. c. 18 (St. Westminster II.).

until the rents and profits sufficed to pay the judgment, he being known as a tenant by *elegit*; but now, by statute in England, the creditor may not only take all the debtor's land under the writ, but he may obtain an order for the sale of the land, the proceeds being distributed among all the creditors.<sup>2</sup>

The writ of *elegit* has been made use of in but few states, and is at the present day, it seems, obsolete in every state but Delaware.<sup>3</sup> In most of the states the same method is authorized for the realization of debts from the land of the judgment debtor as from his chattels,—that is, a seizure and sale by the sheriff, and application of the proceeds to the payment of the judgment. In the New England states, however, the satisfaction of a judgment out of the debtor's land is usually obtained, not by a sale of the land, but by a delivery of the land, or a part thereof, at a value fixed by appraisers, to the judgment creditor, this being known as a levy "by extent," and the land being said to be "extended." The statutory provisions as to the method of making the extent are full and precise, and they must be strictly followed. A certain period, usually six months or a year, is allowed to the debtor in which he may pay the judgment and recover the extended lands, but, if this is not done, the creditor acquires the whole estate and interest of the debtor absolutely.<sup>4</sup> The satisfaction of a pecuniary judgment, whether by a sale under the writ or an extent, is known as an "execution" of the judgment.

As a general rule, all legal interests in land other than tenancies at will, bare legal titles, liens, and, in most states,

<sup>2</sup> Williams, Real Prop. (18th Ed.) 250.

<sup>3</sup> 3 Freeman, Executions (3d Ed.) § 370.

<sup>4</sup> 3 Freeman, Executions, § 372 et seq.; 2 Dembitz, Land Titles, § 173.

it would seem, contingent future interests, may be sold under a writ of execution.<sup>5</sup> At common law there was no method by which the equitable interests could be reached by execution, but, by the Statute of Frauds,<sup>6</sup> it was enacted that the execution might be levied on lands of which any other person or persons were seised or possessed of in trust for the execution debtor. This provision has been adopted or re-enacted in a number of the states, but it has usually been construed as applicable only in cases in which a *cestui que trust* has, under an express declaration of trust, the exclusive enjoyment of a beneficial interest, the legal title to which is in another, and neither it nor its American counterparts have had the effect of making all equitable interests subject to execution. In some states, however, more liberal statutes have been adopted, subjecting equitable interests generally to execution, while in others the common-law rule which prevailed previous to the Statute of Frauds still controls.<sup>7</sup> Equitable interests which cannot be sold under execution may usually be reached by a proceeding in equity, known as a "creditors' bill."<sup>8</sup>

A sale by a sheriff under a writ of execution is by force of a statutory power,<sup>9</sup> and is effective, if legally made, and followed by a conveyance to the purchaser, to divest the title of the judgment debtor, and to vest it in the vendee. In order that the sale may have this effect, it must be made under a judgment rendered by a court having jurisdiction of the subject-matter and the parties.<sup>10</sup> If the judgment is

<sup>5</sup> 2 Freeman, Executions, § 172.

<sup>6</sup> 29 Car. II. c. 3, § 10.

<sup>7</sup> 2 Freeman, Executions, §§ 187-189; 11 Am. & Eng. Enc. Law (2d Ed.) 632.

<sup>8</sup> 2 Freeman, Executions, § 424 et seq.; 5 Enc. Pl. & Pr. 393. See post, § 461.

<sup>9</sup> See ante, § 274.

<sup>10</sup> Freeman, Executions, §§ 19, 20; Kleber, Void Judicial Sales §§ 262-267, 294.

valid, an innocent purchaser at the sale is not usually affected by irregularities in the proceedings leading up to the sale, though, if the judgment creditor is the purchaser, the rule is different, and he is regarded as chargeable with notice of any irregularities.<sup>11</sup>

The statutes of a number of states give the judgment debtor a certain period after the execution sale within which he may redeem therefrom. In the absence of statute, there is no right of redemption.<sup>12</sup>

The sheriff is required, by the statutes of most, if not all, the states, to make a conveyance of the land to the purchaser at the sale, and this is usually regarded as necessary to vest the legal title in the purchaser. This conveyance should recite the recovery of the judgment, the issue of the writ, and the sale thereunder, but any requirements in this regard are regarded as directory merely. The conveyance must usually be executed like other conveyances, and an acknowledgment is, in most states, though not in all, necessary only for the purpose of record. If the conveyance is invalid, the purchaser is ordinarily entitled to have a valid one executed in its place.<sup>13</sup>

In the case of a sale under execution, the sale is made by the sheriff as a ministerial officer, acting under the writ, and the court has no control over his actions, and, except in a few states, no confirmation of the sale by the court is necessary in order to validate the sale. An execution sale is accordingly to be distinguished from the sales hereafter referred to in this chapter, which are made in conformity with the order of a court, and must be confirmed by it, and which are accordingly regarded as the act of the court, though a commissioner or other officer is necessarily employed by the

<sup>11</sup> § Freeman, Executions, § 339 et seq.

<sup>12</sup> § Freeman, Executions, § 314.

<sup>13</sup> § Freeman, Executions, § 324 et seq.

court as an instrument in making the sale. An execution sale is accordingly not, properly speaking, a judicial sale.<sup>14</sup>

**§ 461. Sales in equity at the instance of creditors.**

The various liens to which land may be subject in behalf of a person other than the owner are enumerated in another part of this work.<sup>15</sup> These liens are almost invariably enforced by a sale of the land under the decree of a court of equity for the purpose of paying the amount of the lien from the proceeds. Likewise, equity may decree a sale in a creditors' suit brought to obtain a discovery of assets, or to reach property which is not subject to execution because of its equitable character, or because transferred by a conveyance fraudulent as to creditors.<sup>16</sup>

**§ 462. Sales of decedents' lands.**

At common law, an unsecured debt could not be enforced, as against the real property of the debtor after the latter's decease, unless it was due on a contract under seal, which expressly bound the debtor's heirs, and then it could be enforced against the heir to the extent of any land in fee simple descended to him.<sup>17</sup> Under this condition of the law there was no remedy available to even the specialty creditor in case the decedent had devised the land, or the heir had aliened it, and, accordingly, it was provided by statute<sup>18</sup> that a devisee should be liable to the same extent as the heir, and that no alienation by either the heir or the devisee should affect his liability for the debt. These statutes imposed on the heir and devisee a personal liability for the land to the extent

<sup>14</sup> Kleber, *Vold Judicial Sales*, §§ 15-20.

<sup>15</sup> Post, Part VI.

<sup>16</sup> 3 Pomeroy, *Eq. Jur.* §§ 1413-1415. See note 8, ante.

<sup>17</sup> 2 Bl. Comm. 244; Williams, *Real Prop.* (18th Ed.) 262.

<sup>18</sup> 3 Wm. & M. c. 14 (A. D. 1691); 6 & 7 Wm. III. c. 14 (A. D. 1696); 1 Wm. IV. c. 47 (A. D. 1830).

of the value of land descended or devised to him, and this was restricted to debts under seal. Later it was provided<sup>19</sup> that all interests in land should be assets for the payment of debts, whether by simple contract or under seal, and that the heir or devisee might be sued in equity accordingly by any creditor of the deceased. In this country there is probably in every state a statute making the realty of a decedent liable for his debts as against his heirs and devisees.<sup>20</sup>

Under the English statute making the lands of a decedent liable in equity for his debts, the proceeding to subject the land was by a "creditors' bill" in equity, and this mode of proceeding for the purpose is recognized in a number of the states.<sup>21</sup> In most of the states, however, the probate court has full jurisdiction to order the sale of land for the payment of debts, and likewise, frequently, for other purposes, such as the payment of legacies, or in order to make distribution, and the statutes usually provide that such sales shall be ordered on the application of the executor or administrator.<sup>22</sup> The length of time after the decedent's death within which a sale of lands for this purpose can be applied for by the personal representatives or the creditors of deceased is in some states fixed by statute.<sup>23</sup> In the absence of statute, it is said that the application must be made within a reasonable time,<sup>24</sup> and some courts have adopted the statutory period in which an action to recover lands is barred, holding that an

<sup>19</sup> 3 & 4 Wm. IV. c. 104 (A. D. 1833).

<sup>20</sup> 2 Dembitz, Land Titles, § 150; 2 Woerner, Administration, §§ 463, 490; 11 Am. & Eng. Enc. Law (2d Ed.) 833.

<sup>21</sup> 3 Pomeroy, Eq. Jur. §§ 1162-1164; 2 Woerner, Administration, § 463; 11 Am. & Eng. Enc. Law, 1072.

<sup>22</sup> 2 Woerner, Administration, §§ 463, 464.

<sup>23</sup> 2 Woerner, Administration, § 465.

<sup>24</sup> Liddel v. McVickar, 11 N. J. Law, 44; Rosenthal v. Renick, 44 Ill. 202; Killough v. Hinton, 54 Ark. 65; State v. Probate Court of Ramsey County, 40 Minn. 296; Ferguson v. Scott, 49 Miss. 500. See Bindley's Appeal, 69 Pa. St. 295.



application thereafter is, in the absence of special circumstances, too late.<sup>25</sup>

A sale of real estate to pay debts is ordinarily authorized only when the personal estate is insufficient for the purpose, and that such is the case must appear from the bill or petition for sale in order to give the court jurisdiction. In some states proceedings for sale by an executor or administrator are regarded as adversary to the heirs or devisees, so that a failure to give the notice to the latter as required by statute renders the sale void. In other states they are regarded as proceedings *in rem*, and so valid, though no notice is given.<sup>26</sup> In a number of states the failure of the executor or administrator to give bond before making sale as required by the statute is regarded as absolutely invalidating the sale, and sometimes such effect is given to a failure to make the proper oath.<sup>27</sup>

The sale must comply not only with the requirements of the statute, but also with the terms of the order for sale. The sale, when made by the executor or administrator, must, in most states, be confirmed by the court in order to have any effect whatever in passing title, since the personal representative, not expressly empowered to sell by the terms of the will, is regarded as the instrument of the court, and the sale, to be valid, must be adopted by the court as its own act.<sup>28</sup> After the sale is confirmed, the executor or administrator, still acting as the instrument of the court, is required to make a conveyance of the land to the purchaser,

<sup>25</sup> Ricard v. Williams, 7 Wheat. (U. S.) 59; Wingerter v. Wingerter, 71 Cal. 105; Rosenthal v. Renick, 44 Ill. 202; Bozeman v. Bozeman, 82 Ala. 389; Sumner v. Child, 2 Conn. 607.

<sup>26</sup> 2 Woerner, Administration, § 466; Kleber, Void Judicial Sales, §§ 72, 156.

<sup>27</sup> 2 Woerner, Administration, § 472; Kleber, Void Judicial Sales, §§ 253, 254, 316, 317.

<sup>28</sup> Kleber, Void Judicial Sales, §§ 1-4, 331.

and, until such conveyance is executed, the purchaser has an equitable title merely.<sup>29</sup>

§ 463. Sales of lands of infants and insane persons.

The extent to which a court of equity has inherent power to sell the land of an infant for his benefit seems to be involved in considerable doubt; but the question has lost its importance, owing to the passage of acts, in most, if not all, of the states, authorizing such sales either by courts either of equity or probate jurisdiction. These sales are usually conducted by the guardian of the infant, under the direction of the court, the proceedings being generally similar to those in the case of sales of decedents' lands. The application for the sale is usually required to be made by the guardian, but in some states the statute authorizes it to be made by parents or other persons interested in the infant's welfare.<sup>30</sup>

The lands of persons *non compos mentis* may likewise be sold under the direction of a court by force of statutes to that effect in all or in most of the states, and occasionally such power has been asserted by courts of equity apart from statute. The sale is usually made by the committee or guardian of the lunatic acting as an instrument of the court.<sup>31</sup>

§ 464. Sales and transfers for purpose of partition.

Proceedings by one concurrently interested in land with others, to obtain a partition or sale of the land, have previously been discussed.<sup>32</sup> In this country the jurisdiction of proceedings for partition is usually determined by the statute, and there are in many states special provisions for

<sup>29</sup> 2 Woerner, Administration, § 480.

<sup>30</sup> Woerner, Guardianship, §§ 68-78; 2 Dembitz, Land Titles, § 151; 3 Pomeroy, Eq. Jur. § 1309; Kleber, Void Judicial Sales, §§ 93, 157, 234-236.

<sup>31</sup> Woerner, Guardianship, § 148; 3 Dembitz, Land Titles, § 152.

<sup>32</sup> Ante, § 175.

the partition of land belonging to a decedent in the probate court, or for a sale for the purpose of partition.<sup>23</sup>

As before stated, a partition proceeding is available only in the case of concurrent interests in land,<sup>24</sup> and consequently cannot be employed in order to apportion the land, or to procure a sale, when the persons interested in the land own, not concurrent, but successive, interests, as when they are tenants for life and in remainder, or one is tenant in fee simple, subject to an executory limitation in favor of the other. In a few states there is a provision for a sale in such case under the direction of a court of equity.<sup>25</sup>

§ 465. Equitable decrees transferring title.

The court of chancery in England always acted *in personam*, and not *in rem*, and consequently, in adjudicating rights of the different parties to a proceeding concerning land, it did not, by its decree, undertake to transfer the title from one to the other of such parties, but gave relief by ordering one party to make a conveyance, cancel an instrument, or do other acts so as to establish and perfect the rights of the respective parties as adjudicated. This principle of action on the part of courts of equity has, however, been changed by statute in many states of the country, so that, instead of requiring the parties to carry out the decree, the court itself does so, acting through a commissioner or other officer, and, under some statutes, the decree alone, without any further action, is sufficient to transfer the title. As regards land outside the jurisdiction, however, the court must still act *in personam*.<sup>26</sup>

While a judgment in an action concerning land of a strict-

<sup>23</sup> Freeman, Cotenancy, §§ 550-564.

<sup>24</sup> Ante, § 175.

<sup>25</sup> 2 Dembitz, Land Titles, § 156.

<sup>26</sup> Pomeroy, Eq. Jur. §§ 124, 125, 170, 1217.

ly legal character, such as ejectment, or the old real actions, or the statutory "trespass to try title," is usually decisive of the rights of the parties thereto in regard to the ownership of the land, as between themselves, it cannot be regarded as transferring the title in any sense, but merely decides what effect is to be given to previous transfers.

§ 466. Adjudications of bankruptcy.

The present bankrupt act<sup>27</sup> provides that the trustee of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The title to the bankrupt's land, therefore, as well as other property, passes, as it were, by force of the adjudication of bankruptcy, to the trustee subsequently appointed. Previous bankrupt acts, as well as the insolvency statutes of the various states, have contained similar provisions transferring the property of the bankrupt or insolvent to the trustee, for the purpose of distribution among creditors.<sup>28</sup>

<sup>27</sup> Act July 1, 1898 (30 Stat. 565, § 70a).

<sup>28</sup> 16 Am. & Eng. Enc. Law, 721.

## **CHAPTER XXIX.**

### **TRANSFER FOR NONPAYMENT OF TAXES.**

**§ 467. Character of title acquired.**

**468. Judgment for taxes.**

**469. Forfeiture to state.**

**470. Remedial legislation.**

By statutory provision, land is usually liable to be sold in case of nonpayment of taxes thereon. The sale is, under some statutes, of the land without reference to the particular estates or interests therein, and, under others, of the estate or interest only of the person against whom the tax is assessed.

The proceedings leading up to the sale, including the levy and assessment of the taxes, must, for the most part, be strictly followed. The title does not pass till a deed is made to the purchaser by the officer making the sale, and such deed is not made until a certain period, named in the statute, has elapsed, during which any person interested in the land may redeem from the sale. In some states the tax sale is required to be preceded by a judgment determining the amount of taxes due.

In some states, land may be forfeited directly to the state for nonpayment of taxes.

In many states the statutes undertake to render a sale for taxes valid in spite of irregularities in the proceedings. Such statutes are usually valid only as applied to such parts of the proceeding as could have been previously dispensed with by statute.

**§ 467. Character of title acquired.**

The payment of taxes on land is in this country usually enforced by a summary sale of the land, conducted by the tax collector or some other ministerial officer.

The power to sell lands for nonpayment of taxes is a purely statutory power, and it has always been held that the statutory requirements as to the mode of making sale must be strictly complied with, and that, moreover, since the power to sell exists only in case there are valid taxes, which are unpaid, no title will pass unless the tax was levied and assessed in accordance with law. Tax sales have accordingly been held to be invalid in particular cases for want of a valid assessment or valuation of the property, duly verified by the proper officers, and approved by the legal reviewing authority or "board of equalization," defects in the levy of the tax, defects in the warrant issued to the collector for the collection of the tax, failure to return the list of delinquent taxes, noncompliance with the various requirements as to the mode of advertising the sale, failure to comply with the statute, and also with the advertisement, as to the conduct of the sale, failure to sell all the land, though a part brings enough to pay the taxes. Furthermore, the statutory requirements as to the return of the sale by the officer must be complied with, and he must make a conveyance to the purchaser in strict conformity to the statute. The sale is also invalid if the tax was unconstitutional, or not properly levied by the legislature or the municipal authorities, or if the land was exempt, or the taxes had been paid before the sale. In view of these many possible defects in the proceedings, as well as others which might be mentioned, it is not strange that titles based on tax sales are generally regarded as of most questionable soundness, and, though this condition of things has been to some extent removed by legislation, hereafter referred to, the possibilities of failure of title through defects in the proceedings are still such that land, when sold for taxes, rarely, if ever, brings its actual value, and its (1064)

purchase is ordinarily for purposes of speculation, rather than for actual occupation.<sup>1</sup>

By the statutes of many states, the sale is of an estate in fee simple in the land, free from any incumbrances, and without reference to the estate or interest belonging to the particular person against whom the tax was assessed,—that is, the proceeding for sale is in effect against the land, and not against any particular owner thereof; and if one interested in the land, though not bound to pay the taxes as against the person in possession, desires to protect his interest, he must pay the taxes, or redeem from the tax sale. So, a remainderman or lienor may, by the failure of the owner in possession to pay the taxes, be divested of all interest in the land. In some states, however, or under particular acts, the taxes are not enforceable against the entire interest in the land, but against the interest only of the person against whom the taxes are assessed, in which case the interests of other owners or of lienors are not divested by the sale.

The statute usually, if not always, names a certain period, varying from six months to three years, within which the owner of the land may redeem from the sale by the payment to the purchaser of the purchase money, interest, and costs, in addition to which he is ordinarily required to pay a penalty, calculated in interest at a high rate.

The purchaser has, until the execution of a conveyance or "deed" by the officer making the sale, neither a legal nor equitable title to the land, but rather a lien thereon for the amount of the purchase money, interest, costs, and penalty. He is usually entitled to the deed upon the expiration of the

<sup>1</sup> An admirable sketch of the uncertainties involved in a tax title is contained in 2 Dembitz, Land Titles, p. 1323 et seq. The standard works upon the very extensive subject of tax sales are those by Robert S. Blackwell, the fifth edition of which is well edited by Frank Parsons, Esq., and by Henry C. Black, Esq.

time for redemption, and not before, and the statutes frequently impose certain formalities as conditions precedent to his obtaining the deed. The requirements of the statute as to the form of the deed, which are frequently most detailed and precise in character, and often include full recitals of the antecedent proceedings, must be strictly followed, and the deed must be executed in strict compliance with the statute in order to vest the title in the purchaser.

**§ 468. Judgment for taxes.**

In some states the legislature has provided that the sale of land for taxes shall be preceded by the rendition of a judgment determining the amount of the taxes due. The proceeding to obtain such a judgment is in the nature of a proceeding *in rem* against the land, rather than *in personam* against the owner of the land, and, consequently, personal service of notice of the proceeding is not regarded as a prerequisite to the judgment, constructive service by publication being authorized. Any objections to the validity of the tax or to the assessment must be made by way of defense to the application for judgment, and the judgment is, until reversed, regarded as conclusive of the right to make the sale, according to numerous decisions, even though the taxes were actually paid.

**§ 469. Forfeiture to state.**

The statute occasionally provides that, upon nonpayment of taxes due the state, the land, instead of being sold, shall be forfeited to the state. Whether such a forfeiture is valid if not preceded by a judicial finding that a default in the payment of taxes exists is a question open to very considerable doubt.<sup>2</sup>

<sup>2</sup> Cooley, Taxation, 461 et seq.



## § 470. Remedial legislation.

The legislatures of the various states have, particularly in more recent years, frequently passed curative statutes for the purpose of validating tax sales previously made, as well as those thereafter to be made. These acts are regarded as valid in so far as they undertake to validate the proceedings in respect to a particular step therein with which the legislature could have dispensed in the first place, but no further. The same end of curing defective proceedings has frequently been attained by the passage of acts providing that the deed to the purchaser shall be *prima facie* evidence of the regularity of the proceedings, and it has sometimes been made even conclusive evidence in this respect, this latter legislation being valid, however, as are other curative acts, in regard only to matters which could have been previously dispensed with.

Another mode in which the legislatures have undertaken to add to the security of the purchaser at a tax sale is by "short" statutes of limitation in connection with tax titles, requiring the original owner to proceed to recover the land from the purchaser within a certain number of years, less than that within which actions for land must ordinarily be brought. These statutes have usually, like the other statutes having the same purpose in view, been regarded as applicable only when the jurisdictional requirements of a valid sale were present, and as insufficient to validate a sale which is void for want of jurisdiction on the part of the officials to make the sale.

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## **CHAPTER XXX.**

### **APPROPRIATION UNDER EMINENT DOMAIN.**

- § 471. The power to appropriate.**
- 472. Rights subject to appropriation.**
- 473. Mode of appropriation.**
- 474. Time of passing of title.**

Under its power of eminent domain the state may appropriate private property, including land, or particular interests therein, for public use, upon payment of just compensation. The power may be exercised by the state or any corporation or person to whom it delegates the power.

The title to the land appropriated does not usually pass till payment of the compensation therefor, but the statute may provide that it shall do so, in the absence of any explicit constitutional prohibition.

- § 471. The power to appropriate.**

The power of the state to appropriate property for public use, upon payment of just compensation, may be exercised directly by the state itself, or the state may, in the exercise of the power, select particular agencies, either natural persons or corporations, on whom it confers the right to take private property for public use. Thus, the legislature may, and ordinarily does, authorize municipal corporations to appropriate or "condemn" land for street and other municipal purposes, and so it may authorize a railroad or irrigation company, or other private corporation, to appropriate property for its use, upon payment of just compensation, provided only the use for which it is appropriated is of a public character. This grant by the legislature of the right to ex-

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ercise the power is frequently by means of a general statute operating in favor of the corporations of a particular class which may desire to exercise the right.<sup>1</sup>

The result of the exercise of the power in connection with land is to transfer to the state, or to the corporate body to which the power is delegated by the state, all or some of the rights in particular land previously vested in a particular individual, or in a number of individuals.

§ 472. Rights subject to appropriation.

There may be an appropriation of the rights of ownership in a particular piece of land, the entire interest of the former owner thus passing to the appropriator, or a right merely to use the land for the particular public purpose may be acquired. Whether there is an appropriation of the ownership of the land is usually a question of the construction of the statute under which the land is condemned, in connection with any constitutional restrictions upon the power. In the case of a taking by a private corporation there is usually a presumption that the ownership, or, as it is ordinarily expressed, the "fee," does not pass, and, unless the statute explicitly authorizes the taking of a fee, or this is necessary for the particular use, it is usually considered that a right of user only is taken by even a public corporation.<sup>2</sup> Accordingly a railroad company ordinarily acquires by condemnation merely an easement in the land, and, in the case of land taken for highway purposes, the public frequently acquires merely the right to use the land for such purposes.

The rights of the owner of land may be infringed, not by the actual taking of the land for a particular public purpose, but by the fact that the utilization of neighboring land

<sup>1</sup> Randolph, *Eminent Domain*, §§ 102-106; 1 Lewis, *Eminent Domain*, § 243.

<sup>2</sup> Randolph, *Eminent Domain*, § 305; 1 Lewis, *Eminent Domain*, § 273.

for such a purpose results in the forcing of water upon the former land, or the casting thereon of stone, earth, or sewerage, thus interfering with the owner's rights of user in the land, and to that extent appropriating his rights in the land.<sup>3</sup> The taking for public use may also involve, not a physical invasion of the land itself, but merely the divesting of some of the natural rights incident to the ownership of land. So, one may be divested of rights as to the flow of a natural watercourse, of access to water, or of rights with respect to percolating and surface water. Likewise, one may be deprived of his natural right to freedom from dust, smoke, noise, and the like. The cases are in very considerable conflict as to the right to compensation for consequential injuries to land, arising from the invasion of the natural rights of freedom from dust, noise, or noxious odors.<sup>4</sup>

One may, moreover, be deprived, by the physical appropriation of another person's land, of an easement which he enjoys in such land.<sup>5</sup>

The fact that one's land abuts on a highway or street is quite generally considered to give him certain rights of light, air, and access, interference with which entitles him to compensation as for the taking of property. Rights of this character, as the subject of compensation, have been before considered, as has the question of the extent to which the previous appropriation or dedication of land for a highway authorizes its use, without further compensation, for particular purposes, on the ground that such purposes are of a "highway" character.<sup>6</sup>

<sup>3</sup> *Pumpelly v. Green Bay & Mississippi Canal Co.*, 18 Wall. (U. S.) 166; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, *Finch's Cas.* 1.

<sup>4</sup> *Randolph, Eminent Domain*, § 152; 1 *Lewis, Eminent Domain*, § 151a.

<sup>5</sup> *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Ladd v. City of Boston*, 151 Mass. 585; 1 *Lewis, Eminent Domain*, § 144.

<sup>6</sup> *Ante*, § 365.

## § 473. Mode of appropriation.

The statutes usually contain explicit provisions as to the constitution of the tribunals which are to decide the amount of compensation to be paid for the property taken. Such a tribunal may, in the absence of any statutory requirement to the contrary, be composed of a jury of less than twelve men, or of a board of commissioners.

The petition for the condemnation should show the public character of the use, and the necessity of taking the particular land, and this latter must be accurately described. Notice to the owner is necessary before the compensation is assessed, but constructive notice by publication is usually regarded as sufficient. The action of the tribunal in fixing the amount of the compensation is frequently subject to review by appeal or *certiorari*, but is not so in the absence of a statutory provision. In the case of an attempted taking of private property under color of the right of eminent domain, which is, however, unauthorized, on account of the private nature of the use, the lack of necessity for the appropriation, or lack of legislative authority, the owner may usually obtain an injunction against the wrongful entry on the land, or may sue in ejectment or trespass, and sometimes other remedies are available.

The constitutions of some states provide that compensation shall be made before the land is taken, but in others, where there is no such provision, the legislature sometimes authorizes a taking of property, and leaves the onus upon the landowner of instituting proceedings to ascertain the compensation to be paid, and to enforce its payment. Such legislation has usually been supported in the case of a taking by the state or a municipal corporation, but in a number of states it has been held that, in the case of the actual occupation of land by a private corporation, the payment of the compensation must be in some way secured to the owner of

the land before he can thus be deprived of his property. When the taking of property does not involve the direct occupation of the land of the person claiming compensation, but merely consequential injuries thereto, the recovery of compensation is naturally subsequent to the acts which constitute the taking, since they were not previously ascertainable.<sup>7</sup>

§ 474. Time of passing of title.

The statute is usually construed as divesting the title of the owner of the land only upon payment of the compensation awarded,<sup>8</sup> and this is necessarily the case when the constitution provides that the compensation shall be paid previous to the taking. In the absence of such a constitutional provision, the statute may authorize the taking of the land before payment. Such a statutory provision is sometimes construed as not transferring the title before payment of the award, but as merely giving a right of entry and occupation of the land as a preliminary to acquiring title by condemnation.<sup>9</sup> But, in the absence of such a constitutional provision as that referred to, the fact that the constitution requires a just or reasonable compensation to be paid does not prohibit a statute authorizing the passing of the title before payment of the compensation, provided there is adequate

<sup>7</sup> Randolph, *Eminent Domain*, §§ 231, 291, 362; 1 Lewis, *Eminent Domain*, §§ 456-459, 607.

<sup>8</sup> *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48; *City of Chicago v. Barblian*, 80 Ill. 482; *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39; *Manchester & K. R. Co. v. Keene*, 62 N. H. 81; *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Perkins v. Maine Cent. R. Co.*, 72 Me. 95; *Williams v. New Orleans, M. & T. R. Co.*, 60 Miss. 689; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *Jones v. Miller (Va.)* 23 S. E. 35; *Levering v. Philadelphia, G. & N. R. Co.*, 3 Watts & S. (Pa.) 459.

<sup>9</sup> *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Cushman v. Smith*, 34 Me. 247; *Kennedy v. Indianapolis*, 103 U. S. 599.

provision for the ascertainment and collection of the compensation.<sup>10</sup>

By a number of decisions it is held that the owner of the land has a lien for the amount of the compensation, either by force of the specific statutory provisions, or by analogy to a vendor's lien for the purchase price.<sup>11</sup> Such decisions seem necessarily to imply that the ownership of the land has passed by the condemnation proceeding, since one cannot usually have a lien on his own land.

<sup>10</sup> *Sweet v. Rechel*, 159 U. S. 330; *Ballou v. Ballou*, 73 N. Y. 325; *City of Pittsburgh v. Scott*, 1 Pa. St. 309.

<sup>11</sup> *Organ v. Memphis & Little Rock R. Co.*, 51 Ark. 235; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Bridgman v. St. Johnsbury & L. C. R. Co.*, 58 Vt. 198; *Drury v. Midland R. Co.*, 127 Mass. 571; *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. St. 615; *In re New York, W. S. & B. Ry. Co.*, 94 N. Y. 287; *Frelinghuysen v. Central R. Co. of New Jersey*, 28 N. J. Eq. 338; *Gillison v. Savannah & C. R. Co.*, 7 Rich. (S. C.) 173; *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; 2 *Lewis, Eminent Domain*, § 620.

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## CHAPTER XXXI.

### NOTICE, PRIORITY, AND RECORDING.

- § 475. The equitable doctrines.
- 476. The recording acts.
- 477. Sufficiency of record.
- 478. Persons affected with notice by record.
- 479. Notice as substitute for recording.
- 480. Notice from possession.
- 481. Notice from statements in instruments of title.
- 482. Purchasers under particular classes of conveyances.
- 483. Purchasers for value.
- 484. Purchasers with notice from purchasers without notice.
- 485. Purchasers without notice from purchasers with notice.
- 486. Purchasers at execution sales.
- 487. *Lis pendens*.

Any conflict arising in connection with particular land, as between persons claiming under different conveyances by the same person, is ordinarily determined by the doctrine of notice, one acquiring title for value being entitled to assert his claim as against a claim which had previously accrued in favor of another, provided he did not have notice of such prior claim, and not otherwise.

A subsequent purchaser may have actual notice of a prior instrument vesting rights in another, or he may have constructive notice thereof, by reason of the record of such instrument under the recording acts, from the possession of the land by one claiming under such instrument, or from any other facts reasonably calculated to put him on inquiry as to such adverse claim.

That the record of an instrument may affect a subsequent purchaser with notice, the record must be in conformity to law, and the instrument must usually have been acknowledged.

Notice to a subsequent purchaser sufficient to postpone his  
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claim to one under a prior instrument may arise from the fact that his agent has notice of such instrument.

One having constructive notice of an instrument by reason of its record is charged with notice of whatever is contained in such instrument, or is referred to therein.

In some states, but not in all, a subsequent purchaser cannot claim as against a prior instrument, although this be unrecorded, unless his own conveyance be recorded.

A purchaser under a quitclaim deed cannot, in some states, claim priority as against a prior conveyance, although the latter be unrecorded, and he has no notice thereof.

One who acquires rights in land otherwise than for a valuable consideration takes subject to all prior instruments affecting the land.

If one acquires land free from an adverse claim because without notice thereof, one to whom he sells the land takes it in the same condition, unless his vendor originally acquired the land from him.

By the doctrine of "lis pendens," one acquiring land, pending litigation in regard thereto, from one of the parties to the litigation, usually takes it subject to the results of the litigation.

#### § 475. The equitable doctrines.

Apart from the recording acts, hereafter to be discussed, and certain statutes in reference to fraudulent conveyances,<sup>1</sup> transfers of the legal title to land rank, between themselves, according to priority in time,—that is, if an owner of land transfers a legal estate to one person, a subsequent attempted transfer of a legal estate of the same or a less quantum to another person necessarily conveys nothing, because the transferrer has nothing to convey. Moreover, apart from statute, one who obtains the conveyance of the legal title for value, and without notice of a prior equity of any sort, takes

<sup>1</sup> Post, §§ 461, 462.

free from that equity, whether 'it be a trust, an equitable lien, or any other right enforceable in equity alone.<sup>2</sup>

As between interests or claims of a purely equitable character,—that is, enforceable in equity alone,—while, as a general rule, they will be ranked according to the time of accrual, this is by no means always so, equity frequently postponing an earlier to a later claim, the rule being that only as between equal equitable claims, or "equities," as they are usually called, will priority of time give priority of right. Consequently, the equity prior in time may be deferred from considerations of the respective natures of the two equities, as when a mere gift is postponed to a subsequent trust or lien created for a valuable consideration. Likewise, the equity prior in time may be postponed because the person entitled thereto was guilty of fraud or negligence. Finally, a court of equity may, under certain peculiar circumstances, refuse to enforce a claim, though prior in time, as against the holder of a title or claim subsequently obtained, on the ground that the holder of the latter is a "purchaser for value without notice,"—that is, that he obtained his right not only by paying value, but without notice of the prior equity.<sup>3</sup>

While the absence of notice may have the effect of preventing the enforcement of an equity as against the holder of the subsequent equity, courts of equity have also adopted and unfailingly enforced the rule that, if the holder of the subsequent equity, even though he be a purchaser for value,

<sup>2</sup> 2 Pomeroy, Eq. Jur. § 767; *Fahn v. Bleckley*, 55 Ga. 81; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209; *Gray v. Coan*, 40 Iowa, 327; *Hoult v. Donahue*, 21 W. Va. 294; *Carlisle v. Jumper*, 81 Ky. 282.

<sup>3</sup> *Snell, Principles of Eq.* (4th Ed.) 23-42; 2 Pomeroy, Eq. Jur. §§ 591-785. This latter work, containing, as it does, a most admirable discussion of the equitable doctrines above referred to, and also of their modification by the recording acts, has furnished much of the material for this chapter.

does, at the time of obtaining such equity, have notice of the prior equity, he takes subject thereto.

The equitable rule just referred to, by which one who takes an interest with notice of a prior equity takes subject thereto, is not confined to the case of a purchaser of an equity, but is also applied as against a purchaser of the legal title with notice of a prior equity,—that is, it is a general rule in equity that one who takes an interest with notice of an outstanding adverse interest takes subject thereto.

§ 476. The recording acts.

The rule above referred to, that, as between conveyances of the legal title, the first in time must prevail, has been entirely changed by the recording acts, which exist in every state, and which provide in effect that a conveyance or mortgage of land, and frequently any other instrument affecting land, shall not, as against a subsequent conveyance or mortgage in favor of a purchaser for value, be valid, unless it is filed for record in a public record office. Usually this requirement of record is for the protection of subsequent purchasers only, and the failure to record the instrument in no way affects the passing of the title as between the parties.<sup>4</sup>

The construction placed by the courts upon the recording acts has been in effect to make the record of an instrument in accordance with the act equivalent to notice, to every subsequent purchaser, of the existence and contents of the instrument, irrespective of whether he actually examines the

<sup>4</sup> See 1 Stimson's Am. St. Law, § 1611(B); Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 881; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; McLaughlin v. Ihmsen, 85 Pa. St. 364.

In Maryland, the instrument must be recorded to pass title. Nickel v. Brown, 75 Md. 172. And so record may be required in order to give validity to a particular conveyance, as one by a married woman. Rorer's Heirs v. Roanoke Nat. Bank, 83 Va. 589.

records so as to obtain such information;<sup>5</sup> the recording acts being thus in effect made to involve an application and extension of the pre-existing doctrine that a purchaser with notice of a prior right takes subject to such right.

Though by some of the earlier decisions the record of an equitable title was not regarded as sufficient to affect a subsequent purchaser with notice thereof, the rule is now generally settled otherwise, sometimes by express statutory provision, and consequently a purchaser of a title, legal or equitable, takes subject to an instrument, creating or transferring an equity, which has been recorded.<sup>6</sup>

In many states the statute requires that a power of attorney shall be recorded in order to render the record of a conveyance made under such power effective as notice to subsequent purchasers.<sup>7</sup> In the absence of such statutory requirement there is no necessity, it seems, of recording the power, since the conveyance puts the purchaser on inquiry as to the authority of the agent or attorney.<sup>8</sup> The revocation of a power of attorney is also frequently required to be recorded in order to be valid, if the power itself has been recorded.<sup>9</sup>

The practical effect of the recording acts is that an in-

<sup>5</sup> 2 Pomeroy, Eq. Jur. § 649; 2 White & T. Lead. Cas. Eq. 203; Webb, Record of Title, § 4.

<sup>6</sup> Russell's Appeal, 15 Pa. St. 319, 6 Gray's Cas. 387; General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore, 10 Md. 517, 69 Am. Dec. 174; Edwards v. McKernan, 55 Mich. 520; Wilder v. Brooks, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; Herrington v. Williams, 31 Tex. 448; Hunt v. Johnson, 19 N. Y. 279; Tarbell v. West, 86 N. Y. 280; O'Neal v. Selxas, 85 Ala. 80; Fish v. Benson, 71 Cal. 428; Bailey v. Myrick, 50 Me. 171; Smith v. Neilson, 13 Lea (Tenn.) 461; Webb, Record of Title, § 36.

<sup>7</sup> 1 Stimson's Am. St. Law, § 1624(10), 1670.

<sup>8</sup> See Anderson v. Dugas, 29 Ga. 440; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Wilson v. Troup, 2 Cow. (N. Y.) 198, 14 Am. Dec. 458.

<sup>9</sup> 1 Stimson's Am. St. Law, § 1673.

tending purchaser of land may, by reference to the record, determine whether his vendor has previously disposed of any interest in the land, and also ascertain both the person from whom his vendor obtained the land, and whether such person disposed of any interest to a person other than such vendor, and so, in the case of each of the successive owners of the land, determine whether, during the period of his ownership, he created any interest not vested in the present vendor. The names of such successive owners of the land constitute what is usually known as "the chain of title."

Since the recording acts have been construed as charging a purchaser with notice of a recorded instrument, on the theory that, if he exercised proper diligence, he would, by searching the records, discover the existence and terms of such instrument, he has, on the same theory, been held not to be charged with notice when his failure to discover the recorded instrument was not owing to lack of diligence. Accordingly, intending purchasers have been regarded as charged with notice, not of all instruments which appear on the record as affecting the land, but of those only which appear there as having been made by a person in the chain of title,—that is, if there be another and independent chain of title upon the records, a purchaser is not affected with notice of the instruments contained therein, since there is no clue calling his attention to such instruments. For instance, A. purchasing from B. is not affected with notice of a conveyance, previously recorded, from C. to D., unless B.'s title appears on the record to be derived through C.<sup>10</sup>

<sup>10</sup> 2 Pomeroy, Eq. Jur. §§ 658, 761; *Lumpkin v. Adams*, 74 Tex. 97; *Blake v. Graham*, 6 Ohio St. 580, 67 Am. Dec. 360; *Hetherington v. Clark*, 30 Pa. St. 393; *City of Chicago v. Witt*, 75 Ill. 211; *Page v. Waring*, 76 N. Y. 463; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614.

So, if a conveyance from A. is not recorded, the fact that a conveyance from the grantee therein to another is recorded will not

A purchaser is not, as a general rule, charged with notice of a conveyance which is of record, even though made by a person in the chain of title, unless it was made by such person after the time at which the records show him to have obtained the title,—that is, the purchaser is not bound to search the records to determine whether any particular person in the chain of title, previous to obtaining the title, had done any acts which would affect the title.<sup>11</sup> In some states, however, an exception to this rule exists by reason of the application of the rule that an after-acquired title passes by estoppel, it being there held that, when one has made a conveyance which would pass an after-acquired title as against him, it will have the same effect as against a purchaser from him of such after-acquired title, who has no actual notice of the previous conveyance, such purchaser being thus in effect charged with notice of such conveyance by its presence on the records.<sup>12</sup> But occasionally the rule as to the passing of an after-acquired title has not been applied as against a purchaser of such title without notice of the previous con-

ffect with notice a person who subsequently obtains a conveyance from the first grantor. *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Frank v. Heidenheimer*, 84 Tex. 642; *Hetherington v. Clark*, 30 Pa. St. 393. And so the record of a conveyance of an equitable title from one who has such title only, while notice to a subsequent purchaser of the same title from the same grantor, is not notice to one who purchases from the person who has the legal title. *Tarbell v. West*, 86 N. Y. 280. Compare *Edwards v. McKernan*, 55 Mich. 530.

<sup>11</sup> *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163, 6 Gray's Cas. 489; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Farmers' Loan & Trust Co. v. Maltby*, 3 Paige (N. Y.) 361; *Page v. Waring*, 76 N. Y. 463; *Frank v. Heidenheimer*, 84 Tex. 642; 2 *Pomeroy*, Eq. Jur. § 658, p. 914, note 1. See note to *Ford v. Unity Church Soc. of St. Joseph*, 23 L. R. A. 565.

<sup>12</sup> *White v. Patten*, 24 Pick. (Mass.) 324, 6 Gray's Cas. 486; *Ayer v. Philadelphia & Boston Brick Co.*, 159 Mass. 84; *Knight v. Thayer*, 125 Mass. 25; *McCusker v. McEvey*, 9 R. I. 523, 10 R. I. 606; *Powers v. Patten*, 71 Me. 533; *Jarvis v. Aikens*, 25 Vt. 635; *Taft v. Munson*, 57 N. Y. 97.

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veyance, it being regarded as contrary to the purpose and spirit of the recording acts to thus hold him bound, at his peril, to examine the records for conveyances outside of the chain of title, for the sake of protecting a previous purchaser who, through his negligent failure to examine the records, obtained a defective title.<sup>13</sup>

By statute in many of the states, a purchaser cannot assert his claim as against a prior unrecorded instrument unless he first record his own conveyance.<sup>14</sup> Apart from such a statutory provision, one may, without recording his conveyance, claim as a purchaser for value without notice as against the prior unrecorded instrument.<sup>15</sup>

#### § 477. Sufficiency of record.

In order that the record of an instrument shall operate as constructive notice to subsequent purchasers, the instrument must be such that its record is authorized. Consequently, if it is not duly executed,<sup>16</sup> or if it is not acknowledged or certified as required by law,<sup>17</sup> its record does not

<sup>13</sup> *Calder v. Chapman*, 52 Pa. St. 359, 6 Gray's Cas. 489; *Bingham v. Kirkland*, 34 N. J. Eq. 229. See *Rawle, Covenants*, §§ 259-261; *Way v. Arnold*, 18 Ga. 181; *Bennett v. Davis*, 90 Me. 457; *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113, reporter's note; 2 *Smith, Lead. Cas.* 348.

<sup>14</sup> 1 *Stimson's Am. St. Law*, § 1611. See *Simmons v. Stum*, 101 Ill. 454; *Clabaugh v. Byerly*, 7 Gill (Md.) 354, 48 Am. Dec. 575; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9; *Westbrook v. Gleason*, 79 N. Y. 23.

<sup>15</sup> *Coster's Ex'rs v. Bank of Georgia*, 24 Ala. 37; *Sanborn v. Adair*, 29 N. J. Eq. 338; *McGuire v. Barker*, 61 Ga. 339; *Steele's Lessee v. Spencer*, 1 Pet. (U. S.) 552; *Miller v. Merine* (C. C.) 43 Fed. 261; *Webb, Record of Title*, §§ 13, 166.

<sup>16</sup> *Carter v. Champion*, 3 Conn. 549, 21 Am. Dec. 695; *Parret v. Shaubhut*, 5 Minn. 323 (Gil. 258), 30 Am. Dec. 424; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Racouillat v. Sansevain*, 32 Cal. 376; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>17</sup> *Graves v. Graves*, 6 Gray (Mass.) 391, 6 Gray's Cas. 401; *Heister*

operate as constructive notice to subsequent purchasers. Moreover, in order to give priority as against a subsequent purchaser, the instrument must describe the land with sufficient accuracy to enable one examining the record to identify the land.<sup>18</sup>

An index of the grantors and grantees as named in the recorded conveyance is ordinarily kept in the record office, and the statute frequently so requires.<sup>19</sup> In some states the index is in effect part of the record, so that, although the conveyance is recorded, it is not notice to a subsequent purchaser unless it appears correctly on the index.<sup>20</sup> In other states a purchaser is bound by the prior conveyance, even though it is not indexed, or is indexed under a wrong name.<sup>21</sup>

The courts of the different states are divided upon the question as to who must suffer the loss occasioned by an error made by the officer in recording a conveyance deposited with him for record. Some courts hold that a grantee, by lodging the instrument with the proper officer for record,

v. Fortner, 2 Binn. (Pa.) 40, 4 Am. Dec. 417, 6 Gray's Cas. 390; Fryer v. Rockefeller, 63 N. Y. 268; Fleschner v. Sumpter, 13 Or. 161; Raines v. Walker, 77 Va. 92; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Girardin v. Lampe, 58 Wis. 267; Hayden v. Moffatt, 74 Tex. 647, 15 Am. St. Rep. 866; Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406; Cockey v. Milne's Lessee, 16 Md. 200.

<sup>18</sup> Bright v. Buckman (C. C.) 39 Fed. 247; Rodgers v. Cavanaugh, 24 Ill. 583; Bailey v. Galpin, 40 Minn. 319; Banks v. Ammon, 27 Pa. St. 172; Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260. See Carter v. Hawkins, 62 Tex. 393.

<sup>19</sup> 1 Stimson's Am. St. Law, § 1620.

<sup>20</sup> Barney v. McCarty, 15 Iowa, 510, 6 Gray's Cas. 413; Lombard v. Culbertson, 59 Wis. 433; Ritchie v. Griffiths, 1 Wash. St. 429, 22 Am. St. Rep. 155.

<sup>21</sup> Curtis v. Lyman, 24 Vt. 333, 58 Am. Dec. 174, 6 Gray's Cas. 405; Mutual Life Ins. Co. of New York v. Dake, 87 N. Y. 257; Green v. Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Davis v. Whitaker, 114 N. C. 279.



acquits himself of all responsibility as to the actual recording, and that from that time it is notice to subsequent purchasers of what it contains, and not of what the recording officer may make it show on the record.<sup>23</sup> Other courts hold that subsequent purchasers are bound only by what the record shows, and that the grantee in a conveyance, in order to absolutely guard against mistakes by the recorder, which will jeopardize his rights as against subsequent purchasers, must ascertain that the recording is correctly done.<sup>24</sup>

§ 478. Persons affected with notice by record.

The recording acts usually in terms require the record of an instrument for the benefit of a subsequent purchaser or incumbrancer only. Consequently, one who has previously acquired an interest in the land, or who is a party to the instrument itself, is not charged with notice of any facts by the record.<sup>24</sup> So, a mortgagee of the land need not, except for the purpose of foreclosure, examine the records subse-

<sup>23</sup> *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Mims v. Mims*, 35 Ala. 23, 6 Gray's Cas. 409; *Merrick v. Wallace*, 19 Ill. 486; *Lewis v. Hinman*, 56 Conn. 55; *Gillespie v. Rogers*, 146 Mass. 610; *Schell v. Stein*, 76 Pa. St. 398; *Wood's Appeal*, 82 Pa. St. 116.

<sup>24</sup> *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288, 6 Gray's Cas. 403; *Beekman v. Frost*, 18 Johns. (N. Y.) 544; *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Miller v. Bradford*, 12 Iowa, 14, 6 Gray's Cas. 410; *Barnard v. Campau*, 29 Mich. 162; *Jennings' Lessee v. Wood*, 20 Ohio, 261; *Sawyer v. Adams*, 8 Vt. 172, 30 Am. Dec. 459; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Ritchie v. Griffiths*, 1 Wash. St. 429, 22 Am. St. Rep. 155. But as to New York, see *Mutual Life Ins. Co. of New York v. Dake*, 87 N. Y. 257.

<sup>24</sup> *Webb*, Record of Title, § 163; 3 Pomeroy, Eq. Jur. § 657; *Stuyvesant v. Hone*, 1 Sandf. Ch. (N. Y.) 419; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Davis v. Monroe*, 187 Pa. St. 212, 67 Am. St. Rep. 581; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350.

quent to his mortgage before taking any action in connection with his mortgage.<sup>25</sup>

§ 479. Notice as substitute for recording.

The statutes requiring a record of a conveyance in order to make it effective as against a subsequent purchaser have almost invariably been construed as not applying in favor of one who has notice of a prior unrecorded conveyance.<sup>26</sup> This seems to be merely a logical result of the construction put upon the recording acts as making record of an instrument equivalent to notice thereof on the part of a subsequent purchaser, since this construction implies that notice otherwise obtained will have the same effect.<sup>27</sup> In many cases, however, the rule that notice otherwise obtained is sufficient, though the prior instrument was not recorded, is based upon the theory that the taking of a conveyance with the purpose of impairing prior rights of which he has notice constitutes a fraud, this view being adopted from the decisions of the English courts in connection with the local registration acts of that country.<sup>28</sup> In many of the statutes it is expressly provided that the conveyance must be recorded only as against

<sup>25</sup> *George v. Wood*, 9 Allen (Mass.) 20, 6 Gray's Cas. 492; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108; *Heaton v. Prather*, 84 Ill. 330; *Birnie v. Main*, 29 Ark. 591. See post, § 536. So, a judgment lienor may release part of his lien without first examining the records to see how it will affect other persons. *Taylor's Ex'rs v. Maris*, 5 Rawle (Pa.) 51.

<sup>26</sup> 2 Pomeroy, Eq. Jur. § 649; Webb, Record of Title, § 201; 2 White & T. Lead. Cas. Eq. 213; *Lamont v. Cheshire*, 65 N. Y. 30.

In two states the statute has been construed as so absolutely requiring the record of a mortgage as to make it invalid even as against a subsequent purchaser having actual notice thereof. *Mayham v. Coombs*, 14 Ohio, 428, 6 Gray's Cas. 441; *Home Building & Loan Ass'n of Columbus v. Clark*, 43 Ohio St. 427; *Quinnerly v. Quinnerly*, 114 N. C. 145.

<sup>27</sup> 2 Pomeroy, Eq. Jur. § 665.

<sup>28</sup> 2 Pomeroy, Eq. Jur. §§ 659, 660; 2 White & T. Lead. Cas. Eq. 213. (1084)

a purchaser "with notice," or "with actual notice," or equivalent expressions are used.<sup>29</sup>

In the majority of the states it is sufficient, in order to deprive a person of the right to claim as against a prior unrecorded conveyance, that he has either actual knowledge of such conveyance, or that he has information sufficient to put him on inquiry in regard to such conveyance, and this construction has been given even to statutes which provide that an unrecorded conveyance shall be void except as against persons having "actual notice."<sup>30</sup> But in one state, at least, such a statutory requirement of "actual notice" has been held to involve the necessity of actual knowledge of the prior conveyance.<sup>31</sup> That information sufficient to put one on inquiry in regard to an adverse right is *prima facie* sufficient to charge one with notice of such right is a principle well settled in equity, without reference to the recording acts, and the question as to what constitutes such knowledge in connection with these acts, when actual knowledge is not required, is determined by an application of equitable considerations.

The information thus sufficient to put one on inquiry may consist of a statement made by the claimant of the adverse right,<sup>32</sup> or by a third person not pecuniarily interested, if

<sup>29</sup> See 1 Stimson's Am. St. Law, § 1611; 2 Pomeroy, Eq. Jur. § 646, and notes; Webb, Record of Title, § 222.

<sup>30</sup> *Williamson v. Brown*, 15 N. Y. 354, 6 Gray's Cas. 449; *Maupin v. Emmons*, 47 Mo. 304, 6 Gray's Cas. 458; *Drey v. Doyle*, 99 Mo. 459; *Erickson v. Rafferty*, 79 Ill. 209; *Clark v. Holland*, 72 Iowa, 34; *Knapp v. Bailey*, 79 Mo. 195; *Brinkman v. Jones*, 44 Wis. 498; *Gaines v. Summers*, 50 Ark. 322; *Hunt v. Dunn*, 74 Ga. 124; *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737; *Greer v. Higgins*, 20 Kan. 420.

<sup>31</sup> *Lamb v. Pierce*, 113 Mass. 72, 6 Gray's Cas. 462; *Pomroy v. Stevens*, 11 Metc. (Mass.) 244, 6 Gray's Cas. 446. See 2 White & T. Lead. Cas. Eq. 213.

<sup>32</sup> *Davis v. Kennedy*, 105 Ill. 300; *Nelson v. Sims*, 23 Minn. 383, 57 Am. Dec. 144; *Epley v. Witherow*, 7 Watts (Pa.) 163.

he is in a position to know the facts, and his statement is definite.<sup>33</sup> The information must be sufficient to furnish a basis for investigation, and a mere rumor or indefinite statement that there is an adverse claim is not sufficient to put one on inquiry.<sup>34</sup> Knowledge by the purchaser of the condition of the land, as by the presence of structures thereon, may likewise be sufficient to put him on inquiry as to whether this does not indicate the existence of some adverse right or easement.<sup>35</sup> The fact that a purchaser obtains the property at a very inadequate price is also, it is said, a fact which should put him on inquiry, and is accordingly at least evidence of notice by him of an adverse claim.<sup>36</sup>

If one put on inquiry makes such investigation as may reasonably be demanded of a person of ordinary diligence and understanding, and fails to ascertain the existence of the adverse claim, the presumption of notice is rebutted.<sup>37</sup> In some cases, however, the circumstances may be such that a diligent inquiry would necessarily involve the ascertainment

<sup>33</sup> *Butcher v. Yocum*, 61 Pa. St. 168, 100 Am. Dec. 625; *Lawton v. Gordon*, 37 Cal. 202; *Jackson, L. & S. R. Co. v. Davison*, 65 Mich. 416, 447; *Jaeger v. Hardy*, 48 Ohio St. 335; *Cox v. Milner*, 23 Ill. 476; *Curtis v. Mundy*, 3 Metc. (Mass.) 405; 1 *White & T. Lead. Cas. Eq.* 147.

<sup>34</sup> *Maul v. Rider*, 59 Pa. St. 167; *Condit v. Wilson*, 36 N. J. Eq. 370; *Buttrick v. Holden*, 13 Metc. (Mass.) 355; *Loughridge v. Bowland*, 53 Miss. 546; *Shepard v. Shepard*, 36 Mich. 173; *Tompkins v. Henderson*, 33 Ala. 391; *City of Chicago v. Witt*, 75 Ill. 311; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167.

<sup>35</sup> *Webb v. Robbins*, 77 Ala. 176; *Blatchley v. Osborn*, 33 Conn. 226; *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Randall v. Silverthorn*, 4 Pa. St. 173; *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527.

<sup>36</sup> *Durant v. Crowell*, 97 N. C. 367; *Lounsbury v. Norton*, 59 Conn. 170; *Hoppin v. Doty*, 25 Wis. 573.

<sup>37</sup> *Williamson v. Brown*, 15 N. Y. 354, 6 *Gray's Cas.* 449; *Gregory v. Savage*, 32 Conn. 250; *Thompson v. Pioche*, 44 Cal. 503; *Schweiss v. Woodruff*, 73 Mich. 473; *Cavin v. Middleton*, 63 Iowa, 613; 2 *Pomeroy, Eq. Jur.* § 607.

of the adverse claim, and in such case the presumption of notice may be regarded as conclusive.<sup>38</sup> Each case must, to a very considerable degree, depend upon its own peculiar circumstances, and it is impossible to frame any absolute rule by which to determine whether an intending purchaser has sufficient information to put him on inquiry, and what constitutes due and sufficient inquiry.

— Notice to agent.

The rule that notice to an agent is notice to his principal applies in the case of a purchaser of land acting through an agent, and he may consequently be charged with notice of adverse claims either by the agent's actual knowledge, or by information acquired by the latter sufficient to put him on inquiry.<sup>39</sup> The limitations upon the general rule in connection with the time of the acquisition of notice by the agent, and the character of the transaction in connection with which the notice is received, are by no means settled, and are properly a matter for consideration in a treatise on agency. It is held by some courts that notice acquired by the agent before the beginning of the agency is in no case to be imputed to the principal;<sup>40</sup> while other courts hold that such notice is to be imputed to the principal, provided the fact of which he has received notice is present in his mind while acting for the principal,<sup>41</sup> and provided he is at liberty

<sup>38</sup> 2 Pomeroy, Eq. Jur. § 608.

<sup>39</sup> Clark v. Fuller, 39 Conn. 238; Smith v. Dunton, 42 Iowa, 48; Hickman v. Green, 123 Mo. 165; Cowan v. Withrow, 111 N. C. 306; Bigley v. Jones, 114 Pa. St. 510; Russell v. Sweezey, 22 Mich. 235.

<sup>40</sup> Huffcutt, Agency (2d Ed.) § 144; Houseman v. Girard Mut. Building & Loan Ass'n, 81 Pa. St. 256; Kauffman v. Robey, 60 Tex. 308, 48 Am. Rep. 264; McCormick v. Joseph, 83 Ala. 401.

<sup>41</sup> Distilled Spirits, 11 Wall. (U. S.) 356; Arrington v. Arrington, 114 N. C. 151; Constant v. University of Rochester, 111 N. Y. 604.

to disclose it to the principal.<sup>42</sup> Notice of a fact to the agent will not in any case bind the principal if the fact is not within the scope of the agency.<sup>43</sup> Nor is the principal charged with notice if the agent is acting in fraud of the principal, and, to further his own ends, conceals the fact from the principal.<sup>44</sup>

§ 480. Notice from possession.

An intending purchaser of land is, as a general rule, by the fact that the land is in the possession of a person other than he who is undertaking to sell it, charged with notice of the rights of such person, to the extent that he could, by reasonable inquiry, have ascertained the nature of such rights.<sup>45</sup> This presumption of notice exists, even though the intending purchaser is a nonresident, or for other reasons is without actual knowledge of the possession by a third person.<sup>46</sup>

<sup>42</sup> *Distilled Spirits*, 11 Wall. (U. S.) 356; *Littauer v. Houck*, 92 Mich. 162.

<sup>43</sup> *Trentor v. Pothen*, 46 Minn. 298; *Pringle v. Dunn*, 37 Wia. 449; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Tucker v. Tilton*, 55 N. H. 223; *Roach v. Karr*, 18 Kan. 529; *Wood v. Rayburn*, 18 Or. 3.

<sup>44</sup> 2 *Pomeroy*, Eq. Jur. §§ 674, 675; *National Life Ins. Co. of United States v. Minch*, 53 N. Y. 144; *Hickman v. Green*, 123 Mo. 165; *Frenkel v. Hudson*, 82 Ala. 158; *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185.

<sup>45</sup> *Kirby v. Tallmadge*, 160 U. S. 379; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285; *Pleasants v. Blodgett*, 39 Neb. 741, 43 Am. St. Rep. 624; *Strickland v. Kirk*, 51 Miss. 795; *Truesdale v. Ford*, 37 Ill. 210; *Phelan v. Brady*, 119 N. Y. 587; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Williamson v. Brown*, 15 N. Y. 354, 6 Gray's Cas. 449; *Maupin v. Emmons*, 47 Mo. 304, 6 Gray's Cas. 453; *Toland v. Corey*, 6 Utah, 392.

<sup>46</sup> *Hodge's Ex'rs v. Amerman*, 40 N. J. Eq. 99; *Edwards v. Thompson*, 71 N. C. 177; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Tillotson v. Mitchell*, 111 Ill. 518; *Ranney v. Hardy*, 43 Ohio St. 157; *Sheorn v. Robinson*, 22 S. C. 32; *Hyde v. Mangan*, 88 Cal. 319; *Woodson v. Col-* (1088)

The possession of one whose title is of record is not, however, notice of any rights in him other than those that appear of record, the purchaser being justified in attributing his possession to his record title.<sup>47</sup> By some courts it is held that the continuance in possession by a grantor, after conveying the land, is, like the possession of any other person, sufficient to put a subsequent purchaser on inquiry, and so affect him with notice of any rights reserved by the grantor.<sup>48</sup> Other courts take the view that any subsequent purchaser from the grantee is entitled to rely upon the conveyance purporting to dispose of all the grantor's title, and that consequently he is justified in assuming, without inquiry, that the possession of the grantor is by sufferance of the grantee, and does not indicate the existence of any rights in him.<sup>49</sup>

By the majority of the decisions, a purchaser is not only charged with the rights of the person in possession, but, if such person is tenant under another, he is charged with notice of the rights of such other.<sup>50</sup>

*lms*, 56 Tex. 168; *Phelan v. Brady*, 119 N. Y. 587; *Galley v. Ward*, 60 N. H. 33. See *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442.

To satisfy a requirement of "actual notice" in the recording acts, a knowledge by the purchaser of the possession has been held to be necessary. *Brinkman v. Jones*, 44 Wis. 498. See *Porter v. Sevey*, 43 Me. 519; *Harra! v. Leverty*, 50 Conn. 46.

<sup>47</sup> *Plumer v. Robertson*, 6 Serg. & R. (Pa.) 184; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Great Falls Co. v. Worster*, 15 N. H. 412; *Fargason v. Edrington*, 49 Ark. 207.

<sup>48</sup> *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Pell v. McElroy*, 36 Cal. 268; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *Daubenspeck v. Platt*, 22 Cal. 330; *New v. Wheaton*, 24 Minn. 406.

<sup>49</sup> *Van Keuren v. Central R. Co. of New Jersey*, 38 N. J. Law, 165; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *Koon v. Tramel*, 71 Iowa, 132; *Haftcr v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659; *Eylar v. Eylar*, 60 Tex. 315.

<sup>50</sup> *Hanly v. Morse*, 32 Me. 287; *Brunson v. Brooks*, 63 Ala. 248; *O'Rourke v. O'Connor*, 39 Cal. 442; *Tillotson v. Mitchell*, 111 Ill. 523; *Phelan v. Brady*, 119 N. Y. 587; *Glendenning v. Bell*, 70 Tex. 632;

(1089)

The possession, to charge a purchaser with notice, must be an actual and visible possession,<sup>51</sup> and must not be in connection with another person who appears from the records to have the title, since the purchaser is then justified in assuming that the possession is based on the permission of the latter.<sup>52</sup>

The presumption of notice of the rights of a third person arising from his possession, or from the possession of his tenant, is not, by the weight of authority, conclusive, and the purchaser may show that he made due inquiry, from all accessible sources of information, as to the rights of such person in possession, and had reason to believe that such person was in possession merely under the vendor, and claimed no rights.<sup>53</sup>

§ 481. Notice from statements in instruments of title.

A purchaser of land is affected with notice of all matters stated or referred to in the conveyances or other instruments, of which he has actual or constructive notice, as being recorded or otherwise, so far as those statements or references may possibly affect the title, and he is bound to

*Hottenstein v. Lerch*, 104 Pa. St. 454; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238; 2 Pomeroy, Eq. Jur. § 625.

<sup>51</sup> *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *McMechan v. Griffing*, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; *Mason v. Mullahy*, 145 Ill. 383; *Ranney v. Hardy*, 43 Ohio St. 157; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442.

<sup>52</sup> *Bell v. Twilight*, 22 N. H. 500; *Butler v. Stevens*, 26 Me. 484; *Billington's Lessee v. Welsh*, 5 Binn. (Pa.) 132, 6 Am. Dec. 406; *Townsend v. Little*, 109 U. S. 510; *Harris v. McIntyre*, 113 Ill. 275; *Lindley v. Martindale*, 78 Iowa, 379; *Watt v. Parsons*, 73 Ala. 202; *Smith v. Yule*, 31 Cal. 180, 39 Am. Dec. 167; *Pope v. Allen*, 90 N. Y. 298.

<sup>53</sup> *Williamson v. Brown*, 15 N. H. 354, 6 Gray's Cas. 449; *Trumppower v. Marcey*, 92 Mich. 529; *Hellman v. Levy*, 55 Cal. 117; *Rogers v. Jones*, 8 N. H. 264; 2 Pomeroy, Eq. Jur. §§ 623, 624; 2 White & T. Lead. Cas. Eq. 122.



make any inquiries or researches suggested by such statements or references.<sup>54</sup> He is not, however, so charged with notice of matters contained in a conveyance which is not a part of the chain of title under which he claims, and which is not referred to in any instrument constituting a part of such chain.<sup>55</sup> Notice thus acquired by references in the chain of title is sufficient to defeat any claim of priority based upon the failure to record the previous conveyance,<sup>56</sup> even, it seems, when the statute invalidates such unrecorded conveyance except as against one having "actual" notice.<sup>57</sup>

§ 482. Purchasers under particular classes of conveyances.

In some states the grantee in a quitclaim deed, which purports to convey only such right and title as the grantor has, cannot claim priority, as a *bona fide* purchaser, over a previous conveyance, which has not been recorded, the theory being that the purchaser is, by the form of the instrument, charged with notice that there is some outstanding claim or interest.<sup>58</sup> This view, however, has been repudiated in other

<sup>54</sup> *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 533; *Crawford v. Chicago, B. & Q. R. Co.*, 112 Ill. 314; *Gaines v. Summers*, 50 Ark. 322; *Smith v. Burgess*, 133 Mass. 513; *Buchanan v. Balkum*, 60 N. H. 406; 2 *Pomeroy*, Eq. Jur. §§ 626-631.

<sup>55</sup> *Hetherington v. Clark*, 30 Pa. St. 393; *Grundies v. Reid*, 107 Ill. 304; *Ely v. Wilcox*, 20 Wis. 523; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Knox County v. Brown*, 103 Mo. 223.

<sup>56</sup> *Rosser v. Cheney*, 61 Ga. 468; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Parke v. Neeley*, 90 Pa. St. 52; *Bronson v. Wanzer*, 86 Mo. 408.

<sup>57</sup> *George v. Kent*, 7 Allen (Mass.) 16, 6 Gray's Cas. 457; *Sargent v. Hubbard*, 102 Mass. 380; *Hamilton v. Nutt*, 34 Conn. 501; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>58</sup> *Marshall v. Roberts*, 18 Minn. 405 (Gil. 365), 6 Gray's Cas. 425; *Peters v. Cartier*, 80 Mich. 124, 20 Am. St. Rep. 508; *Johnson v. Williams*, 37 Kan. 179, 1 Am. St. Rep. 243; *Garrett v. Christopher*, 74 Tex. 454, 15 Am. St. Rep. 850; *Baker v. Woodward*, 12 Or. 3; *Steele*

jurisdictions as not justified by the purpose or the language of a quitclaim deed.<sup>59</sup> And even in states in which the grantee himself in a quitclaim deed is charged with notice of an adverse right, a purchaser from him for value is not so charged, since otherwise the occurrence of one quitclaim deed in the chain of title would to a great extent render such a title unmarketable.<sup>60</sup>

A conveyance purporting to convey land by a general description, such as "all my land," or "all the land which I have," or "all which I now have," in a certain place, does not, it has been held, take precedence of a prior unrecorded conveyance of particular land in such place, the evident intent being to convey only such land as the grantor still retains.<sup>61</sup>

By some courts it has been held that a purchaser from an

*v. Sioux Valley Bank*, 79 Iowa, 339, 18 Am. St. Rep. 370; *Meikel v. Borders*, 129 Ind. 529.

<sup>59</sup> *Moelle v. Sherwood*, 148 U. S. 21; *Chapman v. Sims*, 53 Miss. 154; *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Frey v. Clifford*, 44 Cal. 335; *Nidever v. Ayers*, 83 Cal. 39; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill. 214, 37 Am. Rep. 105.

That a sheriff's conveyance of "all the right, title, and interest" of the execution creditor in certain described land does not deprive the purchaser of his rights as against a prior unrecorded conveyance, see *Woodward v. Sartwell*, 129 Mass. 210, and *Parker v. Prescott*, 87 Me. 444; and that a conveyance by a private grantor in the same terms does not have such effect, see *Dow v. Whitney*, 147 Mass. 1, 6 Gray's Cas. 434. The fact that the conveyance is by quitclaim may, however, be considered on the issue of good faith. *Post v. Inhabitants of Foxborough*, 131 Mass. 202.

<sup>60</sup> *Winkler v. Miller*, 54 Iowa, 476; *Meikel v. Borders*, 129 Ind. 529; *Snowden v. Tyler*, 21 Neb. 199; *Sherwood v. Moelle* (C. C.) 36 Fed. 478.

<sup>61</sup> *Fitzgerald v. Libby*, 142 Mass. 235, 6 Gray's Cas. 427; *Callane v. Merrill*, 81 Iowa, 73; *Coe v. Persons Unknown*, 43 Me. 432; *Eaton v. Trowbridge*, 38 Mich. 454. See *Butterfield v. Smith*, 11 Ill. 486. In *Hetherington v. Clark*, 30 Pa. St. 393, the question whether such a conveyance was intended to convey only such land as the grantor still retained was regarded as a question for the jury.

heir or devisee takes subject to a conveyance by the ancestor, which was not recorded, on the theory that he undertakes to purchase merely the interest which the heir or devisee has.<sup>62</sup> But in other states it has been held more consistently, it would seem, with the policy of the recording laws, that a purchaser from an heir or devisee is, like a purchaser from any other person, entitled to rely upon the title as it appears of record.<sup>63</sup>

§ 483. Purchasers for value.

In order to claim priority as against one whose rights have first accrued, one must be a purchaser for value, and one who receives a conveyance based on a merely "good," as distinguished from a "valuable," consideration, takes subject to all prior conveyances or incumbrances. This is a principle of equity, independent of statute, but the recording acts usually in terms require record of a conveyance only as against purchasers for valuable consideration, and, in the absence of such an express declaration, the statutes have uniformly been so construed.<sup>64</sup> One is not a purchaser for a valuable consideration, within the rule, unless he has parted with money or money's worth in consideration of the conveyance.<sup>65</sup>

The question in regard to a conveyance by a debtor to a creditor—that is, whether an "antecedent" consideration is a valuable one—is viewed differently by different courts. By perhaps the weight of authority, a conveyance made merely to

<sup>62</sup> *Hancock v. Beverly's Heirs*, 6 B. Mon. (Ky.) 531; *Hill v. Meeker*, 24 Conn. 211. Compare *Harlan's Heirs v. Seaton's Heirs*, 18 B. Mon. (Ky.) 312.

<sup>63</sup> *Earle v. Fiske*, 103 Mass. 491, 6 Gray's Cas. 423; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northup*, 15 Ill. 148; *Powers v. McFerran*, 2 Serg. & R. (Pa.) 47; *McCulloch's Lessee v. Eudaly*, 3 Yerg. (Tenn.) 346.

<sup>64</sup> See 2 Pomeroy, Eq. Jur. §§ 656, 746-751; 1 Stimson's Am. St. Law, § 1611; Webb, Record of Title, § 204.

<sup>65</sup> 2 Pomeroy, Eq. Jur. § 747; Webb, Record of Title, § 204.

secure the payment of the debt is not sufficient to protect the purchaser as against rights previously accrued,<sup>66</sup> though there are decisions to the contrary.<sup>67</sup> On the other hand, a conveyance not to secure the debt, but in satisfaction of it,<sup>68</sup> or to obtain an extension,<sup>69</sup> has more usually been regarded as based on a valuable consideration.

A purchaser who has not paid the consideration before receiving notice of the earlier conveyance or incumbrance cannot claim priority thereto, even though he has received a transfer of the legal title.<sup>70</sup> If he has paid part of the consideration before receiving notice, he will, by the weight of authority, be protected to the extent of the amount so paid.<sup>71</sup>

<sup>66</sup> *Weaver v. Barden*, 49 N. Y. 286; *Koon v. Tramel*, 71 Iowa, 132; *Liggett Spring & Axle Co.'s Appeal*, 111 Pa. St. 291; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189; *Union Nat. Bank of Oshkosh v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Jones v. Robinson*, 77 Ala. 499; *Chance v. McWhorter*, 26 Ga. 315; *Boxheimer v. Gunn*, 24 Mich. 372.

<sup>67</sup> *Hayner v. Eberhardt*, 37 Kan. 308; *Frey v. Clifford*, 44 Cal. 335; *Cummings v. Boyd*, 83 Pa. St. 372; *Brem v. Lockhart*, 93 N. C. 191.

<sup>68</sup> 2 *Pomeroy*, Eq. Jur. § 749; *State Bank of St. Louis v. Frame*, 112 Mo. 502; *Soule v. Shotwell*, 52 Miss. 236; *Busey v. Reese*, 38 Md. 264; *Hanold v. Kays*, 64 Mich. 439, 8 Am. St. Rep. 835; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; *Foorman v. Wallace*, 75 Cal. 552.

<sup>69</sup> *Jones v. Robinson*, 77 Ala. 499; *Koon v. Tramel*, 71 Iowa, 132; *Cary v. White*, 52 N. Y. 138; *Schumpert v. Dillard*, 55 Miss. 348; *Pittsburgh & C. R. Co. v. Barker*, 29 Pa. St. 160; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

<sup>70</sup> *Schultze v. Houfes*, 96 Ill. 335; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Patton v. Moore*, 32 N. H. 382; *Wells v. Morrow*, 38 Ala. 125; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71; *Lamar's Ex'r v. Hale*, 79 Va. 147; 2 *Pomeroy*, Eq. Jur. §§ 691, 750.

<sup>71</sup> *Webb*, Record of Title, § 206; 2 *Pomeroy*, Eq. Jur. § 750; *Baldwin v. Sager*, 70 Ill. 503; *Birdsall v. Cropsey*, 29 Neb. 679; *Youst v. Martin*, 3 Serg. & R. (Pa.) 423; *Juvenal v. Jackson*, 14 Pa. St. 519, 524; *Marchbanks v. Banks*, 44 Ark. 48.

The fact that the purchaser has given a non-negotiable security for the payment of the price does not constitute him a purchaser for value, since he may be relieved therefrom in equity.<sup>72</sup>

**§ 484. Purchasers with notice from purchasers without notice.**

A purchaser may not only enjoy the property free from any adverse claims of which he had no notice at the time of his purchase, but he may also transfer his rights in this respect to others, and the fact that his alienee himself has notice is immaterial, it being thus the rule that a purchaser with notice from a purchaser without notice has all the rights of the latter.<sup>73</sup> The one exception to this rule exists when the second purchaser is one from whom the purchaser himself derived his title, since otherwise one purchasing with notice could free himself from the effects thereof by conveying the land to an innocent purchaser, and then taking a reconveyance.<sup>74</sup>

**§ 485. Purchasers without notice from purchasers with notice.**

A purchaser of land without notice, either from the records or otherwise, of a prior outstanding claim, is not affected thereby, even though his vendor had actual notice of the claim, since otherwise no person could purchase land with

<sup>72</sup> *Roseman v. Miller*, 84 Ill. 297; *Westbrook v. Gleason*, 79 N. Y. 23; *Beck v. Uhrich*, 13 Pa. St. 636, 53 Am. Dec. 507; *Marchbanks v. Banks*, 44 Ark. 48; *Patten v. Moore*, 32 N. H. 382.

<sup>73</sup> *Harrison v. Forth*, Finch, Prec. Ch. 51; *Whitfield v. Riddle*, 73 Ala. 99; *Roe v. Cato*, 27 Ga. 637; *East v. Pugh*, 71 Iowa, 162; *Bell v. Twilight*, 18 N. H. 159, 45 Am. Dec. 367.

<sup>74</sup> *Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638; *Johnson v. Gibson*, 116 Ill. 294; *Church v. Ruland*, 64 Pa. St. 432; *Huling v. Abbott*, 86 Cal. 423; 1 Story, Eq. Jur. § 410.

any safety, and the purpose of the recording acts would be entirely defeated.<sup>75</sup>

When a purchaser, who records his conveyance before the record of a prior conveyance, nevertheless takes subject thereto because he has actual notice, one who purchases from him subsequent to the recording of the prior conveyance also takes subject thereto. In other words, the last purchaser cannot claim priority by reason of the prior record of the conveyance to his grantor, because his grantor's actual notice rendered the record nugatory, and he cannot claim priority by reason of the record of the conveyance to himself, because such record was subsequent to the record of the prior adverse conveyance.<sup>76</sup> Under this rule, consequently, though one finds, by the index of grantors in the record office, that a particular owner in the chain of title has conveyed the land, a continuance of the search under the name of such grantor down to the time of the search must be made in order to ascertain whether there is another conveyance entitled to priority. Recognizing that this is a hardship upon an intending purchaser, it has been decided in at least one state that, under such a state of facts, the innocent purchaser from a purchaser with actual knowledge is not affected by a conveyance not recorded until after the record of the subsequent conveyance to the latter.<sup>77</sup>

<sup>75</sup> 1 Story, Eq. Jur. § 409; 2 Pomeroy, Eq. Jur. 764; *Roe v. Cato*, 37 Ga. 637.

<sup>76</sup> *Van Rensselaer v. Clark*, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280, 6 Gray's Cas. 479; *Mahoney v. Middleton*, 41 Cal. 41; *Fallase v. Pierce*, 30 Wis. 443; *Erwin v. Lewis*, 32 Wis. 276; *Woods v. Garnett*, 72 Miss. 78; *Van Aken v. Gleason*, 34 Mich. 477; *Bayles v. Young*, 51 Ill. 127, 6 Gray's Cas. 482; 2 Pomeroy, Eq. Jur. § 760.

<sup>77</sup> *Morse v. Curtis*, 140 Mass. 112, 54 Am. Rep. 456, 6 Gray's Cas. 483. In *Day v. Clark*, 25 Vt. 397, this result is attained on the theory that, as a subsequent purchaser with notice from a purchaser without notice takes free from any adverse claim, the last purchaser is, in this case, to be preferred, because he does not know that his grantor did have actual notice of the unrecorded conveyance.

## § 486. Purchasers at execution sales.

A purchaser at a sale on execution stands in the position of any other purchaser for value, and takes free from any claims upon the land in favor of third persons, of which he has no notice, actual or constructive, at the time of his purchase.<sup>78</sup> Moreover, even if he has notice of rights in a third person, he takes the land unaffected by such rights, if the rights of the judgment creditor were superior thereto, this being an application of the principle that a purchaser with notice from a purchaser without notice is not affected thereby.<sup>79</sup> Consequently, when, as may be the case in a number of states,<sup>80</sup> the lien of the judgment or execution is superior to an equity or conveyance which is prior in point of time, owing to the want of notice thereof to the judgment creditor, the purchaser under the execution, even though having notice, is not affected by such equity or claim.<sup>81</sup> But if the lien of the judgment or execution is subject to a pre-existing equity or conveyance, either because the judgment creditor had notice thereof, or because such is the law of the state,<sup>82</sup> the purchaser at execution sale, if he has notice of such outstanding rights in a third person, takes subject thereto.<sup>83</sup>

<sup>78</sup> *Maupin v. Emmons*, 47 Mo. 304, 6 Gray's Cas. 458; *Dow v. Whitney*, 147 Mass. 1, 6 Gray's Cas. 434; *Meek v. Skeen*, 3 C. C. A. 641, 60 Fed. 322; *Carden v. Lane*, 48 Ark. 216, 3 Am. St. Rep. 228; *Gorman v. Wood*, 68 Ga. 524; *Gower v. Doheney*, 33 Iowa, 36; *Lee v. Birmingham*, 30 Kan. 312; *McFadden v. Worthington*, 45 Ill. 362; *Boynton v. Winslow*, 37 Pa. St. 315; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467; *Paine's Lessee v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585.

<sup>79</sup> 2 Pomeroy, Eq. Jur. § 724.

<sup>80</sup> See post, § 507.

<sup>81</sup> *Stevenson v. Texas & P. Ry. Co.*, 105 U. S. 703; *Motley v. Jones*, 98 Ala. 443; *Sharp v. Shea*, 32 N. J. Eq. 65; *Blum v. Schwartz* (Tex.) 20 S. W. 54; *Butler v. Maury*, 10 Humph. (Tenn.) 420; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334.

<sup>82</sup> See post, § 507.

<sup>83</sup> *Moyer v. Hinman*, 13 N. Y. 180; *Churchill v. Morse*, 23 Iowa, 229

§ 487. *Lis pendens*.

The doctrine of *lis pendens*, by which one purchasing land from a party to a pending litigation concerning such land takes subject to the results of such litigation, is based, not on the theory that such purchaser has notice of the adverse claim, but rather on the principle that, pending the litigation, a party thereto cannot transfer his rights in the land to others, so as to prejudice another party to the litigation, since otherwise the decision might be utterly ineffectual.<sup>84</sup> The courts, however, usually refer to the doctrine as constituting a branch of the law of notice, a pending litigation being said to be notice to purchasers from parties thereto, and this is, in most all cases, the result of the doctrine. Consequently it is not improper to discuss the doctrine in connection with the law of notice.

The doctrine of *lis pendens* is sometimes spoken of as being peculiarly applicable to equitable proceedings, on the ground that, in the case of a legal action, a purchaser pending the litigation can take only the title of his vendor, irrespective of notice; but this principle in regard to legal actions seems to involve but another statement of the doctrine of *lis pendens*, and the doctrine is regularly applied in the case of proceedings concerning land at law, as well as in equity.<sup>85</sup>

92 Am. Dec. 422; *Rhodes v. Outcalt*, 48 Mo. 367; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381.

<sup>84</sup> 2 Pomeroy, Eq. Jur. § 632; *Bellamy v. Sabine*, 1 De Gex & J. 566; *Newman v. Chapman*, 2 Rand. (Va.) 93, 6 Gray's Cas. 464; *Dovey's Appeal*, 97 Pa. St. 153; *Arrington v. Arrington*, 114 N. C. 151; *Watson v. Wilson*, 2 Dana (Ky.) 406, 26 Am. Dec. 459; *Lamont v. Cheshire*, 65 N. Y. 30; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233; *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 258.

<sup>85</sup> See 2 Pomeroy, Eq. Jur. § 633; *Metcalf v. Pulvertoft*, 2 Ves. & B. 200; *McIlwraith v. Hollander*, 73 Mo. 106, 39 Am. Rep. 484; *Lamont v. Cheshire*, 65 N. Y. 30; *Smith v. Hodsdon*, 78 Me. 180; *Rollins v. Henry*, 78 N. C. 342; *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 258; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233; *Houston v.* (1098)



Applications of the doctrine accordingly occur in connection with actions of ejectment,<sup>86</sup> as well as in connection with equitable proceedings, such as suits to foreclose a mortgage or enforce any other lien,<sup>87</sup> to establish a trust in land,<sup>88</sup> or to set aside a conveyance.<sup>89</sup>

A purchaser is affected with notice only if the land is described with reasonable certainty in the pleadings in the litigation.<sup>90</sup> A purchaser from a person who is not a party to pending litigation concerning the land is not affected with notice thereof.<sup>91</sup>

By statute in many of the states the original doctrine of *lis pendens* has been modified by statutory provisions requiring a notice of *lis pendens* to be registered or recorded in some particular mode, in order that a purchaser for value

Timmerman, 17 Or. 499, 11 Am. St. Rep. 848; Tilton v. Coffield, 92 U. S. 163.

<sup>86</sup> Walden v. Bodley's Heirs, 9 How. (U. S.) 34; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Smith v. Hodsdon, 78 Me. 180; Snively v. Hitechew, 59 Pa. St. 49; Rollins v. Henry, 78 N. C. 342; Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190.

<sup>87</sup> Dodd v. Lee, 57 Mo. App. 167; Owen v. Kilpatrick, 96 Ala. 421; Burieson v. McDermott, 57 Ark. 229; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Rosenheim v. Hartsock, 90 Mo. 357; O'Brien v. Putney, 55 Iowa, 292.

<sup>88</sup> Walker v. Elledge, 65 Ala. 51; Pratt v. Hoag, 5 Duer (N. Y.) 631.

<sup>89</sup> Mellen v. Moline Malleable Iron Works, 131 U. S. 352; Jackson v. Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574, 6 Gray's Gas. 473; Evans v. Welch, 63 Ala. 250; Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459.

<sup>90</sup> Miller v. Sherry, 2 Wall. (U. S.) 237; Low v. Pratt, 53 Ill. 438; Todd v. Outlaw, 79 N. C. 235; Lewis v. Mew, 1 Strob. Eq. (S. C.) 180; Griffith v. Griffith, 9 Paige (N. Y.) 317.

<sup>91</sup> Miller v. Sherry, 2 Wall. (U. S.) 237; Green v. Rick, 121 Pa. St. 180, 6 Am. St. Rep. 760; Allen v. Morris, 34 N. J. Law, 159; Herrington v. Herrington, 27 Mo. 560; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Scarlett v. Gorham, 28 Ill. 319; Parsons v. Hoyt, 24 Iowa, 154; Travis v. Topeka Supply Co., 42 Kan. 625.

and without actual notice may be charged with notice of the litigation.<sup>92</sup>

There is a conflict in the decisions as to whether a suit to enforce a conveyance or incumbrance, such as a mortgage which has not been recorded, is sufficient to make a purchaser pending the litigation a purchaser with notice, so as to render the unrecorded instrument effective as against him.<sup>93</sup>

<sup>92</sup> 2 Pomeroy, Eq. Jur. § 640. See *Smith v. Gale*, 144 U. S. 509; *Bensley v. Mountain Lake Water Co.*, 18 Cal. 306, 73 Am. Dec. 575; *Jorgenson v. Minneapolis & St. L. Ry. Co.*, 25 Minn. 206; *Sheridan v. Andrews*, 49 N. Y. 478; *Todd v. Outlaw*, 79 N. C. 235; *Alterauge v. Christiansen*, 48 Mich. 60.

<sup>93</sup> That it does have such effect, see *Bolling v. Carter*, 9 Ala. 921, 6 Gray's Cas. 477; *Thoms v. Southard*, 2 Dana (Ky.) 475. That it does not, see *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766, 6 Gray's Cas. 464; *Douglass v. McCrackin*, 52 Ga. 596. See, also, *McCutchen v. Miller*, 81 Miss. 65, 85.

(1100)

## **CHAPTER XXXII.**

### **REGISTRATION OF TITLE.**

- § 488. The purpose of the legislation.**
- 489. The method of registration.**
- 490. Transfers after registration.**
- 491. Equitable interests.**
- 492. Liens.**
- 493. Transfer of decedent's land.**

In some states there exist statutory provisions for the registration of title to land, the effect of which is to make a certificate of title, issued by an official named in the statute, conclusive as to the character of the title of the person to whom it is issued, and as to the rights of other persons in connection with such title.

- § 488. The purpose of the legislation.**

The system of registration of titles, frequently called the "Torrens System,"<sup>1</sup> has for its purpose the establishment of a system by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in this regard. Such a certificate is first issued after a judicial proceeding in the nature of a suit to quiet title, and all subsequent transfers or transactions affecting the title are either noted on this certificate, or on a new certificate substituted therefor. The advantages claimed for this system over that

<sup>1</sup> After Sir Robert Torrens, of South Australia, who first introduced it into use among English speaking people. A similar system had been in vogue in some parts of the present German empire for many years.

now in vogue in this country, by which a purchaser is dependent chiefly on the record of conveyances for knowledge of the state of his vendor's title, are many. Chief among them are the saving to the community of the cost of a new examination of the title in connection with each transfer or other transaction affecting the land, the removal of all uncertainties as to the title, which can be accomplished only partially by the present system of examining the records, and the greater speed with which transfers can be effected, after the title has once been made the subject of judicial proceedings for its establishment. The details of the legislation providing for the introduction of this system differ greatly in different countries, and, so far as introduced in this country, in different states, and a mere outline of the methods of procedure thereunder can here be given.<sup>2</sup>

§ 489. The method of registration.

In order that land may be registered under the statute, and the initial certificate of title obtained, the following mode of procedure is usually prescribed: The person or persons claiming the ownership of the land in fee simple file an application, addressed to the court having jurisdiction under the statute, describing the land, setting forth any estates, interests, or liens outstanding in other persons, so far as known to the petitioner, the name of the occupant, and the names of owners of adjoining land. Upon the filing of the application it is referred to one or more official examiners of title, who, after making a proper examination, report to the court. Any persons who appear to be interested in the land are made parties, and the statute provides for the sending of no-

<sup>2</sup> There is a great deal of literature on the subject, to a great extent in the form of articles in legal periodicals. Lists of such articles may be found in Morris, *Land Registration* (English), and *Land Title Registration*, by Theodore Sheldon, Esq. (American).

tices to such persons, and also for the publication of a notice in a newspaper for a prescribed period. If the examiner approves the title, and no adverse claims are presented, or if those presented do not appear meritorious, the court confirms the applicant's title, and directs the person having charge of the registration office, known usually as the registrar, to issue to the applicant a certificate of title. This certificate states that the applicant has a fee-simple title (or otherwise, as the case may be), and also there are noted on the certificate any outstanding interests, trusts, or incumbrances in other persons which are recognized by the decree of the court. This certificate is made out in duplicate; one copy being issued to the applicant and one copy being retained in the registration office, where it is inserted in a book called the "register" or "registration book."

No person other than the owner in fee simple can, under the acts adopted in this country, obtain the registration of the title, but the existence of lesser estates in other persons does not affect such owner's right to registration, the rights of the owners of lesser estates being protected by statements upon the certificate issued to the owner in fee simple.

The proceeding by which the title is registered is, by the terms of the statute, absolutely conclusive upon all persons, either immediately upon the rendition of the decree, or within a short period thereafter. The proceeding is thus in effect one to quiet title. The constitutionality of such legislation, in so far as it makes the decree binding upon persons interested in the land, who receive notice of the proceeding merely by publication, has been vigorously questioned, on the ground that it deprives such persons of property without due process of law; but it has been upheld in at least three states.<sup>3</sup>

<sup>3</sup> *Tyler v. Judges of Court of Registration*, 175 Mass. 71; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *State v. Westfall* (Minn.) 89 N. W. 175. See note to latter case in 54 Cent. Law J. 293.

The United States supreme court has refused to assume jurisdiction to determine the question until a case is presented by one who has actually been deprived of property by means of such legislation.<sup>4</sup>

The certificate issued upon the registration of the title is conclusive that no outstanding interests and incumbrances exist in other persons, with certain exceptions, specified in the statute, these exceptions ordinarily including liens for taxes, leases for terms of but a few years, highways, and easements, or particular classes of easements, and, as to all such excepted interests, any purchaser of the land must satisfy himself otherwise than by reference to the certificate of title.

Rights of ownership in the land less than fee simple, as well as rights in the land existing in others, such as easements and profits *a prendre*, are not usually the subject of a separate certificate, but they are protected by memoranda upon the certificate of the fee-simple owner.

#### § 490. Transfers after registration.

After the title to particular land has been registered, all subsequent transactions affecting such title must be by means of the machinery furnished by the act. If the owner of the fee-simple title, as registered, desires to make a transfer thereof, he makes the usual conveyance, and hands it, together with his certificate of title, to the intending purchaser, who delivers them to the registrar, who then cancels the former certificate, and makes out a new one in favor of the purchaser. The latter is protected, as against any adverse claims unknown to him, by his ability to inspect the original certificate before paying over the price, and on this he can absolutely rely, except with reference to the classes of rights excepted in the statute. The delivery of the conveyance to

<sup>4</sup> *Tyler v. Judges of Court of Registration*, 179 U. S. 405.

the grantee therein is not regarded as effecting a transfer of title, but the transfer takes place only upon the issuance of the new certificate. In case the fee-simple owner desires to transfer only a part of the land, his former certificate is canceled, and a new certificate is issued to him for the part retained, and another is issued to the purchaser for his part.

§ 491. Equitable interests.

The registration is of the legal title only, and, in case an equitable interest has been created in another by a declaration of trust or otherwise, a memorandum to that effect is made upon the certificate, without stating the terms of the instrument creating the same, but referring to the place of record of such instrument. The statute usually provides that no instrument undertaking to deal with land held in trust shall be registered until it has been approved by a court, or, in one state at least, by official examiners of title, as being in accordance with the terms of the trust, it being provided that such approval shall be conclusive as to the validity of the transfer.\*

§ 492. Liens.

Though the subject of liens, including mortgages, is treated in a subsequent part of this work, it seems desirable to here consider the effect of the registration of the title to land upon such liens as may be created thereon.

\*The Illinois act (Laws 1897, p. 156, § 69), making the approval of such transfer by two examiners conclusive as to its validity, has been criticised as conferring judicial powers upon ministerial officers. It has, however, been sustained by the supreme court. *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175. In Massachusetts this difficulty is avoided by the establishment of a court of land registration, which renders a decree construing the trust in such a case, and performs any other acts of a judicial nature which may be called for in the administration of the law.

All existing liens, equitable or statutory, except those excepted in the statute, are noted upon the certificate of title when issued upon the registration of the land, and those subsequently created on the land are also required to be noted on the certificate, generally upon the filing with the registrar of a copy of the proceedings or instrument upon which the lien is based.

In the case of a mortgage on the land, made subsequent to the registration of the title, the statute sometimes provides for the issue of a duplicate certificate of title to the mortgagee, a memorandum of such issue being noted on the original certificate in the registration book, while sometimes the mortgage merely is given to the mortgagee, a duplicate being held by the registrar, and the transaction being, as in the other case, noted in the registration book. Upon an assignment or discharge of the mortgage, these facts are noted upon the certificate in the registration book.

**§ 493. Transfer of decedent's land.**

The acts providing for the registration of title differ in their provisions for the transfer upon the register of lands belonging to a decedent. By some statutes it is provided that the title to all registered land shall, on the death of the owner, pass to the executor or administrator, or to a trustee to be selected, and that he, under an order of court, shall transfer the title upon the register to the heirs or devisees as named in the order, or to the purchaser, in case the land is sold for purposes of administration. Other statutes provide that the heirs or devisees shall make application for the entry of a new certificate in their favor, and, after notice to all persons in interest by publication and otherwise, and after due hearing, such a certificate is issued, subject, however, to all claims against deceased until final settlement of the estate, and a transfer of the land to another.

(1106)



## **CHAPTER XXXIII.**

### **RESTRICTIONS UPON THE FREEDOM OF TRANSFER.**

- § 494. General considerations.**
- 495. Conveyances in fraud of creditors.**
- 496. Conveyances in fraud of subsequent purchasers.**
- 497. Conveyances in violation of the bankrupt act.**
- 498. Transfers by disseisees.**
- 499. The homestead exemption.**
- 500. Restrictions in creation of estate.**

The right of one having an estate or interest in land to transfer it to another is subject to restrictions as follows:

The transfer must not be in fraud of creditors, as being intended to deprive them of the means of realizing their claims from the debtor's property.

The transfer must not be in fraud of a subsequent purchaser, as being intended as a device for rendering the sale to such purchaser nugatory.

Under the United States bankruptcy act, a transfer by one within a certain time before he is adjudged a bankrupt, with the purpose of giving a preference to a particular creditor, is voidable, as is a general assignment of all his property for the benefit of creditors.

In some states, one cannot transfer land which is in the adverse possession of another.

In many states, the interest of a debtor in the "homestead" occupied by his family is, to a certain extent, measured either by the quantity or value of the land, exempt from liability to involuntary transfer under execution, or otherwise, in satisfaction of his debts, other than those of particular excepted classes. In some states the statute extends the benefit of the exemption to persons having no family.

One cannot, in creating a legal estate in fee, restrict the rights of the tenant as regards voluntary alienation, or the rights of the latter's creditors to proceed against the land; nor can one so do in creating a legal life estate or an estate for years, except by a provision that the estate shall terminate upon such voluntary or involuntary alienation. Furthermore, one cannot, in assigning an estate for years, impose such a restriction upon his assignee. In connection with equitable, as distinct from legal, estates for life, in many states, and apparently, in a few, in connection with equitable estates in fee simple, a restriction may be imposed, in the creation of the estate, upon the rights of the beneficiary to transfer his interest, and upon the rights of his creditors to collect their claims therefrom, such express restrictions creating what are frequently termed "spendthrift trusts."

§ 494. General considerations.

As a general rule, the owner of any particular estate in land has full power to make any disposition thereof, transferring either all his rights in the land or a part only, and creating at his pleasure, in favor of different persons, such estates as are recognized by the law. There are, however, certain restrictions imposed by law upon the right of transfer. One class of such restrictions—those growing out of the legal incapacity of certain classes of persons to transfer any interests in land, or, in some cases, to acquire them—will be considered in the next chapter. Of the other restrictions upon the right of the owner of land to transfer his land when and as he chooses, those imposed by the rule against perpetuities,<sup>1</sup> by the prohibition of invalid conditions,<sup>2</sup> by the law as to charitable trusts,<sup>3</sup> and for the pur-

<sup>1</sup> Ante, §§ 152-160.

<sup>2</sup> Ante, § 70.

<sup>3</sup> Ante, § 102.

pose of protecting marital rights<sup>4</sup> have been before discussed.

There remain to be considered the restrictions arising from the prohibition of conveyances in fraud of creditors,<sup>5</sup> the prohibition of conveyances in fraud of subsequent purchasers,<sup>6</sup> those imposed by the bankrupt act,<sup>7</sup> those existing, in a few states, as a result of a statutory prohibition of the conveyance of land in the adverse possession of another.<sup>8</sup> The restrictions previously enumerated are imposed solely upon the voluntary transfer of interests in land by the person entitled thereto. There also exist, in many of the states, statutes of great importance, exempting from forced sale in behalf of a creditor the "homestead" or residence of the debtor, and these statutes also usually prohibit a conveyance of such homestead without the assent of the owner's wife, they thus effecting a restriction upon both the voluntary and involuntary transfer of his title.<sup>9</sup> Frequently, although the law imposes no restriction upon the right of the owner of land to dispose thereof, or of his creditors to enforce payment therefrom, the instrument by which he is given title to the land undertakes to restrict his rights, or those of his creditors, in this regard.<sup>10</sup>

§ 495. Conveyances in fraud of creditors.

By St. 13 Eliz. c. 5,<sup>11</sup> it was provided "that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels,

<sup>4</sup> Ante, §§ 189, 209.

<sup>5</sup> Post, § 495.

<sup>6</sup> Post, § 496.

<sup>7</sup> Post, § 497.

<sup>8</sup> Post, § 498.

<sup>9</sup> Post, § 499.

<sup>10</sup> Post, § 500.

<sup>11</sup> A. D. 1570.

\* \* \* and all and every bond, suit, judgment, and execution," made to hinder, delay, or defraud creditors or others "of their just and lawful actions, suits, debts, accounts, damages," etc., should be deemed, as against that person or persons, his heirs and successors, whose actions, suits, etc., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void. This statute has been frequently asserted to be merely declaratory of the common law, and probably at the present day, even in the absence of any statute, the rights of creditors would be protected at law or in equity as against such a fraudulent attempt by the debtor to avoid paying his debts.<sup>12</sup> In most of the states, however, there is an express statute essentially similar to the English statute.<sup>13</sup> In at least two states the statute has been adopted as part of the common law of the state.<sup>14</sup>

The statutes directed against fraudulent conveyances do not prohibit the preference by a debtor in failing circumstances of one or more of his creditors, provided the property conveyed for the purpose of effecting such preference does not exceed the *bona fide* amount of the debt or debts, and no benefit is reserved to the grantor.<sup>15</sup> It is only by means of an express prohibition of such preferences, such as is found in the bankrupt act, that they can be regarded as invalid.

The creditors protected by the terms of the statutes above referred to include not only those who are such at the time

<sup>12</sup> 2 Bigelow, Fraud, c. 2.

<sup>13</sup> 1 Stimson's Am. St. Law, § 4591.

<sup>14</sup> Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 232; Howe v. Ward, 4 Me. 195.

<sup>15</sup> 2 Bigelow, Fraud, 491; Huntley v. Kingman, 152 U. S. 527; Southern White Lead Co. v. Haas, 73 Iowa, 399; Banfield v. Whipple, 14 Allen (Mass.) 13; Wilt v. Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 271, 21 Am. Dec. 642.

of the conveyance alleged to be fraudulent, but also those persons who may thereafter become creditors. So, in case one makes a conveyance of property with the present intention of entering into a hazardous business, or of creating debts, with the knowledge that the conveyance will probably affect his ability to pay his debts, the conveyance will be void as against the persons with whom such debts were contracted.<sup>16</sup>

If a conveyance is made with the intention of defrauding creditors, the fact that it is based on a valuable consideration will not render it valid as against them.<sup>17</sup>

A voluntary conveyance—that is, one not supported by a valuable consideration—is, in some states, void as against existing creditors, on a conclusive presumption of fraud on the part of the grantor.<sup>18</sup> But in most jurisdictions, though a voluntary conveyance is presumptively fraudulent as against existing creditors, it is upheld if it can be shown that, at the time of making it, the grantor retained amply sufficient property to satisfy the claims of his creditors, and that it was owing only to the happening of unforeseen contingencies

<sup>16</sup> *Winchester v. Charter*, 12 Allen (Mass.) 606, 6 Gray's Cas. 295; *Case v. Phelps*, 39 N. Y. 164, 6 Gray's Cas. 299; *Redfield v. Buck*, 35 Conn. 328, 95 Am. Dec. 241; *Snyder v. Free*, 114 Mo. 360; *Monroe v. Smith*, 79 Pa. St. 459; *Churchill v. Wells*, 7 Cold. (Tenn.) 364; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85; *Moritz v. Hoffman*, 35 Ill. 553; *Mackay v. Douglas*, L. R. 14 Eq. 106, 6 Gray's Cas. 223; *Ex parte Russell*, 19 Ch. Div. 588, 6 Gray's Cas. 235.

<sup>17</sup> *Twyne's Case*, 3 Coke, 80b, 6 Gray's Cas. 196, 1 Smith, Lead. Cas. Eq. 1; *Gragg v. Martin*, 12 Allen (Mass.) 498; *Gable v. Columbus Cigar Co.*, 140 Ind. 563; *Haymaker's Appeal*, 53 Pa. St. 306; *Billings v. Russell*, 101 N. Y. 226; *May, Fraud. Conv.* (2d Ed.) 85 et seq.; *Walt, Fraud. Conv.* §§ 207; 208.

<sup>18</sup> *Wooten v. Steele*, 109 Ala. 563, 55 Am. St. Rep. 947; *Swartz v. Hazlett*, 8 Cal. 126; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641. See *Marmon v. Harwood*, 124 Ill. 104.

that he was unable to pay such claims.<sup>19</sup> In a number of states the statute provides, in accordance with this view, that a conveyance is not necessarily void because voluntary.<sup>20</sup> The fact that a conveyance is voluntary does not render it open to attack by subsequent creditors, unless it was made under circumstances showing actual fraud.<sup>21</sup>

A conveyance, though declared by the statute to be "void" as against creditors, is merely voidable by them, and, as between the parties thereto and their successors in interest, and as against other persons not creditors, it is perfectly valid.<sup>22</sup> A conveyance which is fraudulent as to one or more creditors is, it seems, invalid as to all;<sup>23</sup> and, by some decisions, a conveyance fraudulent as to existing creditors is regarded as voidable at the instance of subsequent creditors,<sup>24</sup> though, in some states, such a view is considered to

<sup>19</sup> *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's Cas. 304; *Parish v. Murphree*, 13 How. (U. S.) 92; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 46, 7 Am. St. Rep. 78; *Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717; *Cole v. Tyler*, 65 N. Y. 78; *Goodman v. Wineland*, 61 Md. 449; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85, and note; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475.

<sup>20</sup> 1 Stimson's Am. St. Law, § 4598.

<sup>21</sup> See *Todd v. Nelson*, 109 N. Y. 316, 6 Gray's Cas. 307; *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's Cas. 304; *Winchester v. Charter*, 12 Allen (Mass.) 606, 6 Gray's Cas. 295; *Elyton Land Co. v. Iron City Steam Bottling Works*, 109 Ala. 602; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, and note; *Kane v. Desmond*, 63 Cal. 464; *Moritz v. Hoffman*, 35 Ill. 553; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116.

<sup>22</sup> *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235, 6 Gray's Cas. 369; *Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670; *Knight v. Glasscock*, 51 Ark. 390; *Stillings v. Turner*, 153 Mass. 534; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664; *McElroy v. Hiner*, 133 Ill. 156.

<sup>23</sup> *Barrett v. Nealon*, 119 Pa. St. 171, 4 Am. St. Rep. 628; *Personette v. Cronkhite*, 140 Ind. 586; *Savage v. Knight*, 92 N. C. 493, 53 Am. Rep. 423.

<sup>24</sup> *McLane v. Johnson*, 43 Vt. 48; *Bassett v. McKenna*, 52 Conn. 437; *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's (1119)

be applicable only under particular circumstances, as when there is a secret trust for the grantor, or the pre-existing debts remain unpaid, or the subsequent creditors were, at the time the debts were contracted, entirely without knowledge of the previous conveyance.<sup>25</sup>

— Protection of bona fide purchasers.

Although a conveyance is otherwise voidable as being in fraud of creditors, it will not be so treated in case the grantee was a purchaser for value without notice of the fraud. The Statute of Elizabeth and most of the state statutes contain an exception in favor of such a purchaser;<sup>26</sup> but even in the absence of any statute, the exception has been enforced, in pursuance of the usual equitable policy of protecting *bona fide* purchasers for value.<sup>27</sup>

The protection accorded to a *bona fide* purchaser for value is also extended to one who is, not the grantee in the fraudulent conveyance, but a purchaser from the grantee; and this, although the conveyance could have been avoided as against the original grantee, owing to his knowledge of the fraud, or because he did not pay a valuable consideration.<sup>28</sup>

Cas. 304; Walsh v. Byrnes, 39 Minn. 527; Jordan v. Collins, 107 Ala. 572; Day v. Cooley, 118 Mass. 527; Trezevant v. Terrell, 96 Tenn. 528; Lockhard v. Beckley, 10 W. Va. 87; 2 Bigelow, Fraud, 89 et seq.

<sup>25</sup> See Clark v. French, 23 Me. 221, 39 Am. Dec. 618; Wyman v. Brown, 50 Me. 139; Claflin v. Mess, 30 N. J. Eq. 211; Springer v. Bigford, 160 Ill. 495; Simmons v. Ingram, 60 Miss. 886; Monroe v. Smith, 79 Pa. St. 459; Sheppard v. Thomas, 24 Kan. 780; Hagerman v. Buchanan, 45 N. Y. Eq. 292, 14 Am. St. Rep. 732, and note.

<sup>26</sup> 1 Stimson's Am. St. Law, § 4598.

<sup>27</sup> Gridley v. Bingham, 51 Ill. 153; Farlin v. Sook, 30 Kan. 401, 46 Am. Rep. 100; Leach v. Francis, 41 Vt. 670; Jackson v. Glaze, 3 Okl. 143; Dougherty v. Cooper, 77 Mo. 528; Tiernay v. Claflin, 15 R. I. 220; Shauer v. Alterton, 151 U. S. 607.

<sup>28</sup> Anderson v. Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235, 6 Gray's Cas. 369; George v. Kimball, 24 Pick. (Mass.) 234; Thames v. Rembert's Adm'r, 63 Ala. 561; Williamson v. Russell, 39 Conn.

§ 496. Conveyances in fraud of subsequent purchasers.

St. 27 Eliz. c. 4, made perpetual by St. 39 Eliz. c. 18, provided in effect that all alienations of land, made with intent to defraud and deceive subsequent purchasers for valuable consideration, should, as against such persons and persons claiming under them, be void, unless the alienation be made for good consideration and *bona fide*. The expression "good" consideration, as used in the statute, has always been construed as meaning "valuable" consideration.<sup>29</sup>

This statute is frequently stated to be declaratory of the common law.<sup>30</sup> This is questionable, however.<sup>31</sup> In many states in this country there is an express statutory provision substantially equivalent to the English statute,<sup>32</sup> while occasionally such statute has been regarded as in force without any express provision upon the subject.<sup>33</sup>

In England the statute was construed as invalidating any conveyance not made on a valuable consideration, as against one to whom the grantor subsequently conveyed the land on a valuable consideration, even though the subsequent alienee had notice of the previous conveyance, the execution of the subsequent conveyance being regarded as evidence that the

406; *Scott v. Purcell*, 7 Blackf. (Ind.) 66, 39 Am. Dec. 453; *Young v. Lathrop*, 67 N. C. 63, 12 Am. Rep. 663; *Sawtelle v. Weymouth*, 14 Wash. 21.

<sup>29</sup> *Twyne's Case*, 3 Coke, 80b, 6 Gray's Cas. 196, 1 Smith, Lead. Cas. Eq. 1; *Dolphin v. Aylward*, L. R. 4 H. L. 486; 2 Bigelow, Fraud, 532; May, Fraud. Conv. (2d Ed.) 245.

<sup>30</sup> *Cadogan v. Kennett*, Cowp. 434; *Hamilton v. Russel*, 1 Cranch (U. S.) 309; *Kimball v. Hutchins*, 3 Conn. 450; *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126.

<sup>31</sup> 1 Story, Eq. Jur. § 352; 2 Bigelow, Fraud, 25.

<sup>32</sup> 1 Stimson's Am. St. Law, § 4592. See 2 Bigelow, Fraud, 517 et seq.

<sup>33</sup> *Beal v. Warren*, 2 Gray (Mass.) 447, 6 Gray's Cas. 321; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 205.

(1114)



first conveyance was fraudulent. The effect of this construction was that a conveyance of land not based on a valuable consideration could always be revoked by the grantor by means of a subsequent conveyance by him for value, unless the first grantee had conveyed the land to a purchaser for value.<sup>34</sup> This construction placed upon the statute was finally removed by a late statute,<sup>35</sup> providing that no voluntary conveyance of land, if *bona fide* and free from fraudulent intent, should be defeated by a subsequent purchase for value. In this country the construction placed upon the act by the English courts has not been adopted, and consequently the influence of the statute has been much less felt. So it is usually held that, if the subsequent purchaser has notice of a previous voluntary conveyance, he cannot claim to have been defrauded thereby, provided there was no actual fraud in the making of the first conveyance.<sup>36</sup> In many states the statute specifically provides that the prior conveyance shall not be void as against a subsequent purchaser with actual or legal notice.<sup>37</sup> Moreover, the notice, to thus preclude the subsequent purchaser from claiming the protection of the statute, need not, by the weight of authority, be actual, constructive notice from the recording of the first convey-

<sup>34</sup> Doe d. Otley v. Manning, 9 East, 59; Doe d. Newman v. Rusham, 17 Q. B. 723, 6 Gray's Cas. 314; Dolphin v. Aylward, L. R. 4 H. L. 486. See May, Fraud. Conv. (2d Ed.) 189 et seq.; Mellick v. Mellick, 47 N. J. Eq. 86. But the heir or devisee of the grantor could not revoke the voluntary conveyance by making a conveyance for value. Doe d. Newman v. Rusham, 17 Q. B. 723, 6 Gray's Cas. 314; Lewis v. Rees, 3 Kay & J. 132.

<sup>35</sup> 56 & 57 Vict. c. 21 (A. D. 1892).

<sup>36</sup> Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 343; Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Foster v. Walton, 5 Watts (Pa.) 378; Chaffin v. Kimball's Heirs, 23 Ill. 36; City of Baltimore v. Williams, 6 Md. 235; Gilliland v. Fenn, 90 Ala. 230; Anderson v. Etter, 102 Ind. 115; Laird v. Scott, 5 Heisk. (Tenn.) 314; Gardner v. Cole, 21 Iowa, 212.

<sup>37</sup> 1 Stimson's Am. St. Law, § 4592.

ance being sufficient.<sup>38</sup> Apart from the question of the effect of notice of the previous conveyance, the making of the second conveyance is not usually regarded as necessarily showing a fraudulent intent in making the first conveyance, so as to bring it within the terms of the statute,<sup>39</sup> though it may cast upon the grantee in the first conveyance the burden of showing the absence of such an intent.<sup>40</sup> The general result of the decisions in this country, accordingly, is that, while a conveyance intended to be in fraud of a subsequent purchaser is invalid as against him, it is not so, even though voluntary, if not actually fraudulent, and he has notice of its existence.

Even though the prior conveyance be invalid so far as concerns the grantee therein, it cannot be set aside as against a purchaser from him for value without notice of the fraud, nor, when the fraud is based, as formerly in England, on the voluntary character of the conveyance, although he knows of its voluntary character.<sup>41</sup>

The Statute of 27 Eliz. c. 4, also contained a provision that a conveyance containing a power of revocation in the grantor should be invalid as against a subsequent convey-

<sup>38</sup> *Gardner v. Cole*, 21 Iowa, 216; *City of Baltimore v. Williams*, 6 Md. 235; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *Laird v. Scott*, 5 Heisk. (Tenn.) 314. Contra, *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318. And see *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261; *Mellick v. Mellick*, 47 N. J. Eq. 86.

<sup>39</sup> *Beal v. Warren*, 2 Gray (Mass.) 447, 6 Gray's Cas. 321; *Cathcart v. Robinson*, 5 Pet. (U. S.) 280; *Jackson v. Town*, 4 Cow. (N. Y.) 603; *City of Baltimore v. Williams*, 6 Md. 235; *Shaw v. Tracy*, 83 Mo. 224; 4 Kent's Comm. 463, note.

<sup>40</sup> *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 212; *Gilliland v. Fenn*, 90 Ala. 230; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; 1 Story, Eq. Jur. § 427; 2 Pomeroy, Eq. Jur. § 974.

<sup>41</sup> *Prodgers v. Langham*, 1 Sid. 133, 6 Gray's Cas. 328; *Doe d. Newman v. Rusham*, 17 Q. B. 723, 6 Gray's Cas. 314; *Gilliland v. Fenn*, 90 Ala. 230; *Fletcher v. Peck*, 6 Cranch (U. S.) 133; *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 228.

ance by the same grantor to a purchaser for a valuable or good consideration. This provision, or its substantial equivalent, has been adopted in many states;<sup>42</sup> but occasion for the application of such statutes has, in England, but seldom arisen, and, in this country, practically, never.

§ 497. Conveyances in violation of the bankrupt act.

The present bankrupt act<sup>43</sup> provides that, if one adjudged a bankrupt shall, within four months before the filing of the petition to have him so adjudged, or after the filing of the petition, and before the adjudication, have given a preference to any creditor, such preference shall be voidable by the trustee, provided the person receiving the preference, or to be benefited thereby, or his agent, shall have had reasonable cause to believe that it was intended thereby to give a preference. It is further provided that one shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any others of such creditors of the same class. If, however, property transferred to a creditor by way of preference is by him transferred to a *bona fide* purchaser for value, the latter is not, it would seem, affected by the illegality of the original transfer.<sup>44</sup> The statute also gives the trustee the right to take proceedings to set aside any transfer in fraud of creditors, and vests in him the title to property so transferred.<sup>45</sup> Under the act, more-

<sup>42</sup> 1 Stimson's Am. St. Law, § 4593.

<sup>43</sup> Act July 1, 1898, § 60. See Collier, Bankr. (3d Ed.) 338 et seq.

<sup>44</sup> *Rison v. Knapp*, 1 Dill. 187, Fed. Cas. No. 11,361; *In re Mullen* (D. C.) 101 Fed. 413.

<sup>45</sup> Bankruptcy Act, §§ 67, 70; Loveland, Bankr. 299.

over, any general assignment for the benefit of creditors, although free from fraudulent intent, and containing no preferences, is an act authorizing an adjudication of bankruptcy, whereupon the assignment becomes void.<sup>46</sup>

### § 498. Transfers by disseisees.

By St. 32 Hen. VIII. c. 9,<sup>47</sup> it was declared to be unlawful to buy or sell any pretended right or title to any lands or hereditaments unless the vendors or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale, but the purchase of a pretended title, by a person in lawful possession of the rents and profits, was declared to be allowable. It is sometimes said that this statute is merely declaratory of the common law, but since, at common law, and before the Statute of Uses, the transfer of freehold interests in land necessarily involved a transfer of the seisin, there was, it would seem, but little room for the application of a statute forbidding the transfer of land by one who was disseised,—that is, the transfer of a right of entry merely.<sup>48</sup>

In a few states in this country the English statute, or the principle involved therein, was adopted as a part of the common law.<sup>49</sup> In other states there are specific statutory provisions invalidating transfers of land in the adverse pos-

<sup>46</sup> Bankruptcy Act, § 3; Collier, Bankr. 42; West Co. v. Lea, 174 U. S. 594; In re Meyer (C. C. A.) 98 Fed. 976.

<sup>47</sup> The "Pretended Title Act" (A. D. 1540).

<sup>48</sup> See Rawle, Covenants for Title, § 47. Article in 2 Law Quart. Rev. 481, by Prof. Maitland.

<sup>49</sup> Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Patterson v. Nixon, 79 Ind. 251; Tabb v. Baird, 3 Call (Va.) 481; Barry v. Adams, 3 Allen (Mass.) 493; 4 Kent's Comm. 443.

session of another person.<sup>50</sup> In a majority of the states, however, at the present time, no restriction upon the right of transfer arising from the fact that the land is in the adverse possession of a third person is recognized,<sup>51</sup> and that such is the law is quite frequently declared by statute.<sup>52</sup>

The adverse possession in a third person which invalidates the conveyance need not, as a rule, be under color of title,<sup>53</sup> though in two states the statute is otherwise construed.<sup>54</sup>

The statute has been held not to apply to a transfer made in the performance of an executory contract valid when made,<sup>55</sup> to a transfer made to correct a mistake,<sup>56</sup> to a

<sup>50</sup> 1 Stimson's Am. St. Law, § 1401.

<sup>51</sup> *Roberts v. Cooper*, 20 How. (U. S.) 467; *Matthews v. Hevner*, 2 App. D. C. 349; *Doe d. Cain v. Roe*, 23 Ga. 82; *Lytle v. State*, 17 Ark. 608; *Mathewson v. Fitch*, 22 Cal. 86; *Bayard v. McLane*, 3 Har. (Del.) 139; *Farrar v. Fessenden*, 39 N. H. 268; *Sims v. De Graffenreid*, 4 McCord (S. C.) 253; *Stoever v. Whitman's Lessee*, 6 Binn. (Pa.) 416.

<sup>52</sup> 1 Stimson's Am. St. Law, § 1401; *Trustees of Putnam Free School v. Fisher*, 34 Me. 172; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Cassedy v. Jackson*, 45 Miss. 397; *Carrington v. Goddin*, 13 Grat. (Va.) 587; *Stewart v. McSweeney*, 14 Wis. 468; *Shortall v. Hinckley*, 31 Ill. 219.

In England, the statute was regarded as invalidating a sale by one who had not been in possession for a year. *Doe d. Williams v. Evans*, 1 C. B. 717. But 8 & 9 Vict. c. 106, making rights of entry alienable, changed the law in this respect. *Kennedy v. Lyell*, 15 Q. B. Div. 491; *Jenkins v. Jones*, 9 Q. B. Div. 128.

<sup>53</sup> *Sharp v. Robertson's Ex'rs*, 76 Ala. 343; *Dubois v. Marshall*, 3 Dana (Ky.) 336; *Barry v. Adams*, 3 Allen (Mass.) 493; *German Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, 2 Am. Rep. 341.

<sup>54</sup> See *Crary v. Goodman*, 22 N. Y. 170; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Stoddard v. Whiting*, 46 N. Y. 627; *Kreuger v. Schultz*, 6 N. D. 310.

<sup>55</sup> *Greer v. Wintersmith*, 85 Ky. 516; *Simon v. Gouge*, 12 B. Mon. (Ky.) 156; *Gunn v. Scovill*, 4 Day (Conn.) 234; *Hale v. Darter*, 10 Humph. (Tenn.) 92.

<sup>56</sup> *Hopkins v. Paxton*, 4 Dana (Ky.) 36; *Ross v. Blair*, Meigs (Tenn.) 525; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75.

judicial sale,<sup>57</sup> to a transfer by the state,<sup>58</sup> nor to a release made to the person in possession.<sup>59</sup>

A conveyance of land in the adverse possession of another, in violation of the statute, though it does not convey the legal title, so as to enable the grantee to maintain an action against the person in possession, is almost invariably regarded as effective for the purpose of transferring the title as between the parties, and as against everybody except the person in possession and those claiming under him.<sup>60</sup> Consequently, while the grantor can alone sue in ejectment or otherwise for the recovery of the land, a recovery by him inures to the benefit of the grantee,<sup>61</sup> and the grantee may himself, if he so desires, bring ejectment in the name of his grantor.<sup>62</sup>

<sup>57</sup> *Humes v. Bernstein*, 72 Ala. 546; *Little v. Bishop*, 9 B. Mon. (Ky.) 240; *Preston v. Breckinridge*, 86 Ky. 619; *Hoyt v. Thompson*, 5 N. Y. 320; *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229; *Doe d. Williams v. Bennett*, 26 N. C. 122.

<sup>58</sup> *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Cassedy v. Jackson*, 45 Miss. 407; *Hill v. Dyer*, 3 Me. 441.

<sup>59</sup> *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Adams v. Buford*, 6 Dana (Ky.) 413.

<sup>60</sup> *Farnum v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Den d. Hadley v. Geiger*, 9 N. J. Law, 225; *Hamilton v. Wright*, 37 N. Y. 502; *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164; *Park v. Pratt*, 38 Vt. 545; *Pearson v. King*, 99 Ala. 125; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75; *Crowley v. Vaughan*, 11 Bush (Ky.) 517; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Coogler v. Rogers*, 25 Fla. 853; *Wentworth v. Abbetta*, 78 Wis. 63; *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164.

<sup>61</sup> *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Hamilton v. Wright*, 37 N. Y. 502; *Chamberlain v. Taylor*, 92 N. Y. 348.

<sup>62</sup> *Farnum v. Peterson*, 111 Mass. 148; *Cleverly v. Whitney*, 7 Pick. (Mass.) 36; *Coogler v. Rogers*, 25 Fla. 853; *Thompson v. Richards*, 19 Ga. 594; *Justice v. Eddings*, 75 N. C. 581; *Park v. Pratt*, 38 Vt. 545; *Key v. Snow*, 90 Tenn. 664. Contra, *Crowley v. Vaughan*, 11 Bush (Ky.) 517.

## § 499. The homestead exemption.

In most of the states there are constitutional or statutory provisions exempting from execution or other forced sale for debts, to a certain extent, the "homestead" or residence of the debtor. While these provisions have usually been dictated, in the various states, by the same policy,—that of protecting the family home as against the demands of creditors,—they are exceedingly diverse in character, and even substantially similar provisions have received different constructions in different courts. A brief summary only of the more important features of this legislation, as construed by the courts, can here be given.

The courts have sometimes spoken of the homestead right as an "estate" in land.<sup>63</sup> While the widow's homestead, as before explained, frequently has the characteristics of an estate,<sup>64</sup> it is difficult to understand how the right of an owner of particular land to hold such land exempt from liability for debts can be in any sense an "estate"; and even in states where the statute expressly declares that it is an "estate,"<sup>65</sup> a new meaning must, it would seem, be given to the latter term, in order that the provision may have any real significance.<sup>66</sup> That the homestead right is not an estate has been quite frequently asserted judicially.<sup>67</sup>

<sup>63</sup> *Dorrington v. Myers*, 11 Neb. 339; *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Poe v. Hardie*, 65 N. C. 447; *Hargadene v. Whitfield*, 71 Tex. 482.

<sup>64</sup> *Ante*, § 215.

<sup>65</sup> As in Illinois and Massachusetts. See *Browning v. Harris*, 99 Ill. 460; *Abbott v. Abbott*, 97 Mass. 136; *Pratt v. Pratt*, 161 Mass. 278.

<sup>66</sup> The right of homestead exemption is but a partial restoration of the common law of exemption of one's land from liability for debts. The estate of the owner, whether a fee simple, for life, or for years, is not changed by the fact that he marries or takes indigent relatives to live with him, or otherwise acquires a right to the exemption, or by the fact that he loses it by abandonment or

— Persons entitled to the right.

The policy of the homestead statutes is usually to protect the family home, rather than individuals,<sup>68</sup> and consequently the statute ordinarily in terms gives the exemption only to the "head of a family," or to a "householder," or "house-keeper" having a family.<sup>69</sup> Whether one is the head of a family is usually determined by the consideration whether he is under a legal or moral obligation to support a person or persons living with him who are dependent on him for support.<sup>70</sup> The family need not consist of more than two

otherwise. See the discussion in *Waples, Homestead*, c. 9. And see, particularly, the dissenting opinion of Clark, J., in *Vanstory v. Thornton*, 112 N. C. 211, for a clear and forcible statement of the character of the homestead right.

<sup>67</sup> *Black v. Curran*, 14 Wall. (U. S.) 463; *Flatt v. Stadler*, 16 Lea (Tenn.) 371; *Little's Guardian v. Woodward*, 14 Bush (Ky.) 585; *Citizens' Nat. Bank v. Green*, 78 N. C. 247; *Jones v. Britton*, 102 N. C. 166; *Yoe v. Hanvey*, 25 S. C. 96; *Burns v. Keas*, 21 Iowa, 257; *Carrigan v. Rowell*, 96 Tenn. 185; *McDonald v. Crandall*, 43 Ill. 331, 92 Am. Dec. 112.

<sup>68</sup> *Waples, Homestead*, c. 3.

<sup>69</sup> *Waples, Homestead*, c. 2. See *Moyer v. Drummond*, 32 S. C. 165, 17 Am. St. Rep. 850; *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Linton v. Crosby*, 56 Iowa, 386, 41 Am. Rep. 107; *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530; *Calhoun v. Williams*, 32 Grat. (Va.) 18, 34 Am. Rep. 759; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106.

<sup>70</sup> *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Moyer v. Drummond*, 32 S. C. 165, 17 Am. St. Rep. 850; *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484; *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 631; *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 41; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584.

Accordingly, an unmarried woman, supporting the children of a deceased sister, is entitled to the homestead exemption. *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248. And likewise an unmarried man supporting brothers or sisters dependent on and living with him. *Greenwood v. Maddox*, 27 Ark. 649; *Marsh v. Lazenby*, 41 Ga. 153. So, a woman supporting the children or grandchildren of a deceased husband (*Wolfe v. Buckley*, 53 Tex. 641; *Holloway v* (1122)



persons.<sup>71</sup> But a person living alone is not usually entitled to the benefit of the law,<sup>72</sup> even though he supports others, if these others live apart from him.<sup>73</sup> In a number of states, however, it has been held that one who has been entitled to the exemption as head of a family continues to be so entitled, so long as he remains in possession of the same home, although he ceases to be actually the head of a family, owing to the death or departure of all the other members.<sup>74</sup> The head of the family need not be a man;<sup>75</sup> nor need he or she be married.<sup>76</sup> But a mere contract relation,

Holloway, 86 Ga. 576, 22 Am. St. Rep. 484), and a father for whom adult children living with him did work without wages (*Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621), have been held to be entitled to claim the exemption. But one who supports relatives living with him who are independent of his support is not entitled to claim the homestead right. *Harbison v. Vaughan*, 42 Ark. 539; *Ramey v. Allison*, 64 Tex. 697. Nor is one who supports persons living with him who are not related to him. *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Galligar v. Payne*, 34 La. Ann. 1057; *Hill v. Franklin*, 54 Miss. 632; *Whitehead v. Nickelson*, 48 Tex. 517.

<sup>71</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Barney v. Leeds*, 51 N. H. 253; *Chamberlain v. Brown*, 33 S. C. 597; *Miller v. Finegan*, 26 Fla. 29.

<sup>72</sup> *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Calhoun v. Williams*, 32 Grat. (Va.) 18, 34 Am. Rep. 759; *Rock v. Haas*, 110 Ill. 528.

<sup>73</sup> *Rock v. Haas*, 110 Ill. 528; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165. And see *Pearson v. Miller*, 71 Miss. 379; 42 Am. St. Rep. 470.

<sup>74</sup> *Silloway v. Brown*, 12 Allen (Mass.) 30; *Stanley v. Snyder*, 48 Ark. 429; *Stutts v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575; *Wilkinson v. Merrill*, 87 Va. 513; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Barney v. Leeds*, 51 N. H. 253.

<sup>75</sup> *Brooks v. Collins*, 11 Bush (Ky.) 622; *Chamberlain v. Brown*, 33 S. C. 597. And see cases referred to ante, note 70.

<sup>76</sup> *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248; *Ellis v. White*, 47 Cal. 73; *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 41; *Chamberlain v. Brown*, 33 S. C. 597; *Marsh v. Lazenby*, 41 Ga. 154; *Greenwood v. Maddox*, 27 Ark. 649.

as when one has only servants living with him, is not sufficient.<sup>77</sup>

During the husband's life, the wife is, by the construction placed on some of the statutes, excluded from the right to a homestead exemption, even in her own property, she not being the head of a family,<sup>78</sup> while, under other statutes, she is entitled to such homestead in her own property.<sup>79</sup> Occasionally the wife has been held to be entitled to claim a homestead in the husband's land on the husband's failure to do so,<sup>80</sup> or upon the desertion of the wife and family by the husband.<sup>81</sup>

— Land in which the right exists.

Since the purpose of the homestead law is usually to protect the family residence, only such land is ordinarily exempt thereunder as is occupied as such residence.<sup>82</sup> This requirement of occupancy is not regarded as satisfied by a mere indefinite intention to occupy the land as a home in the future.<sup>83</sup> But acts constituting a preparation of the

<sup>77</sup> *Calhoun v. McLendon*, 42 Ga. 405; *Garaty v. Du Bose*, 5 Rich. (S. C.) 493; *Ellis v. Davis*, 90 Ky. 183; *Whitehead v. Nickelson*, 48 Tex. 517; *Calhoun v. Williams*, 32 Grat. (Va.) 18, 34 Am. Rep. 759. But one having only a servant living with him was held to be a "housekeeper." *Pierce v. Kusic*, 56 Vt. 418.

<sup>78</sup> *Fussler v. Buckner*, 28 La. Ann. 594; *Turner v. Argo*, 89 Tenn. 443; *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530. See *Rosenberg v. Jett* (C. C.) 72 Fed. 90.

<sup>79</sup> *Crane v. Waggoner*, 33 Ind. 83; *Partee v. Stewart*, 50 Miss. 717; *Hill v. Myers*, 46 Ohio St. 183; *Ehrck v. Ehrck*, 106 Iowa, 614; *McPhee v. O'Rourke*, 10 Colo. 301. See *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

<sup>80</sup> *Bowen v. Bowen*, 55 Ga. 182; *Farley v. Hopkins*, 79 Cal. 203.

<sup>81</sup> *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 23; *Moore v. Dunning*, 39 Ill. 130.

<sup>82</sup> *Waples, Homestead*, c. 6.

<sup>83</sup> *Williams v. Dorris*, 31 Ark. 466; *Lee v. Miller*, 11 Allen (Mass.) 37; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606; *Power v. Burd*, 18 Mont. 22; *Fant* (1124)

premises for residence, coupled with an intention to reside thereon, are usually regarded as sufficient.<sup>84</sup> The premises may, if partly used as a residence, be occupied in part for business purposes,<sup>85</sup> or they may, according to some decisions, be leased in part to others.<sup>86</sup> But, generally, occupation by a tenant is not sufficient to give the homestead exemption to the landlord.<sup>87</sup>

In some states one is allowed a homestead right in a tract of land adjoining that on which the residence is situated, provided, generally, that the tract be used in connection with the residence.<sup>88</sup> And the exemption has been allowed in land adjoining, and used in connection with, the claimant's residence, without reference to his ownership of the latter,

*v. Talbot*, 81 Ky. 23; *Grosholz v. Newman*, 21 Wall. (U. S.) 481; *Fort v. Powell*, 59 Tex. 321; *Currier v. Woodward*, 62 N. H. 63; *Greenman v. Greenman*, 107 Ill. 404.

<sup>84</sup> *Gilworth v. Cody*, 21 Kan. 702; *Hanlon v. Pollard*, 17 Neb. 368; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832; *Woodbury v. Warren*, 67 Vt. 251, 48 Am. St. Rep. 815; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927; *Denville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852; *Waples, Homestead*, 193.

<sup>85</sup> *In re Ogburn's Estate*, 105 Cal. 95; *Stevens v. Hollingsworth*, 74 Ill. 202; *Bebb v. Crowe*, 39 Kan. 342; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Corey v. Schuster*, 44 Neb. 269; *De Ford v. Painter*, 3 Okl. 80. *Contra*, *Johnson v. Moser*, 66 Iowa, 536; *Crow v. Whitworth*, 20 Ga. 38.

<sup>86</sup> *Mercier v. Chace*, 11 Allen (Mass.) 194; *Layson v. Grange*, 48 Kan. 440; *De Ford v. Painter*, 3 Okl. 80; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108. *Contra*, *Rhodes v. McCormack*, 4 Iowa, 368, 68 Am. Dec. 663; *Hargadene v. Whitfield*, 71 Tex. 483; *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710.

<sup>87</sup> *Kaster v. McWilliams*, 41 Ala. 302; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606; *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Wade v. Wade*, 9 Baxt. (Tenn.) 612; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180; *True v. Morrill's Estate*, 28 Vt. 672.

<sup>88</sup> *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Medlenka v. Downing*, 59 Tex. 32; *Randal v. Elder*, 12 Kan. 257; *Secombe v. Borland*, 34 Minn. 258; *Perkins v. Quigley*, 63 Mo. 498.

or to whether he has the same quantum of estate in both tracts.<sup>89</sup> In some states the right of homestead extends even to land not adjoining the family residence, if used in connection therewith.<sup>90</sup>

The quantity of land which may be held as exempt from the claims of creditors is limited by the statute, either as regards value or extent, and occasionally as regards both,<sup>91</sup> the limitation being frequently different, according to whether the property is located in a town or city, or in the country,—that is, whether it is an “urban” or a “rural” homestead.<sup>92</sup>

The application of the statutory limitation upon the pecuniary amount of the exemption is with reference to the value of a fee-simple estate in the property, though the claimant of the exemption has only a less estate therein,<sup>93</sup> and the value of improvements is included in the estimate,<sup>94</sup> while the amount of incumbrances is deducted.<sup>95</sup>

<sup>89</sup> *Mason v. Columbia Finance & Trust Co.*, 99 Ky. 117, 59 Am. St. Rep. 451; *Libbey v. Davis*, 68 N. H. 355; *Tyler v. Jewett*, 82 Ala. 93.

<sup>90</sup> *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. Rep. 241; *Bothell v. Sweet* (N. H.) 6 Atl. 646; *Martin v. Hughes*, 67 N. C. 293; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 841; *Gregg v. Bostwick*, 22 Cal. 220, 91 Am. Dec. 687; *Hastie v. Kelley*, 57 Vt. 293.

<sup>91</sup> *Waples, Homestead*, c. 7.

<sup>92</sup> See *First Nat. Bank of Owatonna v. Wilson*, 62 Ark. 140; *Kiewert v. Anderson*, 65 Minn. 491, 60 Am. St. Rep. 487; *Crilly v. Sheriff*, 25 La. Ann. 219; *McDaniel v. Mace*, 47 Iowa, 509; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187; *Galligher v. Smiley*, 28 Neb. 189, 28 Am. St. Rep. 319; *Taylor v. Boulware*, 17 Tex. 74.

<sup>93</sup> *Brown v. Starr*, 79 Cal. 608, 12 Am. St. Rep. 180; *Yates v. McKibben*, 66 Iowa, 357; *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Franks v. Lucas*, 14 Bush (Ky.) 395.

<sup>94</sup> *Vanstory v. Thornton*, 110 N. C. 10; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108. Contra, under statute, *Richards v. Nelms*, 38 Tex. 445; *Chase v. Swayne*, 88 Tex. 218.

<sup>95</sup> *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591; *State v. Mason*, 88 Mo. 222.

— Character of the claimant's interest in the land.

In determining the right to a homestead exemption, the character of his estate in the land is immaterial.<sup>96</sup> A life estate in the land is, accordingly, sufficient to entitle one to assert the right,<sup>97</sup> as is a leasehold estate.<sup>98</sup> A present interest is, however, necessary, and one in remainder or reversion is insufficient, since it does not involve any right of occupancy.<sup>99</sup>

One is entitled to the homestead exemption, though he has an equitable estate only in the land,<sup>100</sup> as when he is occupying the land under a contract of purchase merely.<sup>101</sup> It may be claimed in land subject to a mortgage, though this constitutes a mere "equity of redemption."<sup>102</sup>

In some states, a tenant in common may claim the exemption in the land so concurrently held, if he occupies it

<sup>96</sup> *Waples, Homestead*, 108; *Tyler v. Jewett*, 83 Ala. 93; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Johnson v. Richardson*, 33 Miss. 462; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378.

<sup>97</sup> *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Pendergest v. Heekin*, 94 Ky. 384; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350.

<sup>98</sup> *In re Emerson's Homestead*, 58 Minn. 450; *Maatta v. Kippola*, 102 Mich. 116; *Conklin v. Foster*, 57 Ill. 104; *Phillips v. Warner*, (Tex. App.) 16 S. W. 423.

<sup>99</sup> *Murchison v. Plyler*, 87 N. C. 79; *Brokaw v. Ogle*, 170 Ill. 115; *Cornish v. Frees*, 74 Wis. 490; *Howell v. Jones*, 91 Tenn. 403. But if the preceding estate ends before a sale under execution, the exemption may be asserted. *Stern v. Lee*, 115 N. C. 426.

<sup>100</sup> *Bartholomew v. West*, 2 Dill. 290, Fed. Cas. No. 1,071; *Hewitt v. Rankin*, 41 Iowa, 35; *Rice v. Rice*, 108 Ill. 199; *Doane's Ex'r v. Doane*, 46 Vt. 485; *Waples, Homestead*, 117.

<sup>101</sup> *Lessell v. Goodman*, 97 Iowa, 681, 59 Am. St. Rep. 432; *Staford v. Woods*, 144 Ill. 203; *McKee v. Wilcox*, 11 Mich. 353, 83 Am. Dec. 743; *Canfield v. Hard*, 58 Vt. 217; *Myrick v. Bill*, 5 Dak. 167; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158.

<sup>102</sup> *Fellows v. Dow*, 58 N. H. 21; *State v. Mason*, 83 Mo. 222; *Hinson v. Adrian*, 92 N. C. 121; *Doane's Ex'r v. Doane*, 46 Vt. 435.

as a family residence,<sup>103</sup> while in other states a contrary view has been taken.<sup>104</sup>

Land owned by a partnership is, in a number of the states, not exempt from liability for the debts of a partnership because used by one of the partners as a family residence,<sup>105</sup> though in other states it is exempt if all the partners assent to the claim of exemption.<sup>106</sup> The right of one of the copartners to an exemption in his share of the partnership land as against an individual creditor is, it would seem, to be decided with reference to the rule prevailing in the particular jurisdiction in regard to land owned in common, the right to such exemption being, however, contingent upon whether he has himself occupied the land with his family.

— Debts to which the exemption extends.

The existence of the homestead exemption has the effect, generally, of relieving the property from liability for the debts of the owner, but the statute frequently makes exceptions in favor of certain classes of creditors. The statute in almost all the states provides in express terms that

<sup>103</sup> *McClary v. Bixby*, 36 Vt. 254, 84 Am. Dec. 684; *Thorn v. Thorn*, 14 Iowa, 49, 81 Am. Dec. 451; *Clements v. Lacy*, 51 Tex. 150; *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557; *Lozo v. Sutherland*, 38 Mich. 171; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730.

<sup>104</sup> *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121; *Thurston v. Maddocks*, 6 Allen (Mass.) 427; *Holmes v. Winchester*, 133 Mass. 543; *West v. Ward*, 26 Wis. 579; *Ventress v. Collins*, 28 La. Ann. 783.

<sup>105</sup> *Trowbridge v. Cross*, 117 Ill. 109; *Brady v. Kreuger*, 8 S. D. 464; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490; *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132; *Ex parte Karish*, 32 S. C. 437, 17 Am. St. Rep. 865; *Chalfant v. Grant*, 3 Lea (Tenn.) 118; *Drake v. Moore*, 66 Iowa, 58; *Terry v. Berry*, 13 Nev. 514; *Short v. McGruder* (C. C.) 22 Fed. 46.

<sup>106</sup> *Ferguson v. Speith*, 13 Mont. 437, 40 Am. St. Rep. 459; *McMillan v. Williams*, 109 N. C. 252; *Hunnicutt v. Summey*, 63 Ga. 586; *Swearingen v. Bassett*, 65 Tex. 267.

the exemption of the land from liability for debts shall not extend to a debt to the vendor for the purchase price,<sup>107</sup> and, apart from any such express provision, the land would probably be regarded as liable for such a debt, either on the ground of the existence of a vendor's lien, or by the construction placed upon the statute. But the exemption has been held to extend to a claim for money borrowed to pay the purchase price, this not being within the statutory exception in favor of purchase-money claims,<sup>108</sup> though in some cases the view is taken that, if it is understood between the purchaser and the lender that the loan shall be used in paying the purchase price, the lender may enforce his claim against the homestead.<sup>109</sup>

There is quite frequently a provision that the exemption shall not exist as against debts incurred in improving the premises.<sup>110</sup>

Taxes likewise are usually made enforceable against the homestead, either by the terms of the homestead law or the provisions in regard to sales of land for taxes.<sup>111</sup> Generally

<sup>107</sup> *Waples, Homestead*, c. 11.

<sup>108</sup> *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336; *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66; *Loftis v. Loftis*, 94 Tenn. 232. See *Nottes' Appeal*, 45 Pa. St. 361.

<sup>109</sup> *Acruman v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104; *White v. Wheelan*, 71 Ga. 533; *Warhund v. Merritt*, 60 Tex. 24; *Nichols v. Overacker*, 16 Kan. 54; *Carey v. Boyle*, 53 Wis. 574.

If the loan and the purchase can all be considered one transaction, then the lender is, it seems, entitled to stand in the position of the vendor. *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336.

<sup>110</sup> See *Lewton v. Hower*, 18 Fla. 872; *McWilliams v. Bones*, 84 Ga. 203; *Hurd v. Hixon*, 27 Kan. 722; *All v. Goodson*, 33 S. C. 229; *Miller v. Brown*, 11 Lea (Tenn.) 155; *Butler v. Davis*, 15 Ky. Law Rep. 273, 23 S. W. 220.

<sup>111</sup> *Higgins v. Bordages*, 38 Tex. 458; *Douthett v. Winter*, 108 Ill. 330; *Lamar v. Sheppard*, 80 Ga. 25; *Shell v. Duncan*, 31 S. C. 547; *Waples, Homestead*, 327.

speaking, however, claims of the state stand upon the same plane as the claims of private individuals as regards their enforcement against the homestead property.<sup>112</sup>

In some states the statute is construed as exempting the homestead premises only from claims based on contract, leaving them liable for claims arising from tort; this construction being placed on a provision exempting the premises from liability for "debts contracted."<sup>113</sup> In some states the exemption is effective only as against debts incurred after the acquisition of the property, or after its occupation as a homestead, or after a formal declaration of an intention to claim the homestead rights.<sup>114</sup>

Liens which have attached to the land before its purchase, or before it acquired its homestead character, can be enforced against it.<sup>115</sup>

<sup>112</sup> *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323; *Fink v. O'Neill*, 106 U. S. 272; *Colquitt v. Brown*, 63 Ga. 440; *Ren v. Driskell*, 11 Lea (Tenn.) 642; *State v. Pitts*, 51 Mo. 133.

Accordingly, the homestead has been held to be exempt from sale under execution to satisfy a fine or judgment for costs in a criminal prosecution. *Com. v. Lay*, 12 Bush (Ky.) 283, 23 Am. Rep. 718; *Fink v. O'Neill*, 106 U. S. 272; *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28; *Loomis v. Gerson*, 62 Ill. 11.

<sup>113</sup> *Whiteacre v. Rector*, 29 Grat. (Va.) 714, 26 Am. Rep. 420; *Nowling v. McIntosh*, 89 Ind. 593; *Burton v. Mill*, 78 Va. 468; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *McLaren v. Anderson*, 81 Ala. 106; *Davis v. Henson*, 29 Ga. 345.

<sup>114</sup> *Waples, Homestead*, 282 et seq.

<sup>115</sup> *Bullene v. Hiatt*, 12 Kan. 98; *Meador v. Meador*, 88 Ky. 217; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Pender v. Lancaster*, 14 S. C. 25, 37 Am. Rep. 720; *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 822; *Zander v. Scott*, 165 Ill. 51; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Bunn v. Lindsay*, 95 Mo. 250; *Clements v. Lacy*, 51 Tex. 150.

So in the case of mortgage liens. *Mabry v. Harrison*, 44 Tex. 286; *Spaulding v. Crane*, 46 Vt. 292; *Gibson v. Mundell*, 29 Ohio St. 523; *Webster v. Dundee Mortgage & Trust Co.*, 93 Ga. 278; *McCormick v. Wilcox*, 25 Ill. 274.



The exemption cannot be asserted as against debts which were contracted before the adoption of the law creating or enlarging the right, and under which the right is asserted, since the law, if given such retroactive effect, would impair the obligation of contracts, in violation of the United States constitution.<sup>116</sup>

— Claim and selection.

Though, usually, occupancy for residence purposes is sufficient to give to land the homestead character,<sup>117</sup> in some states it is necessary that the owner and occupant also put on record his claim of homestead rights in the property, and the exemption is not effective as against debts incurred before this is done.<sup>118</sup>

The procedure to be adopted in order to secure the exemption in case of issuance of execution against the owner varies greatly in the different states, there usually being a provision for the presentation by the owner of his claim of exemption, and a selection by him of the amount allowed by law from the premises occupied by him.<sup>119</sup>

— Transfer of the homestead property.

The requirement which usually exists, that the wife of

<sup>116</sup> *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595; *Tillotson v. Millard*, 7 Minn. 518 (Gil. 419), 82 Am. Dec. 112; *Homestead Cases*, 22 Grat. (Va.) 266, 12 Am. Rep. 507; *Dye v. Cooke*, 38 Tenn. 275, 17 Am. St. Rep. 832.

<sup>117</sup> *Taylor v. Hargous*, 4 Cal. 272, 60 Am. Dec. 606; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Green v. Farrar*, 53 Iowa, 426; *Broome v. Davis*, 37 Ga. 584; *Barton v. Drake*, 21 Minn. 299; *Imhoff v. Lipe*, 162 Ill. 282; *Davis v. Day*, 56 Ark. 156; *Riggs v. Sterling*, 60 Mich. 643.

<sup>118</sup> See *Wright v. Westhelmer*, 2 Idaho, 962; *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163; *Boreham v. Byrne*, 83 Cal. 23; *Goodwin v. Colorado Mortgage Inv. Co. of London*, 110 U. S. 1; *Drake v. Root*, 2 Colo. 685; *Threat v. Moody*, 37 Tenn. 143.

<sup>119</sup> See *Waples, Homestead*, c. 22.

the owner join in or consent to any transfer of the homestead property, has been previously discussed.<sup>120</sup> Subject to this requirement, the owner has ordinarily the right to transfer the homestead to the same extent as other property;<sup>121</sup> and creditors cannot object to such action as being fraudulent as against them, since they have no rights against the homestead property in any case.<sup>122</sup> Likewise, the land may, in the absence of express prohibition, be mortgaged by the owner, with the joinder or consent of his wife.<sup>123</sup> By statute, occasionally, however, there is a restriction upon the right to transfer or mortgage the homestead. In one state, for instance, it can be mortgaged only to secure the purchase money or the cost of improvements.<sup>124</sup>

<sup>120</sup> Ante, § 214.

<sup>121</sup> *Waples, Homestead*, 469, 497. See *Larson v. Reynolds*, 13 Iowa, 581, 81 Am. Dec. 444; *Wes Gas, Coal & Oil Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297; *Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Fishback v. Lane*, 36 Ill. 437; *Greenough v. Turner*, 11 Gray (Mass.) 324; *Giles v. Miller*, 26 Neb. 246, 33 Am. St. Rep. 730; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Barton v. Drake*, 21 Minn. 299; *Rogers v. Adams*, 66 Ala. 600; *Brame v. Craig*, 12 Bush (Ky.) 404; *Astugueville v. Loustauanau*, 61 Tex. 233.

<sup>122</sup> *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621; *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567; *Tong v. Elfort*, 80 Ky. 152; *Winter v. Ritchie*, 57 Kan. 212, 57 Am. St. Rep. 331; *Castle v. Palmer*, 6 Allen (Mass.) 401; *Smith v. Rumsey*, 33 Mich. 183; *Williams v. Watkins*, 92 Va. 680.

<sup>123</sup> *Preiss v. Campbell*, 59 Ala. 635; *Low v. Anderson*, 41 Iowa, 476; *Jamison v. Bancroft*, 20 Kan. 169; *Hand v. Winn*, 52 Miss. 784; *Grimes v. Portman*, 99 Mo. 229; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

<sup>124</sup> Const. Tex. art. 16, § 50. See *Equitable Mortgage Co. v. Norton*, 71 Tex. 683. And in Georgia any mortgage is, it seems, invalid, while a sale is valid only if approved by the court. *Planters' Loan & Sav. Bank v. Dickinson*, 83 Ga. 711. The prohibitions formerly existing in Arkansas and California against the alienation of the homestead property were repealed. *Peterson v. Hornblower*, 33 Cal. 266; *Brown v. Watson*, 41 Ark. 309.

In most of the states the conveyance of the homestead premises, though it involves an abandonment of the homestead, does not give a right to enforce against the land in the hands of the purchaser a judgment which was obtained against the owner of the homestead during his occupancy.<sup>125</sup>

The statute sometimes authorizes the proceeds of the sale of homestead premises to be invested in another homestead, which will be exempt from all the debts from which the previous homestead was exempt,<sup>126</sup> and occasionally the proceeds of sale, pending such reinvestment, are exempt.<sup>127</sup> The proceeds of a sale of the premises under order of court or by judicial process are also usually exempt to the same extent as the premises,<sup>128</sup> and the proceeds of insurance on the property are, in some states, exempt.<sup>129</sup>

<sup>125</sup> *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Elwell v. Hitchcock*, 41 Kan. 180; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Giles v. Miller*, 86 Neb. 346, 38 Am. St. Rep. 730; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Vanstory v. Thornton*, 112 N. C. 196, 34 Am. St. Rep. 483; *Jones v. Britton*, 102 N. C. 166; *Bonds v. Strickland*, 60 Ga. 624; *Holland v. Kreider*, 86 Mo. 59; *Black v. Epperson*, 40 Tex. 162. Contra, *Denis v. Gayle*, 40 La. Ann. 291; *Whitworth v. Lyons*, 39 Miss. 468. And see the able dissenting opinion in *Vanstory v. Thornton*, *supra*.

<sup>126</sup> *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Watson v. Saxer*, 102 Ill. 585; *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Cooper v. Arnett*, 95 Ky. 603.

The same effect frequently follows when there is a direct exchange of the old homestead for a new one. *Creath v. Dale*, 84 Mo. 349; *Mann v. Corrington*, 93 Iowa, 108, 57 Am. St. Rep. 256; *Schneider v. Bray*, 59 Tex. 668.

<sup>127</sup> *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216; *Hewett v. Allen*, 54 Wis. 583; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414.

<sup>128</sup> *Swandale v. Swandale*, 25 S. C. 389; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707; *Jackson v. Reid*, 32 Ohio St. 443; *Simpson v. Biffe*, 63 Ark. 289.

<sup>129</sup> *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204; *Cameron v. Fay*, 55 Tex. 58; *Houghton v. Lee*, 50 Cal. 101. Contra, *Smith v. Rat-*

transferred by its owner; and this is the case, whether such a provision takes the form of a condition, special limitation, or executory limitation, terminating the estate upon an attempted transfer,<sup>138</sup> or the form merely of a prohibition of such a transfer.<sup>139</sup> A provision is also void, it seems, which undertakes to restrict the right of transfer in one particular way, as by preventing the disposition of the property *inter vivos*, or by mortgage, or by will.<sup>140</sup> As to the validity of a condition that the tenant of a fee-simple estate shall not transfer it to a particular person or persons, the authorities are in conflict.<sup>141</sup> A condition that he can transfer it only to a certain class of persons is, by the weight of authority, invalid.<sup>142</sup> The fact that a restriction upon

<sup>138</sup> Litt. § 360; Co. Litt. 223a; 2 Jarman, Wills, 855; In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; In re Dugdale, 88 Ch. Div. 176, 6 Gray's Cas. 78; Potter v. Couch, 141 U. S. 296; Winsor v. Mills, 157 Mass. 362; Hardy v. Galloway, 111 N. C. 519, 82 Am. St. Rep. 828; Turley v. Massengill, 7 Lea (Tenn.) 353; Mutual Benefit Life Ins. Co. v. Grace Church, 53 N. J. Eq. 413.

So, a provision imposing a penalty to be charged on the land, in case of a transfer of a fee simple, is invalid. *De Peyster v. Michael*, 6 N. Y. 467; In re Rosher, 26 Ch. Div. 806, 6 Gray's Cas. 62. As is a similar provision in the case of a fee tail. *King v. Burchell*, Amb. 379, 6 Gray's Cas. 31; Gray, Restraints Alien. Prop. § 25.

<sup>139</sup> Gray, Restraints Alien. Prop. §§ 105, 113; Murray v. Green, 64 Cal. 363; Winsor v. Mills, 157 Mass. 362; Oxley v. Lane, 35 N. Y. 340; Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; McWilliams v. Nisly, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654.

<sup>140</sup> In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; Ware v. Cann, 10 Barn. & C. 433, 6 Gray's Cas. 42. See Cushing v. Spalding, 164 Mass. 287; Gray, Restraints Alien. Prop. § 55 et seq.

<sup>141</sup> That such a condition is valid, see Litt. § 361; Co. Litt. 223; Winsor v. Mills, 157 Mass. 362 (dictum); Cowell v. Colorado Springs Co., 100 U. S. 55 (dictum). That it is invalid, see 4 Kent's Comm. 131; Barnard's Lessee v. Bailey, 2 Har. (Del.) 56; Williams v. Jones, 2 Swan (Tenn.) 620. See Good v. Fichthorn, 144 Pa. St. 287.

<sup>142</sup> Attwater v. Attwater, 18 Beav. 320, 6 Gray's Cas. 46; In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; Anderson v. Cary, 86 Ohio St. 506, 6 Gray's Cas. 86; Schermerhorn v. Negus, 1 Denio (N. (1136)

the power of alienating a fee simple is to endure for a limited time only does not, by the weight of authority, render the restriction valid if the estate in fee simple is vested.<sup>143</sup> If, however, the interest is not vested, but is contingent upon the happening of a certain event,—that is, if it is merely an executory interest or contingent remainder,—the fact that, in addition to the happening of such event, the nonalienation of the interest is a condition precedent to the vesting, such provision against alienation until the time of vesting is valid.<sup>144</sup>

The rule invalidating a provision in connection with a legal fee-simple estate, restricting the right of transfer, applies to a provision against involuntary as well as voluntary transfer, as in the case of a provision terminating the estate in case of the bankruptcy of the tenant, or a sale under a judgment against him, or merely providing that it shall not be liable for debts.<sup>145</sup>

Y.) 448. See *Morse v. Blood*, 68 Minn. 442. This view is approved by Gray, *Restraints Allen. Prop.* § 41. Contra, *Doe d. Gill v. Pearson*, 6 East, 172, 6 Gray's Cas. 27; *In re Macleay*, L. R. 20 Eq. 186, 6 Gray's Cas. 53.

<sup>143</sup> *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *In re Rosher*, 26 Ch. Div. 801, 6 Gray's Cas. 62; *Potter v. Couch*, 141 U. S. 296; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602, 6 Gray's Cas. 86; 2 *Jarman, Wills*, 860; Gray, *Restraints Allen. Prop.* §§ 47-54, where numerous cases containing dicta to the contrary are cited.

In *Fowlkes v. Wagoner* (Tenn. Ch. App.) 46 S. W. 586, it is stated, in the course of an elaborate opinion, that such a restriction is valid if the estate is to be terminated upon the making of the alienation. In that case, however, there was no provision for cesser. There are dicta in other cases to the same effect. See *Camp v. Cleary*, 76 Va. 140; *Bridge v. Ward*, 35 Wis. 687.

<sup>144</sup> *Large's Case*, 2 Leon. 82, 3 Leon. 182; *Bank of State v. Forney*, 37 N. C. 181; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

<sup>145</sup> *In re Dugdale*, 38 Ch. Div. 176; *Van Osdell v. Champion*, 89 Wis. 661; *Hahn v. Hutchinson*, 159 Pa. St. 133, 138; *McCleary v. Ellis*, 54 Iowa, 811, 37 Am. Rep. 205.

(1187)

The rule that an estate in fee simple necessarily involves the right of transfer has also usually been applied to the case of an equitable as well as of a legal estate in fee simple, it being held that a beneficiary, or all the beneficiaries, of a trust, if in existence and *sui juris*, may demand a conveyance of the legal title from the trustee, and thus obtain absolute control over the property, including the right of alienation;<sup>146</sup> that such property will pass to an assignee in bankruptcy;<sup>147</sup> and that the creditor of a beneficiary may proceed in equity to subject the equitable interest to his claim.<sup>148</sup> It has recently, however, been held in this country that the trust will not be so terminated by compelling a conveyance of the legal title, if this is plainly not in accord with the purpose of the creator of the trust,<sup>149</sup> and that, on the same principle, the creditors of a beneficiary cannot reach the *corpus* of the fund.<sup>150</sup>

In the case of the "equitable separate estate" of a married woman, though she has a fee-simple interest therein, she may, by the terms of the settlement upon her, be restrained from transferring the property, or from anticipating the income, this being merely an application by the courts to her fee-simple interest of the rule previously recognized in cases in which she had merely a life interest.<sup>151</sup>

<sup>146</sup> Ante, § 101.

<sup>147</sup> *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, 6 Gray's Cas. 138.

<sup>148</sup> *Mebane v. Mebane*, 39 N. C. 131, 6 Gray's Cas. 134; *Marshall's Trustee v. Rash*, 87 Ky. 116; *Sears v. Choate*, 146 Mass. 395. So, to the effect that a provision that the equitable estate shall not be liable for the debts of the cestui que trust is invalid. *Taylor v. Harwell*, 65 Ala. 1; *Turley v. Massengill*, 7 Lea (Tenn.) 353.

<sup>149</sup> *Claffin v. Claffin*, 149 Mass. 19, 6 Gray's Cas. 141; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Gunn v. Brown*, 63 Md. 96. See ante, § 101.

<sup>150</sup> *Goe's Estate*, 146 Pa. St. 431; *Weller v. Noffsinger*, 57 Neb. 455.

<sup>151</sup> *Baggett v. Meux*, 1 Phillips, 627, 6 Gray's Cas. 131; *In re Currey*, 32 Ch. Div. 361; *Wells v. McCall*, 64 Pa. St. 207; 2 *Perry, Trusts*, § 671; *Gray, Restraints Allen. Prop.* § 125.

The principle involved in the above decisions—that land cannot be transferred subject to provisions restricting the freedom of alienation by those beneficially entitled—is sometimes applied as a ground for deciding that a noncharitable trust which, by its terms, may continue indefinitely, owing to the absence of any definite *cestui que trust*, who may call for a transfer of the legal estate, or may alien the beneficial interest, is void as creating a perpetuity.<sup>152</sup> In other cases, however, such a trust is regarded as void, owing, not to the possibility of its indefinite continuance, but rather because there is no person in whose favor it can be enforced by the courts.<sup>153</sup>

— Estates in fee tail.

The right of a tenant in tail to transfer the land by a common recovery, or a fine levied in accordance with certain statutes, and so to bar the entail, has been recognized as an essential incident of the estate, of which it cannot be de-

<sup>152</sup> *Thompson v. Shakespear*, 1 De Gex, F. & J. 399; *Cocks v. Manners*, L. R. 12 Eq. 574; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Brannigan v. Murphy* [1896] 1 Ir. 418; *Piper v. Moulton*, 72 Me. 155; *Bates v. Bates*, 134 Mass. 110; *Coit v. Comstock*, 51 Conn. 352; *Williams v. Herrick*, 19 R. I. 197; *Johnson v. Hollifield*, 79 Ala. 423; *Pennoyer v. Wadhams*, 20 Or. 274; *Detwiller v. Hartman*, 37 N. J. Eq. 347; *Hartson v. Elden*, 50 N. J. Eq. 522; *Moore's Ex'r v. Moore*, 50 N. J. Eq. 554; *Brown v. Esterhazy* (D. C.) 25 Wash. Law Rep. 478.

This view is sometimes expressed by a declaration that the trust is in violation of the "rule against perpetuities," a use of the latter phrase calculated to create confusion between this and the rule against remoteness. See article by John C. Gray, Esq., in 15 Harv. Law Rev. 509, and ante, § 152.

<sup>153</sup> *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521; *Chamberlain v. Stearns*, 111 Mass. 267; *Adye v. Smith*, 44 Conn. 60; *Holland v. Alcock*, 108 N. Y. 312; *Lewin, Trusts*, 139; *Perry, Trusts*, §§ 116, 711. As to the application of this requirement of definiteness in the case of a charity, see ante, § 49.

prived by any provision in the instrument creating it;<sup>154</sup> and the statutory right of barring the entail by a conveyance no doubt stands upon the same footing.

— Estates for life.

In the case of a legal or equitable estate for life, a condition or limitation which terminates the estate upon its attempted transfer by him, or upon its involuntary transfer away from him on behalf of his creditors, as upon his bankruptcy, or upon a sale under a judgment, is valid,<sup>155</sup> except when the condition or limitation is created in a settlement made by himself, at least as regards the involuntary alienation of the property.<sup>156</sup>

A provision attached to the creation of a legal estate for life, not that it shall terminate upon an attempt to transfer it, but declaring in effect that such an attempt, whether made by the life tenant himself, or by or in behalf of his creditors, shall be utterly nugatory, is invalid.<sup>157</sup>

In the case of an equitable, as distinct from a legal, estate for life, it has been held in many states, under the doctrine of "spendthrift trusts," in opposition to the well-set-

<sup>154</sup> Portington's Case, 10 Coke, 35b; Gray, Restraints Alien. Prop. § 77; Stansbury v. Hubner, 73 Md. 228.

<sup>155</sup> Gray, Restraints Alien. Prop. § 78 et seq.; Lockyer v. Savage, 2 Strange, 947, 6 Gray's Cas. 91; Rochford v. Hackman, 9 Hare, 475, 6 Gray's Cas. 108; Nichols v. Eaton, 91 U. S. 716, 6 Gray's Cas. 171; Jackson v. Groat, 7 Cow. (N. Y.) 285; Bull v. Kentucky Nat. Bank, 90 Ky. 452.

<sup>156</sup> That is, a man cannot settle his own property on himself, so that, when he becomes bankrupt, or when his creditors otherwise take measures to reach the property, it will pass to another person. On the question whether he can settle property on himself for life, with a provision that his interest shall terminate if he attempts to transfer it, the decisions are not in accord. See Gray, Restraints Alien. Prop. §§ 90-100.

<sup>157</sup> Gray, Restraints Alien. Prop. § 134; Wellington v. Janvrin, 60 N. H. 174; Bridge v. Ward, 35 Wis. 687; McCormick Harvesting Mach. Co. v. Gates, 75 Iowa, 343; Todd v. Sawyer, 147 Mass. 570; Hahn v. Hutchinson, 159 Pa. St. 133.



tled rules of the English courts, as well as in opposition to some decisions and *dicta* in this country,<sup>158</sup> that property may be settled in trust for a person for life, without any power in him to alienate it or anticipate the income, and free from liability for his debts.<sup>159</sup> But even in the states where this view obtains, a person cannot settle his own property in trust in his own favor, so that it will be exempt from the claims of his creditors, while he retains the enjoyment of the income.<sup>160</sup>

The equitable separate estate of a married woman, both in England and in this country, may, by the terms of the settlement upon her, be enjoyed by her, so far as regards the income, without the power of alienating the *corpus* of the fund, or of anticipating the income, and free from the claims of creditors, this relaxation of the ordinary rule being based on the theory that, since the separate estate is the creature of equity, and otherwise the wife has, apart from modern statutes, no power of alienation, the allowance by equity of a modification of such power is merely a partial return to the common-law view of a married woman.<sup>161</sup>

<sup>158</sup> *Brandon v. Robinson*, 1 Rose, 197, 6 Gray's Cas. 145; *Barton v. Briscoe*, Jac. 603, 6 Gray's Cas. 150; *Graves v. Dolphin*, 1 Sim. 66, 6 Gray's Cas. 152; *Tillinghast v. Bradford*, 5 R. I. 205, 6 Gray's Cas. 169; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46; *Baillie v. McWhorter*, 56 Ga. 183; *Robertson v. Johnston*, 36 Ala. 197.

<sup>159</sup> *Fisher v. Taylor*, 2 Rawle (Pa.) 33, 6 Gray's Cas. 166; *Overman's Appeal*, 88 Pa. St. 276, 6 Gray's Cas. 180; *Nichols v. Eaton*, 91 U. S. 716, 6 Gray's Cas. 171; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 6 Gray's Cas. 187; *Stieb v. Whitehead*, 111 Ill. 247; *Lampert v. Haydel*, 96 Mo. 439; *Roberts v. Stevens*, 84 Me. 325; *Leigh v. Harrison*, 69 Miss. 923; *Smith v. Towers*, 69 Md. 77; *Weller v. Noffsinger*, 57 Neb. 455; *Barnes v. Dow*, 59 Vt. 530.

<sup>160</sup> *Pacific Nat. Bank v. Windram*, 133 Mass. 175, 6 Gray's Cas. 190; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Mackason's Appeal*, 42 Pa. St. 330; *Ghormley v. Smith*, 139 Pa. St. 584; *Warner v. Rice*, 66 Md. 436. In many states there is an express statutory provision that any transfer or declaration of a trust for the benefit of the grantor is invalid as against present or future creditors, 1 *Stimson's Am. St. Law*, § 4594.

— Estates for years.

A condition or limitation, by which a term of years is, in favor of the landlord, to terminate upon voluntary or involuntary alienation away from the tenant, is valid;<sup>162</sup> but a lessee cannot, on transferring the term, impose any restrictions upon alienation by his transferee, since this would be equivalent to imposing a restriction upon the transfer of an absolute interest in personalty.<sup>163</sup> Furthermore, as in the case of a legal life estate, a provision that the term shall not be transferred, but that, in spite of any such attempt by the tenant or his creditors, it shall still belong to him, is, it seems, invalid.<sup>164</sup>

— Statutory provisions.

In New York, in connection with the restrictions upon the creation of express trusts in land, there are provisions to the effect that no person beneficially interested in a trust for the receipt of the rents and profits of land can transfer his interest, but that the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary shall be liable in equity to the claims of creditors. The provisions have been the subject of many decisions, not always of an harmonious character.<sup>165</sup> In some other states there are provisions of a more or less similar nature.<sup>166</sup>

<sup>162</sup> *Jackson v. Hobhouse*, 2 Mer. 483, 6 Gray's Cas. 147; *Stogdon v. Lee* [1891] 1 Q. B. 661; *Perry, Trusts*, §§ 670, 671; 2 *Jarman, Wills*, 779; *Gray, Restraints Alien. Prop.* §§ 270, 271. The restraining clause ceases to have any effect when the coverture ends by the husband's death. *Barton v. Briscoe*, Jac. 603, 6 Gray's Cas. 150.

<sup>163</sup> *Roe d. Hunter v. Galliers*, 3 Term R. 133, 6 Gray's Cas. 92; *Gray, Restraints Alien. Prop.* § 46. See ante, § 46.

<sup>164</sup> *Co. Litt.* 223a; *Gray, Restraints Alien. Prop.* §§ 27, 102.

<sup>165</sup> *Hobbs v. Smith*, 15 Ohio St. 419; *Gray, Restraints Alien. Prop.* § 278.

<sup>166</sup> See *Chaplin, Exp. Powers*, § 496, 705-710; *Gray, Restraints Alien. Prop.* Appendix I A.

<sup>167</sup> *Gray, Restraints Alien. Prop.* Appendix I B.  
(1149)

## CHAPTER XXXIV

### PERSONAL DISABILITIES AS TO THE TRANSFER OF LAND.

- § 501. Married women.
- 502. Infants.
- 503. Persons mentally incapacitated.
- 504. Corporations.
- 505. Aliens.
- 505a. Criminals.

A married woman may transfer land by a conveyance *inter vivos*, in which her husband joins, and, in some states, without his joinder; and she can usually transfer it by will without his joinder. The common-law rule that a conveyance directly between the husband and wife is void is still the law in many states, though a conveyance from him to her, if meritorious, is upheld in equity.

A conveyance *inter vivos* by an infant may usually be avoided by him after arriving at majority, or, in case of his death, by his successors in interest. A conveyance to him may likewise be avoided by him after arriving at majority. The age at which one can make a transfer by will is fixed by statute in the different states.

A conveyance by one mentally incapacitated is by some decisions absolutely void, and, by others, merely voidable, and in some states it is valid in favor of an innocent purchaser for value. A will made by one so incapacitated is void.

A corporation has power to acquire land so far as is reasonably incidental to the purposes of its creation, and may transfer it in carrying out such purposes.

At common law, while an alien could acquire land by voluntary conveyance, and hold it till dispossessed by the state, he could not acquire it by act of the law, as by descent, nor could

relationship be traced from or through him for the purpose of claiming by descent. In many states these disabilities have been entirely removed by statute, and in other states considerably restricted.

§ 501. Married women.

At common law, a married woman could not dispose of her land by her sole deed, and could convey it even in conjunction with her husband only by the levy of a fine.<sup>1</sup> In this country a conveyance jointly with her husband, acknowledged by her apart from him, was, however, at a quite early date, substituted for a conveyance by means of a fine,<sup>2</sup> and this mode of conveyance is no doubt legal in all the states. In most states, moreover, at the present day, the formality of a separate acknowledgment by the wife is dispensed with, and the statutes extending her rights over her property free from any control by her husband have in some states given her power to convey her lands by a conveyance executed by her alone, without the joinder of her husband.<sup>3</sup> Such right of sole transfer has for many years been recognized by courts of equity in connection with her equitable separate estate, the right being, however, in some jurisdictions, dependent upon an express grant of the power of disposition in the instrument creating the estate.<sup>4</sup>

The later decisions, under the influence, more or less direct, of the statutes enlarging the powers of married women,

<sup>1</sup> 1 Bl. Comm. 444; 2 Bl. Comm. 298; 2 Kent's Comm. 150; Williams, Real Prop. (18th Ed.) 288; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, Finch's Cas. 987.

<sup>2</sup> Schouler, Domestic Relations, § 94; Manchester v. Hough, 5 Mason, 67, Fed. Cas. No. 9,005; Fowler v. Shearer, 7 Mass. 14; Jackson v. Gilchrist, 15 Johns. (N. Y.) 89, 110.

<sup>3</sup> 1 Stimson's Am. St. Law, § 6500, where the statutory provisions are summarized.

<sup>4</sup> 2 Story, Eq. Jur. § 1392 et seq.; 2 Pomeroy, Eq. Jur. §§ 1104, 1105; ante, § 177.

uphold conveyances made in her behalf by a person holding her power of attorney;<sup>6</sup> and the fact that her attorney is her husband, and that he executes the conveyance in his own right, as well as in her behalf, does not render it invalid.<sup>6</sup>

At common law the husband could dissent from, and so invalidate, a transfer made to the wife.<sup>7</sup> The modern statutes excluding the husband's rights in her property, and his control thereover, are, however, inconsistent with the existence of any such right in him.

— Conveyances between husband and wife.

At common law, a conveyance by a married woman directly to her husband was void, they being regarded in law as but one person, and this is still quite generally the rule, in spite of the statutes enlarging her property rights.<sup>8</sup> Un-

<sup>6</sup> In such cases, the power of attorney has usually been executed by the husband jointly with the wife. *Williams v. Paine*, 169 U. S. 55; *Hull v. Glover*, 126 Ill. 122; *Fulweiler v. Baugher*, 15 Serg. & R. (Pa.) 45. Except when the husband himself is appointed attorney, as to which see cases in next note.

In a number of states there is a statutory provision authorizing the wife to convey by attorney. 1 *Stimson's Am. St. Law*, § 6506. Contra, to the effect that the wife cannot convey an interest in land by attorney, see *Dawson v. Shirley*, 6 Blackf. (Ind.) 531; *King v. Nutall*, 7 Baxt. (Tenn.) 221; *Batte v. McCaa*, 44 Ark. 398; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347; *Sumner v. Conant*, 10 Vt. 9; *Mott v. Smith*, 16 Cal. 533.

<sup>7</sup> *Weisbrod v. Chicago & N. W. Ry. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 278; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661.

<sup>8</sup> *Co. Litt.* 3a; 2 Bl. Comm. 293; 2 Kent's Comm. 150; Schouler, *Domestic Relations*, § 92; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 161, 167; *Baxter v. Smith*, 6 Binn. (Pa.) 427, *Finch's Cas.* 980.

<sup>9</sup> 1 *Roper, Husb. & Wife*, 53; *Brooks v. Kearns*, 86 Ill. 547; *Preston v. Fryer*, 38 Md. 221; *Luntz v. Greve*, 102 Ind. 173; *White v. Wager*, 25 N. Y. 228; *Rico v. Brandenstein*, 98 Cal. 465.

der some statutes, however, she may make such a conveyance to him as freely as to other persons, the statute expressly giving her the same rights to alien her separate property as if she were unmarried.<sup>9</sup> She might, even at common law, convey land to a third person, to be conveyed to the husband, in the absence of any coercion or undue influence on the husband's part.<sup>10</sup>

At common law, the husband could not convey to the wife, and this rule still exists in some jurisdictions.<sup>11</sup> In others it has been changed by the modern statutes with reference to married women.<sup>12</sup> Land could, however, always be transferred indirectly from the husband to the wife by making use of a third person as a conduit of title,<sup>13</sup> and a conveyance directly from the husband to the wife, not in fraud of his creditors, and otherwise meritorious in character, has usually been upheld in equity as a settlement on the wife.<sup>14</sup>

<sup>9</sup> *Wells v. Caywood*, 3 Colo. 487; *Savage v. Savage*, 80 Me. 472; *Robertson v. Robertson*, 25 Iowa, 350.

<sup>10</sup> *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; *Gebb v. Rose*, 40 Md. 387; *Jackson v. Stevens*, 16 Johns. (N. Y.) 110; *Jasper v. Maxwell*, 16 N. C. 357; *Garvin v. Ingram*, 10 Rich. Eq. (S. C.) 130; *Shepperson v. Shepperson*, 2 Grat. (Va.) 501.

<sup>11</sup> 1 Bl. Comm. 442; 2 Kent's Comm. 129; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57; *Carrington v. Richardson*, 79 Ala. 101; *Coates v. Gerlach*, 44 Pa. St. 43; *Frissell v. Rosier*, 19 Mo. 448; *Loomis v. Brush*, 36 Mich. 40; *Johnson v. Vandervort*, 16 Neb. 144; *Humphrey v. Spencer*, 36 W. Va. 11; *Wilder v. Brooks*, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; *Crooks v. Crooks*, 34 Ohio St. 610.

<sup>12</sup> *Baygents v. Beard*, 41 Miss. 531; *Walker v. Long*, 109 N. C. 510; *Burdano v. Ampere*, 14 Mich. 91; *Booker v. Worrill*, 55 Ga. 332.

<sup>13</sup> *Jewell v. Porter*, 31 N. H. 34; *McMillan v. Cheeney*, 30 Minn. 519. And this could be effected, under the Statute of Uses, by a conveyance to a third person of the legal title, to the use of the wife, the use being executed by the statute in the latter. 1 Roper, Husb. & Wife, 53.

<sup>14</sup> *Moore v. Page*, 111 U. S. 117; *Jones v. Clifton*, 101 U. S. 223; *Powe v. McLeod*, 76 Ala. 418; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; *Albright v. Albright*, 70 Wis. 528; *Wilder v. Brooks*, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; *Vought's Ex'rs v. (1146)*

## — Transfer by will.

Under the English Statute of Wills, as declared by a statute passed two years later, a married woman had no power to dispose of her legal interest in lands,<sup>15</sup> nor could she so dispose at common law of her legal personal property, since this belonged to the husband.<sup>16</sup> In most of the states she can, at the present day, dispose of her real or personal property by will without her husband's consent, as if sole,<sup>17</sup> and she can, in all jurisdictions, so dispose of her equitable separate estate.<sup>18</sup>

## § 502. Infants.

At common law, any person under the age of twenty-one is an infant; but by statute in a number of states the period of infancy is, in the case of females, reduced to eighteen years, and, in some, the marriage of a female infant gives her the powers of an adult married woman.<sup>19</sup>

A transfer *inter vivos* of an estate or interest in land by an infant is voidable, though not void,—that is, it is effective to transfer title unless it is repudiated by him after attaining his majority;<sup>20</sup> and it may be repudiated by him,

Vought, 50 N. J. Eq. 177; Johnson v. Vandervort, 16 Neb. 144; Wells v. Wells, 35 Miss. 638; Furrow v. Athey, 21 Neb. 671, 59 Am. Rep. 867; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319; Coates v. Gerlach, 44 Pa. St. 43; Crooks v. Crooks, 24 Ohio St. 610; Humphrey v. Spencer, 36 W. Va. 11.

<sup>15</sup> 34 & 35 Hen. VIII. c. 5, § 14.

<sup>16</sup> 1 Jarman, Wills, 39, Bigelow's note.

<sup>17</sup> 1 Stimson's Am. St. Law, § 6460; 1 Woerner, Administration, § 21.

<sup>18</sup> 1 Jarman, Wills, 41; 2 Perry, Trusts, § 668.

<sup>19</sup> 1 Bl. Comm. 463; 2 Kent's Comm. 233; 1 Stimson's Am. St. Law, § 6601.

<sup>20</sup> Irvine v. Irvine, 9 Wall. (U. S.) 617; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Green v. Wilding, 59 Iowa, 679, 44 Am. Rep. 696; Logan v. Gardner, 136 Pa. St. 588, 20

although the grantee has conveyed to a *bona fide* purchaser without notice.<sup>21</sup> The right to avoid a conveyance made by an infant does not, however, extend to conveyances made by him in the execution of a trust, or as the holder of a bare legal title.<sup>22</sup> In some cases, under particular circumstances, equity has held the grantor estopped to assert his infancy if he induced one to pay a consideration for the land by false representations as to his age.<sup>23</sup>

An infant married woman stands, in respect to her right to avoid any conveyance made by her, upon the same footing as any other infant, and her disability of infancy is not re-

Am. St. Rep. 939; *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. Rep. 569, and note; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665.

Though a conveyance of land by an infant is thus subject to avoidance by him, a binding sale and conveyance of his land may, as before stated, in most jurisdictions, be effected by a judicial proceeding. See ante, § 463.

<sup>21</sup> *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Brantley v. Wolf*, 60 Miss. 420; *Jenkins v. Jenkins*, 12 Iowa, 195; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 340, 76 Am. Dec. 209; *Sims v. Smith*, 86 Ind. 577; *McMorris v. Webb*, 17 S. C. 558, 48 Am. Rep. 629.

<sup>22</sup> *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58, 67; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268; *Prouty v. Edgar*, 6 Iowa, 353; *Bridges v. Bidwell*, 20 Neb. 185; *Starr v. Wright*, 20 Ohio St. 97; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 438.

<sup>23</sup> *Hayes v. Parker*, 41 N. J. Eq. 630; *Ferguson v. Bobo*, 54 Miss. 121; *Ryan v. Growney*, 125 Mo. 474; *Schmitzheimer v. Eiseman*, 7 Bush (Ky.) 298; *Alt v. Graff*, 65 Minn. 191; *Patterson v. Lawrence*, 90 Ill. 174; 1 Story, Eq. Jur. § 385; 2 Pomeroy, Eq. Jur. § 945. See *Thormaehlen v. Kaeppel*, 86 Wis. 378; *Vogelsang v. Null*, 67 Tex. 465. But see *Sims v. Everhardt*, 102 U. S. 300; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Wieland v. Koblick*, 110 Ill. 16, 51 Am. Rep. 676; *Brown v. McCune*, 5 Sandf. (N. Y.) 228; *Studwell v. Shapter*, 54 N. Y. 249; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40. In some states the statute prohibits the disaffirmance of a contract by an infant if the action of the other party in entering therein was induced by the infant's misrepresentations. 1 Stimson's Am. St. Law, § 6602(D).



moved by a statute authorizing married women to make conveyances.<sup>24</sup>

At common law, an infant's conveyance by livery of seisin could be avoided only by an act of equal solemnity, such as an entry, and it has sometimes been stated that the avoidance of any conveyance must be by an act of equal notoriety with the conveyance.<sup>25</sup> The modern view generally is, however, that any act indicative of an intention to repudiate the conveyance is sufficient.<sup>26</sup> Accordingly, an avoidance of the conveyance has been held to have been effected, not only by an entry upon the land,<sup>27</sup> but also by an action of ejectment by the infant to recover the land,<sup>28</sup> a suit by him to set aside the conveyance,<sup>29</sup> a conveyance to another person inconsistent with the former conveyance,<sup>30</sup> or a notice to his grantee of

<sup>24</sup> *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Law v. Long*, 41 Ind. 586; *Hoyt v. Swar*, 53 Ill. 134; *Walsh v. Young*, 110 Mass. 396; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629; *Epps v. Flowers*, 101 N. C. 158; *Greenwood v. Coleman*, 34 Ala. 150; *Hughes v. Watson*, 10 Ohio, 127.

<sup>25</sup> *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Rogers v. Hurd*, 4 Day (Conn.) 57. See *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

<sup>26</sup> *Drake's Lessee v. Ramsay*, 5 Ohio, 252; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *State v. Plaisted*, 43 N. H. 413; *Long v. Williams*, 74 Ind. 115.

<sup>27</sup> *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

<sup>28</sup> *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569; *Chadbourne v. Rackliff*, 30 Me. 354; *Cole v. Pennoyer*, 14 Ill. 158; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

<sup>29</sup> *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Tunison v. Chamblin*, 33 Ill. 378; *Gillespie v. Bailey*, 12 W. Va. 70, 89, 29 Am. Rep. 445.

<sup>30</sup> *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58; *Corbett v. Spencer*, 63 Mich. 731; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *State v. Plaisted*, 43 N. H. 413; note to *Craig v. Van Bebber*, 18 Am. St. Rep. 655.

an intention to disaffirm the conveyance.<sup>31</sup> The conveyance cannot be avoided by the infant until after he arrives at the age of majority.<sup>32</sup> If he dies before either repudiating or affirming the conveyance, his heirs or personal representatives, whichever would be otherwise entitled to the land, may repudiate it.<sup>33</sup>

If the infant, after arriving at majority, affirms the conveyance by unequivocally recognizing it as valid, he is thereafter precluded from repudiating it.<sup>34</sup> In some states, though not in all, the fact that he fails to repudiate the conveyance within a reasonable time after arriving at majority is regarded as an affirmation;<sup>35</sup> and, in any state, if he stands

<sup>31</sup> *Scranton v. Stewart*, 53 Ind. 68; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38.

<sup>32</sup> *Welch v. Bunce*, 83 Ind. 382, *Finch's Cas.* 982; *Sims v. Everhardt*, 102 U. S. 300; *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 75; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Emmons v. Murray*, 16 N. H. 385; *Shipley v. Bunn*, 125 Mo. 445; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Zouch v. Parsons*, 3 Burrows, 1794.

<sup>33</sup> *Gillenwaters v. Campbell*, 142 Ind. 529; *Austin v. Trustees of Charlestown Female Seminary*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Bozeman v. Browning*, 31 Ark. 364; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

<sup>34</sup> *Emmons v. Murray*, 16 N. H. 385; *Allen v. Poole*, 54 Miss. 323; *Keegan v. Cox*, 116 Mass. 289; *Lacy v. Pixler*, 120 Mo. 383; *Davidson v. Young*, 38 Ill. 145; *Cox v. McGowan*, 116 N. C. 131.

<sup>35</sup> *Kell v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Amey v. Cockey*, 73 Md. 297; *Brantley v. Wolf*, 60 Miss. 420; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Ward v. Laverty*, 19 Neb. 429; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Ferguson v. Houston*, 11 & W. T. Ry. Co., 73 Tex. 344; *Thormaehlen v. Kaepffel*, 86 Wis. 378; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798. See *Dolph v. Hand*, 156 Pa. St. 91. Contra, *Sims v. Everhardt*, 102 U. S. 300; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *McMurray v. McMurray*, 66 N. Y. 175; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Donovan v. Ward*, 100 Mich. 601; *Emmons v. Murray*, 16 N. H. 385. See note to *Craig v. Van Bebber*, (1150)

by, after arriving at majority, without asserting any claim, though knowing that his grantee or another is expending money on the supposition that the conveyance is valid, he would be estopped to thereafter deny its validity.<sup>36</sup> In a few states there is a statutory provision requiring the repudiation to take place within a reasonable time.<sup>37</sup> In no state could he assert any right to the land as against one who had been in possession thereof under his conveyance for the statutory period of limitation after he became *sui juris*.<sup>38</sup> If one is under the disability of coverture at the time of her arrival at the age of majority, she cannot, by her failure, during the continuance of her coverture, to avoid a conveyance made by her during infancy, be regarded as affirming it.<sup>39</sup>

In order that one may avoid a conveyance made during infancy, it is not necessary that he return the consideration received by him unless he still has the specific consideration received, as in the case of an unpaid purchase-money note.<sup>40</sup>

18 Am. St. Rep. 675, for full citation and discussion of the cases upon this point.

<sup>36</sup> Logan v. Gardner, 136 Pa. St. 533, 20 Am. St. Rep. 939; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 313; Lacy v. Pixler, 120 Mo. 333; Dolph v. Hand, 156 Pa. St. 91; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263. Compare Davidson v. Young, 38 Ill. 145.

<sup>37</sup> 1 Stimson's Am. St. Law, § 6602(C).

<sup>38</sup> Wells v. Seixas (C. C.) 24 Fed. 32; Rozeman v. Browning, 31 Ark. 364; Donovan v. Ward, 100 Mich. 601; Wallace v. Latham, 52 Miss. 291; Hughes v. Watson, 10 Ohio, 127; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263.

<sup>39</sup> Sims v. Everhardt, 102 U. S. 300; Stull v. Harris, 51 Ark. 294; Wilson v. Branch, 77 Va. 65, 46 Am. Rep. 709; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Epps v. Flowers, 101 N. C. 153.

<sup>40</sup> Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, Finch's Cas. 984; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Brantley v. Wolf, 60 Miss. 420; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569; Englebert v. Trozell, 40 Neb. 195, 42 Am. St. Rep. 665; Stull v. Harris, 51 Ark. 294. But see, to the contrary, Bingham v. Barley, 55 Tex. 231,

A conveyance to an infant is valid unless repudiated by him within a reasonable time after his arrival at majority.<sup>41</sup>

— Transfer by will.

The English Statute of Wills, with its explanatory act passed two years later, excluded persons under twenty-one years of age from those authorized to transfer lands by will, though males over fourteen and females over twelve could at that time transfer personalty.<sup>42</sup> In this country, the statutes of the various states are not uniform in regard to the age at which one may make a will, a distinction sometimes existing between wills of real and personal property in this regard, and sometimes not, and the required age of a female being in some states less than that of a male. In a majority of the states, however, a testator of either sex must be twenty-one years of age.<sup>43</sup>

§ 503. Persons mentally incapacitated.

In determining whether a person has the mental capacity to make a valid and binding conveyance, the only question is whether he is able to clearly understand the nature and consequences of the conveyance, and the fact that his mental powers are impaired, or that he is subject to a delusion, if this is not such as to influence him in making the convey-

40 Am. Rep. 801; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.

<sup>41</sup> *Cecil v. Salisbury*, 2 Vern. 224; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Boody v. McKenney*, 23 Me. 517; *Robbins v. Eaton*, 10 N. H. 561; *Henry v. Root*, 33 N. Y. 526; *Baker v. Kennett*, 54 Mo. 82; *Johnston v. Furnier*, 69 Pa. St. 449; *Ellis v. Alford*, 64 Miss. 8.

<sup>42</sup> 1 Jarman, Wills, 33, and note.

<sup>43</sup> 1 Stimson's Am. St. Law, § 2602; 1 Woerner, Administration, § 20.

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ance, does not impair its validity.<sup>44</sup> One who, at the time of making a conveyance, is unable to understand its nature and effect by reason of intoxication, stands, it seems, upon the same footing in this regard as one who is otherwise mentally incapacitated.<sup>45</sup>

The authorities are not in accord as to the effect of a conveyance *inter vivos* by a person mentally incapacitated. According to some decisions, such a conveyance is, like that of an infant, merely voidable,<sup>46</sup> unless a guardian has been appointed for the grantor and his property after judicial inquiry into his sanity, in which case the conveyance is regarded as absolutely void.<sup>47</sup> By other decisions, a convey-

<sup>44</sup> Buswell, *Insanity*, §§ 390-393; *Burgess v. Pollock*, 53 Iowa, 273, 36 Am. Rep. 218; *Doe d. Guest v. Beeson*, 2 Houst. (Del.) 246; *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 439; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Stewart v. Flint*, 59 Vt. 144; *Whittaker v. Southwest Virginia Improvement Co.*, 34 W. Va. 217; *Dennett v. Dennett*, 44 N. H. 531.

<sup>45</sup> See Buswell, *Insanity*, § 393; *Shackelton v. Sebree*, 86 Ill. 616; *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Dulany v. Green*, 4 Har. (Del.) 235; *Warnock v. Campbell*, 25 N. J. Eq. 435; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

<sup>46</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 994; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Hovey v. Hobson*, 53 Me. 451; *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Langley v. Langley*, 45 Ark. 392; *Nichol v. Thomas*, 53 Ind. 42; 2 Bl. Comm. 291; 2 Kent's Comm. 451. But even when this view is adopted, a conveyance by a married woman, under a statute requiring the joinder of her husband, is absolutely void if he is insane when he executes it. *Leggate v. Clark*, 111 Mass. 308.

<sup>47</sup> *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Hovey v. Hobson*, 53 Me. 451, 39 Am. Dec. 705; *Thorpe v. Hanscom*, 64 Minn. 201; *New England Loan & Trust Co. v. Spitler*, 54 Kan. 560; *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243; *Griswold v. Butler*, 3 Conn. 227; *Elston v. Jasper*, 45 Tex. 409. But see *Hunt v. Hunt*, 13 N. J. Eq. 161.

An adjudication merely that the grantor is insane, and a fit subject for custody in a hospital for the insane, does not have this effect.

ance by one of unsound mind is absolutely void,<sup>48</sup> the logical result of which view is that it can be attacked not only by the grantor and persons in privity with him, but also by third persons generally, and, further, that it can be ratified by the grantor only by making another conveyance after his restoration to sanity.

In states where the conveyance is regarded as voidable only, it may be avoided either by the grantor after he has reacquired his mental capacity, or by his heirs or personal representatives after his death.<sup>49</sup> By ratifying the conveyance when mentally capable of acting, provided it is not regarded as absolutely void, the grantor precludes any subsequent avoidance thereof.<sup>50</sup>

According to perhaps the weight of authority, one cannot assert the invalidity of his conveyance by reason of mental incapacity, as against his grantee who took the conveyance in

*Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468; *Knox v. Haug*, 48 Minn. 58; *Leggate v. Clark*, 111 Mass. 308.

It has been decided that, if the guardianship has been in effect abandoned, the grantor having recovered his sanity, the conveyance will be supported, though the guardian has not been discharged by judicial action. *Thorpe v. Hanscom*, 64 Minn. 201; *Elston v. Jasper*, 45 Tex. 409.

<sup>48</sup> *Sullivan v. Flynn*, 20 D. C. 396; *Elder v. Schumacher*, 18 Colo. 433; *Farley v. Parker*, 6 Or. 105; *German Sav. & Loan Soc. v. De Lashmutt* (C. C.) 87 Fed. 399; *Van Deusen v. Sweet*, 51 N. Y. 378; *In re Desilver's Estate*, 5 Rawle (Pa.) 111; *Dexter v. Hall*, 15 Wall. (U. S.) 9 (power of attorney); *Thompson v. Leach*, Comb. 468, Carth. 435. A distinction has been taken in this respect between a feoffment and a conveyance by deed, the former being stated to be voidable merely, and the latter to be absolutely void. See the three cases last cited.

<sup>49</sup> 2 Bl. Comm. 292; *Langley v. Langley*, 45 Ark. 392; *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 994; *Brown v. Freed*, 43 Ind. 253; *Turner v. Rusk*, 53 Md. 65; *Valpey v. Rea*, 130 Mass. 384; *Judge of Probate v. Stone*, 44 N. H. 593.

<sup>50</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 944; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 424; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.

the reasonable belief that the grantor was mentally capable, unless such grantee is placed *in statu quo* by a return of the consideration.<sup>51</sup> And, on the same theory, it has been held that the conveyance cannot be avoided as against a *bona fide* purchaser from the grantee for value.<sup>52</sup> By other authorities, however, the conveyance may be avoided, although the grantee acted in perfect good faith,<sup>53</sup> and even as against a *bona fide* purchaser from the grantee for value,<sup>54</sup> and the right to avoid the conveyance is not regarded as dependent on the return of the consideration.<sup>55</sup>

A conveyance or devise may be made to a person wanting in mental capacity, and the title is thereby vested in him subject to his right, upon regaining his faculties, to refuse to accept it.<sup>56</sup>

<sup>51</sup> Scanlan v. Cobb, 85 Ill. 296; Odom v. Riddick, 104 N. C. 515; Boyer v. Berryman, 123 Ind. 451; Rusk v. Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413; Behrens v. McKenzie, 23 Iowa, 333; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716. And see Crawford v. Scovell, 94 Pa. St. 43, 39 Am. Rep. 766. Such seems to be the English rule. Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Elliot v. Ince, 7 De Gex, M. & G. 475; Wood Renton, Lunacy, 13.

<sup>52</sup> Odom v. Riddick, 104 N. C. 515. See New England Loan & Trust Co. v. Spittler, 54 Kan. 560.

<sup>53</sup> Sullivan v. Flynn, 20 D. C. 396; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468.

<sup>54</sup> German Sav. & Loan Soc. v. De Lashmutt (C. C.) 67 Fed. 399; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Rogers v. Blackwell, 49 Mich. 192; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468; Valentine v. Lunt, 51 Hun (N. Y.) 544.

<sup>55</sup> Nichol v. Thomas, 53 Ind. 42; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Henry v. Fine, 23 Ark. 417; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

<sup>56</sup> Co. Litt. § 2b; 2 Bl. Comm. 291; Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479.

— Testamentary capacity.

The mental capacity necessary for the making of a will has been the subject of an immense number of decisions, in which the subject is considered with reference to the facts of the particular case. The rule now quite generally approved in this respect is to the effect that it is sufficient if the testator knows the extent and value of his property, the number and names of the persons who are the proper objects of his bounty, their deserts as measured by their conduct towards him, their capacities and necessities, and he has sufficient memory to retain these facts in his mind until the execution of the will. Accordingly, the fact that testator was subject to insane delusions does not necessarily show incapacity to make a will. Nor is a will invalid because, at the time of making it, the testator was under guardianship as an insane person, though this fact usually, if not always, raises a presumption of insanity.<sup>57</sup>

§ 504. Corporations.

A corporation has, in the absence of an express prohibition, the same power as a private individual to transfer its land, as well as its other property, provided only that the transfer is for an object consistent with the purposes of its creation.<sup>58</sup>

At common law, a corporation has power to acquire such land as may be necessary for or reasonably incidental to

<sup>57</sup> 1 Woerner, Administration, § 23 et seq.; Page, Wills, § 97 et seq.; Bigelow, Wills, 72.

<sup>58</sup> 2 Kent's Comm. 281; 1 Clark & M. Corp. § 152; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280, Finch's Cas. 998; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Levering v. Bimel, 146 Ind. 545; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 264, Finch's Cas. 1000.



carrying out the purposes of its creation.<sup>50</sup> This principle is, in most of the states, confirmed by statutory provision, while in a few states there seems to be no limit upon the power to acquire land.<sup>51</sup>

The common-law right of a corporation to acquire land was greatly circumscribed by the enactment of the various statutes of "mortmain," which, while directed chiefly at ecclesiastical bodies, applied in terms to all corporations, and prohibited their acquisition of land without license from the crown, and, during certain periods, from the mesne lord also.<sup>52</sup> These statutes seem to have been adopted in but one state.<sup>53</sup> There are, however, in a number of states, special statutory restrictions upon the power of religious corporations to acquire and hold land, and the United States statutes contain a provision to this effect applicable to corporations in any of the territories.<sup>54</sup> In a few states, moreover, a testamentary provision in favor of a religious or charitable body is invalid if in excess of a certain amount, or if the will is not executed a certain length of time before the testator's death.<sup>55</sup>

Restrictions as to the quantity of land which a corporation may acquire, or the purposes for which it may acquire the land, do not usually invalidate a transfer to the corporation in violation thereof, so as to permit the transfer to be questioned by any private person, but the state only may assert the illegality of the transfer, and consequently, if the state

<sup>50</sup> 1 Bl. Comm. 478; 2 Kent's Comm. 281; 1 Clark & M. Corp. §§ 182, 138.

<sup>51</sup> 2 Stimson's Am. St. Law, § 8204.

<sup>52</sup> See, as to these statutes, 2 Bl. Comm. 268; 2 Kent's Comm. 282.

<sup>53</sup> Pennsylvania. See *Leazure v. Hillegas*, 7 Serg. & R. 313; 2 Kent's Comm. 283.

<sup>54</sup> 5 Thompson, Corp. § 5774. See Rev. St. U. S. § 1890; In re McGraw's Estate, 111 N. Y. 66; *Church Extension of M. E. Church v. Smith*, 56 Md. 392.

<sup>55</sup> 1 Stimson's Am. St. Law, § 2618.

fails so to do, the corporation may retransfer the land to another.<sup>65</sup> Occasionally, however, it has been decided that a transfer by will to a corporation stands on a different footing in this respect from a transfer *inter vivos*, and that such a transfer may be attacked by the heirs of the testator.<sup>66</sup>

§ 505. Aliens.

At common law, an alien might take land by purchase,—that is, by transfer *inter vivos* or devise, and hold the same until a forfeiture in favor of the state was enforced by a proceeding of “office found.”<sup>67</sup>

An alien could not, at common law, acquire any estate in land by operation of law, as by descent,<sup>68</sup> or under the law in relation to dower and curtesy,<sup>69</sup> for the reason, it

<sup>65</sup> 1 Clark & M. Corp. § 228 et seq.; 5 Thompson, Corp. § 5795 et seq.; Jones v. Habersham, 107 U. S. 174; Farrington v. Putnam, 90 Me. 405; Hanson v. Little Sisters of Poor of Baltimore, 79 Md. 434; Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931. But see Wood v. Hammond, 16 R. I. 98.

<sup>66</sup> In re McGraw's Estate, 111 N. Y. 66; House of Mercy of New York v. Davidson, 90 Tex. 529; Gromie v. Home Society, 3 Bush (Ky.) 865; Wood v. Hammond, 16 R. I. 98. See De Camp v. Dobbins, 31 N. J. Eq. 690; Starkweather v. American Bible Soc., 72 Ill. 50.

<sup>67</sup> Co. Litt. 2b, 42b; 1 Bl. Comm. 371; 2 Bl. Comm. 249, 274, 293; 3 Bl. Comm. 258; 2 Kent's Comm. 54; Doe d. Gouverneur's Heirs v. Robertson, 11 Wheat. (U. S.) 332; Carlow v. Aultman, 28 Neb. 672; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344, Finch's Cas. 980; Quigley v. Birdseye, 11 Mont. 439; Wright v. Saddler, 20 N. Y. 320; Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348; Bennett v. Hibbert, 38 Iowa, 154; Doe d. Rouche v. Williamson, 25 N. C. 141. Compare Wunderle v. Wunderle, 144 Ill. 40.

<sup>68</sup> Litt. § 198; Co. Litt. 42b; 2 Bl. Comm. 249, 293, and Chitty's note; Orr v. Hodgson, 4 Wheat. (U. S.) 453; Crosgrove v. Crosgrove, 69 Conn. 416; Montgomery v. Dorton, 7 N. H. 475; Utassy v. Gleding-hagen, 132 Mo. 53; Jackson's Lessee v. Burns, 3 Binn. (Pa.) 75; Barzizas v. Hopkins, 2 Rand. (Va.) 276.

<sup>69</sup> Priest v. Cummings, 20 Wend. (N. Y.) 338, Finch's Cas. 693; Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Buchanan v. Deshon, 1 Har. & G. (Md.) 280; Foss v. Crisp, 20 Pick. (Mass.) 121, Finch's Cas. 645; Sutliff v. Forgey, 1 Cow. (N. Y.) 89; Quinn v. (1156)

is said, that the law will not do a vain thing by giving to a man that which he cannot keep. Furthermore, an alien was not regarded as having heritable blood, and hence, though he died seised or possessed of land, it necessarily escheated to the state for lack of heirs;<sup>70</sup> nor could one claim land by descent from a citizen if his relationship could be traced only through an alien.<sup>71</sup> On the same principle, the native wife

Ladd, 37 Or. 261; Reese v. Waters, 4 Watts & S. (Pa.) 145; Bennett v. Harms, 51 Wis. 251.

<sup>70</sup> Slater v. Nason, 15 Pick. (Mass.) 345; Farrar v. Dean, 24 Mo. 16; Wunderle v. Wunderle, 144 Ill. 40; Montgomery v. Dorion, 7 N. H. 475; Rubeck v. Gardner, 7 Watts (Pa.) 455; Barrett v. Kelly, 31 Tex. 476; Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348; Fry v. Smith, 2 Dana (Ky.) 38; Jackson v. Adams, 7 Wend. (N. Y.) 368; Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U. S.) 603; Co. Litt. 2b; 2 Kent's Comm. 54.

<sup>71</sup> Levy's Lessee v. McCartee, 6 Pet. (U. S.) 102; Beavan v. Went, 155 Ill. 592; Jackson v. Green, 7 Wend. (N. Y.) 333; McLean v. Swanton, 13 N. Y. 535; Furenes v. Mickelson, 86 Iowa, 508; Meier v. Lee, 106 Iowa, 303. This principle has never been recognized in Connecticut. Campbell's Appeal from Probate, 64 Conn. 277.

It has been decided that a brother traces descent from his brother directly, and not through their father, and that hence the alienage of the father will not affect the right of one brother to inherit from the other if both are citizens. Collingwood v. Pays, Sid. 193, 1 Vent. 413, Bridg. 414. And so grandsons of one grandfather have been held to inherit directly, so that the alienage of the grandfather is immaterial. McGregor v. Comstock, 3 N. Y. 408. On the other hand, it has been held that the alienage of the claimant's father prevents inheritance from a paternal uncle or great uncle. Jackson v. Fitz Simmons, 10 Wend. (N. Y.) 10; Furenes v. Mickelson, 86 Iowa, 508. See Levy's Lessee v. McCartee, 6 Pet. (U. S.) 102. The distinctions asserted in this respect are, as remarked by Chancellor Kent (2 Comm. 55), "very subtle."

By 11 & 12 Wm. III. c. 6, the disability to inherit by reason of the alienage of one through whom descent is claimed was removed, and a similar statute has, as stated in a subsequent paragraph of the text, been adopted in a number of states. But these statutes do not enable one to claim by descent if the alien through whom he claims is still alive. McCreery's Lessee v. Somerville, 9 Wheat. (U. S.) 254; McLean v. Swanton, 13 N. Y. 535.

or husband of an alien could not claim dower or curtesy.<sup>73</sup> In case of the death of a citizen, whose next of kin are aliens, the fact of such alienage does not cause the land to pass to the state, but they are simply ignored, and the others related in the same degree, or those related in the next degree, take, to the exclusion of such aliens.<sup>73</sup>

In this country the common-law restrictions upon the right of aliens to acquire and hold lands and transfer have been very considerably relaxed; in most states they having the same rights in this regard as native citizens, and in some the prohibition extending only to nonresident aliens.<sup>74</sup> Moreover, in many cases, the right of an alien in a particular case to acquire and retain land has been upheld by force of treaty provisions between the United States government and the country to which the alien owes allegiance.<sup>75</sup> So far as the statutes of any state may prohibit the acquisition or holding of lands by an alien, they have usually been construed as operating, like the common-law prohibition, differently in respect to rights acquired by descent and those acquired by purchase.<sup>76</sup> In a number of states, moreover, it is provided that no title to real estate shall be invalid on account of the alienage of a former owner, and in many it is declared that, when one claiming by descent is otherwise entitled, the fact that the father, mother, or other ancestor through whom the descent is derived was an alien shall not bar the claim.<sup>77</sup>

<sup>73</sup> *Congregational Church at Mobile v. Morris*, 8 Ala. 182; *Coxe v. Gulick*, 10 N. J. Law, 328.

<sup>74</sup> *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Jackson v. Jackson*, 7 Johns. (N. Y.) 214; *Wunderle v. Wunderle*, 144 Ill. 40; *Hardy v. De Leon*, 5 Tex. 211; *McKellar v. McKellar*, 1 Speer (S. C.) 536; 2 Kent's Comm. 56.

<sup>75</sup> 1 Stimson's Am. St. Law, §§ 6010-6015.

<sup>76</sup> See 2 Am. & Eng. Enc. Law (2d Ed.) 245.

<sup>77</sup> See cases cited *supra*, notes 61-71.

<sup>77</sup> 1 Stimson's Am. St. Law, § 6016.

## § 505a. Criminals.

At common law, while one attainted of treason and felony could not, by alienation of any estate vested in him, deprive the crown of the right to enforce a forfeiture, he could, it seems, make and receive transfers subject to such right in the crown.<sup>78</sup> That a conviction of crime does not affect the capacity of a person to take or transfer lands seems true *a fortiori* in this country, where forfeiture for crime is not generally recognized.<sup>79</sup> A statutory provision, however, suspending the civil rights of one sentenced to life imprisonment, would seem to destroy his power of making a transfer *inter vivos*.<sup>80</sup>

The question has arisen in a number of cases in this country whether one who murders another is entitled to take by descent or devise from the latter. The cases have more generally taken the view that, in such case, the devisee or heir is entitled to take as in any other case, and that a contrary view would involve a forfeiture of property for crime, such as is not recognized in this country.<sup>81</sup> These decisions, though no doubt correct in so far as they decide that the legal title to the property of the deceased passes to the murderer, are probably incorrect in that they fail to apply or recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee *ex maleficio* for the

<sup>78</sup> Sheppard's Touchstone, 232; Doe d. Griffith v. Pritchard, 5 Barn. & Adol. 765; Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368.

<sup>79</sup> Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368; Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. (Ky.) 531.

<sup>80</sup> Williams v. Shackelford, 97 Mo. 322. And see *In re Nerac's Estate*, 35 Cal. 396, 95 Am. Dec. 111. But see, to the contrary, Avery v. Everett, 110 N. Y. 317, 333, 6 Am. St. Rep. 368.

<sup>81</sup> Shellenberger v. Ransom, 41 Neb. 631; Owens v. Owens, 100 N. C. 240; Carpenter's Estate, 170 Pa. St. 203; Deem v. Millikin, 6 Ohio Cir. Ct. R. 357.

persons rightfully entitled,<sup>82</sup>—a view which has been approved by the highest court of one state.<sup>83</sup>

<sup>82</sup> See the exhaustive discussion of the question by James Barr Ames, Esq., in 36 Am. Law Reg. 225. See, also, 30 Am. Law Rev. 130; 4 Harv. Law Rev. 394; 8 Harv. Law Rev. 170.

<sup>83</sup> *Ellerson v. Westcott*, 148 N. Y. 149, commenting on *Riggs v. Palmer*, 115 N. Y. 506.

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## **PART VI.**

### **LIENS.**

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#### **CHAPTER XXXV.**

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## I. THE NATURE AND ESSENTIALS OF A MORTGAGE.

A mortgage on land is a lien on an interest in the land, created by a formal agreement, or by a transfer of such interest, in order to secure the payment of money or the performance of some other act.<sup>1</sup> The modern mortgage is an equitable development of the common-law estate on condition subsequent.

<sup>1</sup> The term "mortgage" is also applied to the formal instrument by which the mortgage lien is created.



In some states, a mortgagee has not only a lien, but also the legal title to the land, which he may utilize as against the mortgagor to render his security more effective. The mortgagor is, however, for most purposes, the owner of the land.

Any interests in land may be mortgaged, including crops growing or to be grown thereon, and equity recognizes a mortgage of things to be acquired in the future.

A mortgage is usually created by an instrument in form a conveyance on condition subsequent, and a formal conveyance is necessary in order to vest the legal title in the mortgagee. A mortgage is also created by an instrument in form an absolute conveyance, if this can be shown to be intended for purposes of security only.

A mortgage may be given to secure advances to be made in the future, but, as a general rule, an advance, when made, is not secured by the mortgage as against an intervening incumbrance known to the mortgagee at the time of making the advance.

Even after a default in the payment to secure which the mortgage was given, the mortgagor may, by making such payment, "redeem" the land from the lien. This right cannot be defeated by agreement, and continues until "foreclosure."

#### § 506. Historical development.

Transfers of land as security for a debt assumed, in early times in England, various forms, among which was the *mortuum vadium*, from which has been derived the term "mortgage." The *mortuum vadium* was so called, it seems, owing to the fact that, upon its creation, the pledgee became entitled to the rents and profits of the land, and consequently the land was "dead" to the debtor, while, by the form of pledge known as the *vivum vadium*, the profits of the land were applied on the debt. Both these forms of security eventually gave place to what is known as the "common-law mortgage," consisting of a feoffment subject to a condition that, on payment by

the feoffor (the debtor) of a sum named, at a certain time, he might re-enter, thereby terminating the feoffee's estate.<sup>2</sup>

A strict compliance with the condition of a common-law mortgage was insisted upon by the courts of law, which refused to consider that the conveyance was intended merely as security for a debt, and they treated the estate of the mortgagee as indefeasible if the condition was not promptly performed by the mortgagor. Consequently, land was often forfeited for a debt much less than its value.<sup>3</sup> The court of chancery, however, quite early showed a disposition to relieve against this hardship, and about the middle of the seventeenth century it became the settled doctrine of that court that the debtor, by paying the debt even after it became due, could recover the ownership of the land,—that is, could “redeem,”—his right so to do being known as the “equity of redemption.”<sup>4</sup>

Since, unless some restriction in respect of time was placed on this right of redemption, the creditor to whom the mortgage was made, known as the “mortgagee,” might be forever deprived of the right to recover his money, the court of chancery allowed this right of redemption to be put an end to by a decree of “foreclosure,” granted upon the bringing of proceedings for the purpose, the right of redemption being

<sup>2</sup> Litt. §§ 332-344. See Digby, *Hist. Real Prop.* 232; Coote, *Mortgages*, 1-3.

The early “gage” of land had much more the characteristics of the modern mortgage, as developed in equity, than the common-law mortgage of the time of Littleton. See Glanville, bk. 10, c. 6; 2 Pollock & Maitland *Hist. Eng. Law*, 117-123; *The Story of Mortgage Law*, by H. W. Chaplin, Esq., 4 *Harv. Law Rev.* 1.

<sup>3</sup> Litt. §§ 332, 337; Coote, *Mortgages*, 13; 4 *Kent's Comm.* 140; Williams, *Real Prop.* (18th Ed.) 510.

<sup>4</sup> *How v. Vigures*, 1 Rep. Ch. 32; *Emanuel College v. Evans*, 1 Rep. Ch. 18, *Kirchwey's Cas.* 704; *Manning v. Burges*, 1 Ch. Cas. 29, *Kirchwey's Cas.* 704; 1 *Spence, Equitable Jurisdiction*, 603; 4 *Kent's Comm.* 158; Williams, *Real Prop.* (18th Ed.) 510.

thereby cut off or "foreclosed," unless the debt was paid by a time named in the decree.<sup>5</sup>

Somewhat later, chancery, regarding the real purpose of the mortgage conveyance, adopted the view that the mortgagor, in spite of his conveyance by way of mortgage, was still the owner of the property, with all the rights of an owner, so far as these were consistent with the security of the mortgagee, and that the latter had merely a charge or lien on the land to secure his debt.<sup>6</sup> But after the position of the mortgagor as owner was thus established in equity, the term "equity of redemption," which had previously and most appropriately been applied to his right to redeem, was applied, rather inappropriately, it would seem, to this entirely distinct right of ownership, and at the present day the term, though used in both senses, more frequently describes the interest of the mortgagor in the mortgaged land than his right to redeem after default.<sup>7</sup>

#### § 507. Legal and equitable theories.

While, as just stated, courts of equity have always regarded the mortgagee as having a lien merely, the common-law view that, by the creation of the mortgage, the legal title to the land is transferred to the mortgagee, as in the case of any

<sup>5</sup> 2 Cruise, Dig. tit. 15, c. 1, § 13; 4 Kent's Comm. 181; 2 Bl. Comm. 159. See post, § 548 et seq.

At the present day, as will appear later, the decree, instead of giving the property to the mortgagee, provides for its sale, and payment of his debt out of the proceeds, or there is a sale without decree.

<sup>6</sup> Casborne v. Scarfe, 1 Atk. 603. See 4 Kent's Comm. 180.

<sup>7</sup> The distinction between the mortgagor's right of ownership in the land before default, and his right, by going into equity, to redeem the land even after default and the consequent loss of the legal ownership, is, it would seem, self-evident, but the courts, by applying the same term to the two distinct rights, have continued to obscure the nature of each. See, e. g., post, note 213.

other conveyance on condition subsequent, is still retained in courts of law in England and some states in this country. This difference of view on the part of the courts of equity and law does not involve any conflict between the two jurisdictions, since courts of law recognize, though they do not usually enforce, the rights given to the mortgagor by courts of equity, while these latter assent to the enforcement by courts of law, so far as necessary for the protection of the mortgagee, of his legal rights as owner of the land.<sup>8</sup> This view, thus adopted in some states, that the legal title is in the mortgagee, at least for certain purposes, may conveniently be termed the "legal theory" of a mortgage.<sup>9</sup> In other states the view that the mortgagee has the legal title is entirely superseded, both at law and in equity, by the view which has always prevailed in equity, that he has merely a lien for the security of his debt. In a number of states, there is a statutory provision confirmatory of this "equitable theory" of a mortgage.<sup>10</sup>

<sup>8</sup> 4 Kent's Comm. 160; 3 Pomeroy, Eq. Jur. § 1184.

<sup>9</sup> The states in which this theory is adopted are Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. 1 Jones, Mortgages (5th Ed.) §§ 17-59; 3 Pomeroy, Eq. Jur. (2d Ed.) §§ 1186-1191. See Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679; Kannady v. McCarron, 18 Ark. 166; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331; Blaney v. Bearce, 2 Me. 132; Jamieson v. Bruce, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557; Ewer v. Hobbs, 5 Metc. (Mass.) 1; Howard v. Robinson, 5 Cush. (Mass.) 119; Hobart v. Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Tryon v. Munson, 77 Pa. St. 250, Finch's Cas. 538; Simmons v. Brown, 7 R. I. 427; Faulkner's Adm'r v. Brockenbrough, 4 Rand. (Va.) 245.

<sup>10</sup> The states in which this view prevails are California, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oregon, South Carolina, South Dakota, Texas, Wisconsin, Utah, and Washington. 1 Jones, Mortgages, §§ 17-59; 3 Pomeroy, Eq. Jur. (1168)

Even in those states which have adopted the English or legal theory of a mortgage, the courts have not consistently followed it out to all its logical consequences; a tendency to regard the mortgage according to its real nature as a mere security being constantly at work, even in courts of law, a tendency which has been increased and strengthened by the various statutes admitting equitable defenses in legal actions, or otherwise obscuring the line between equity and law.<sup>11</sup> The extension of the view that a mortgage is merely a lien marks a distinct advance in legal ideas, and it is to be expected that, with the passage of time, the crude conception of an estate on condition in the mortgagee will entirely disappear.<sup>12</sup>

(2d Ed.) §§ 1186-1191. See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Drake v. Root*, 2 Colo. 685; *McMahon v. Russell*, 17 Fla. 698; *Burnside v. Terry*, 45 Ga. 621; *Grable v. McCulloh*, 27 Ind. 472; *Chick v. Willetts*, 2 Kan. 384; *Taliaferro v. Gay*, 78 Ky. 496; *Caruthers v. Humphrey*, 12 Mich. 270; *Adams v. Corriston*, 7 Minn. 456 (Gil. 365); *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Bredenburg v. Landrum*, 32 S. C. 215; *Wright v. Henderson*, 12 Tex. 43.

In three states (Delaware, Mississippi, and Missouri) the mortgagee has, before default, merely a lien, but after default and entry by the mortgagee, the latter has the legal title, and, as owner, may take possession, or may adopt any legal remedies to obtain possession. *Doe d. Hall v. Tunnell*, 1 Houst. (Del.) 320; *Walker's Adm'r v. Farmers' Bank*, 8 Houst. (Del.) 258; *Cooch's Lessee v. Gerry*, 3 Har. (Del.) 280; *Hill v. Robertson*, 24 Miss. 368; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Buck v. Payne*, 52 Miss. 271; *Reddick v. Gressman*, 49 Mo. 389; *Johnson v. Houston*, 47 Mo. 227; 1 Jones, Mortgages, §§ 24, 38, 39, 58.

<sup>11</sup> See § Pomeroy, Eq. Jur. § 1186. See post, § 517.

<sup>12</sup> See Holland, Jurisprudence, 202; Digby, Hist. Real Prop. 395.

other conveyance on condition subsequent, is still the law in England and some states; and the line that This difference of view on the part of the persons lending and law does not involve any conflict between the courts, since courts of law recognizing the right of redemption, and courts of equity, while these latter are not to assert it; usually enforce, the rights given to the mortgagor, not to assert it; of equity, while these latter are not to assert it; courts of law, so far as necessary, decided that the right mortgagee, of his legal right, is an integral part of every mortgage, thus adopted in some cases, or "clogged" by a provision in mortgage, at least for a contemporaneous agreement, and this be termed the "legal view," and this view, expressed in the phrase, "once a mortgage, the view that the mortgagee has invariably been strictly enforced.<sup>12</sup> superseded, but a contemporaneous agreement to this effect always prevails, and a subsequent agreement which, without affecting security, provides that there shall be no right of redemption in case of nonpayment at maturity, is a mortgage, as depriving the mortgage of one of its essential features.<sup>13</sup>

#### Interests subject to mortgage.

Any interest in land which may be the subject of sale,

<sup>12</sup> Howard v. Harris, 1 Vern. 190, Kirchwey's Cas. 430; Jason v. Eyres, 2 Ch. Cas. 33; Peugh v. Davis, 96 U. S. 332; Batty v. Snook, 5 Mich. 231, Kirchwey's Cas. 433; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40; McCauley v. Smith, 132 N. Y. 524, Finch's Cas. 1109; Youle v. Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; Bayley v. Bailey, 5 Gray (Mass.) 505; Johnston v. Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; Turple v. Lowe, 114 Ind. 37; Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171; Jackson v. Lynch, 129 Ill. 72; Stoutz v. Rouse, 84 Ala. 309; Bradbury v. Davenport, 114 Cal. 593, 55 Am. St. Rep. 92, and note. But if the mortgage is intended merely as a family settlement or provision, the right of redemption may, it has been held, be restricted. Bonham v. Newcomb, 1 Vern. 231 Kirchwey's Cas. 432, reversing Newcomb v. Bonham, 1 Vern. 7. See Coote, Mortgages, 27.

<sup>13</sup> Tennery v. Nicholson, 37 Ill. 464. See Batty v. Snook, 5 Mich. 231, Kirchwey's Cas. 432.



mortgage of an equitable interest in land cannot, it would seem, in states in which the legal theory of mortgages is recognized, have the effect of passing the legal title to the mortgagee, since the mortgagor has no such title to pass.<sup>27</sup> And so in England it is recognized that a second mortgage—that is, a mortgage of the mortgagor's interest—passes no legal title to the mortgagee.<sup>28</sup> In this country, however, no such distinction between the positions of first and second mortgagees seems to be recognized.<sup>29</sup>

— Future acquisitions.

A mere possibility of acquiring property is not the subject of mortgage, as it is not the subject of grant, and consequently one cannot, at law, mortgage interest in land to be acquired by him in the future.<sup>30</sup> In equity, however, a mortgage which in terms covers things thereafter to be acquired creates a lien or charge on such things, upon their acquisition by the mortgagor; this being an application of a general equitable principle that, if one, by contract, undertakes to create a lien or charge, the lien or charge will be regarded as actually existing, upon the acquisition by such person of the thing sought to be charged.<sup>31</sup> This principle has been frequently

v. Shepard, 7 Wis. 449; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *McPherson v. Hayward*, 81 Me. 329; *Davis v. Milligan*, 38 Ala. 523; *Attorney General v. Purmort*, 5 Paige (N. Y.) 620; *Holbrook v. Betton*, 5 Fla. 99.

<sup>27</sup> See *Jarvis v. Dutcher*, 16 Wis. 307.

<sup>28</sup> Coote, *Mortgages*, c. 86. This is the basis of the English doctrine of "tacking." See post, § 543.

<sup>29</sup> See 3 *Pomeroy*, Eq. Jur. § 1185.

<sup>30</sup> 4 *Kent's Comm.* 144; 2 *Story*, Eq. Jur. § 1021; *Purcell's Adm'r v. Mather*, 35 Ala. 570, 76 Am. Dec. 307; *Bayler v. Com.*, 40 Pa. St. 37; *Jones v. Richardson*, 10 Metc. (Mass.) 481; *Emerson v. European & N. A. Ry. Co.*, 67 Me. 337, 24 Am. Rep. 39; *Looker v. Peckwell*, 23 N. J. Law, 253, *Kirchwey's Cas.* 66.

<sup>31</sup> *Pennock v. Coe*, 23 How. (U. S.) 117; *Helroyd v. Marshall*, 10 (1172)



applied in the case of railroad mortgages in terms including property thereafter to be acquired by the railroad company.<sup>32</sup>

To the rule prohibiting such mortgages at law there are a few apparent exceptions, which are, however, explained by the application of other principles not inconsistent therewith. A thing which is added to another thing by way of accession, natural or artificial, so as to become a part thereof in view of the law, is subject to a previous mortgage upon the thing to which it is added. This occurs when a house is built upon mortgaged land, or articles or machinery are attached to a mortgaged building, so as to become part thereof, these being applications of the principle of fixtures, previously treated.<sup>33</sup> So, one may mortgage things which are the natural increase of any things which he owns at the date of the mortgage, he being said to have such increase "potentially."<sup>34</sup>

H. L. Cas. 191, Kirchwey's Cas. 42; *Smithurst v. Edmunds*, 14 N. J. Eq. 408, Kirchwey's Cas. 61; *Mitchell v. Winslow*, 2 Story, 680, Fed. Cas. No. 9,673; *Brett v. Carter*, 2 Lowell, 458, Fed. Cas. No. 1,844, Kirchwey's Cas. 67; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596; *Kribbs v. Alford*, 120 N. Y. 519, Kirchwey's Cas. 72; *Apperson v. Moore*, 30 Ark. 56; *Sillers v. Lester*, 48 Miss. 513. This is an example of an equitable lien. See post, § 561. But in Massachusetts, chattels acquired after the date of a mortgage do not become subject thereto until possession is taken by the mortgagee. *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706, Kirchwey's Cas. 54; *Low v. Pew*, 108 Mass. 347; *Chase v. Denny*, 130 Mass. 566. See 13 Harv. Law Rev. 598.

<sup>32</sup> *Platt v. New York & S. B. Ry. Co.*, 9 App. Div. (N. Y.) 87, 153 N. Y. 670, Kirchwey's Cas. 97; *Pierce v. Emery*, 32 N. H. 494, Kirchwey's Cas. 80; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366.

<sup>33</sup> *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Winslow v. Merchants Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 522, 15 Am. St. Rep. 235. See ante, § 238.

<sup>34</sup> *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am.

Accordingly, it is held that the owner of land may mortgage crops to be grown thereon, "for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant."<sup>85</sup> In some states, however, it is held that a mortgage of annual crops (*fructus industriales*), which have not yet been planted, is invalid, especially as against attaching creditors, since such crops cannot be regarded as having even a potential existence, they being distinguished in this respect from the spontaneous product of the earth, or the increase of that which is already in existence.<sup>86</sup>

A mortgagee of land is a purchaser, within the meaning of the recording acts, and accordingly, if his mortgage is based on a valuable consideration, he takes priority as against a prior unrecorded instrument of which he has no notice.<sup>87</sup>

Rep. 596; *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39.

<sup>85</sup> Hobart, C. J., in *Grantham v. Hawley*, Hob. 132, *Kirchwey's Cas.* 40. To the same effect, see *Jones v. Webster*, 48 Ala. 109; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Cotten v. Willoughby*, 83 N. C. 75; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Cudworth v. Scott*, 41 N. H. 456; *Moore v. Byrum*, 10 Rich. (S. C.) 452, 30 Am. Rep. 58. But the crops must be clearly identified in the mortgage by reference to the land on which, and the year or years within which, they are to be grown. *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39; *Shaw v. Gilmore*, 81 Me. 396; *Stephens v. Tucker*, 55 Ga. 543.

<sup>86</sup> *Hutchinson v. Ford*, 9 Bush (Ky.) 318, 15 Am. Rep. 711; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, *Kirchwey's Cas.* 75; *Gittings v. Nelson*, 86 Ill. 591; *Long v. Hines*, 40 Kan. 220, 10 Am. St. Rep. 189. That such a mortgage is good even against creditors, see *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Wheeler v. Becker*, 68 Iowa, 723.

<sup>87</sup> See *Webb*, *Record of Title*, § 209; 1 *Stimson's Am. St. Law*, §§ 1611, 1625; *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Chapman v. Miller*, 130 Mass. 289; *Fleschner v. Sumpter*, 12 Or. 161; *Seever v. Delash-* (1174)

## § 510. The ordinary form of a mortgage.

A mortgage, being a conveyance of, or a contract concerning, an interest in land, must, under the Statute of Frauds, be in writing.<sup>38</sup> Though, as before shown, the view that a mortgage is a lien merely has for most purposes displaced the view that it is an estate on condition, the old form of conveyance on condition is usually retained. In states where the legal theory still obtains, conformity with the essentials of a conveyance is essential in order that the instrument may be sufficient to vest the legal title in the mortgagee,<sup>39</sup> and the omission of the words of inheritance necessary in a conveyance in fee simple will have the effect of reducing the estate of the mortgagee to one for life only.<sup>40</sup> In states where the equitable theory of a mortgage prevails, there is no necessity that the instrument have the essentials of a conveyance, it being sufficient that the instrument show an intention to mortgage, and that it be executed as required by the statute.<sup>41</sup> The statute quite frequently authorizes a simple and concise form, stating the bare essentials of a mortgage, and it is, of course, sufficient if this be followed.

The mortgaged land must always be described in the mortgage with sufficient particularity to enable it to be identified, as in the case of any other conveyance, but a reference to an-

mutt, 11 Iowa, 174, 77 Am. Dec. 139. Authorities cited in 20 Am. & Eng. Enc. Law (1st Ed.) 576.

<sup>38</sup> Bogert v. Bliss, 148 N. Y. 194, 51 Am. St. Rep. 684, Kirchwey's Cas. 121; McCue v. Smith, 9 Minn. 252 (Gil. 237), 86 Am. Dec. 100.

<sup>39</sup> See Dunn v. Raley, 58 Mo. 134; Peckham v. Haddock, 36 Ill. 38; Goodman v. Randall, 44 Conn. 321. See article by H. W. Chaplin, Esq., in 4 Harv. Law Rev. 1.

<sup>40</sup> Wilson v. King, 27 N. J. Eq. 374; Allendorff v. Gaujengigl, 146 Mass. 542; Smith v. Haskins, 22 R. I. 6.

<sup>41</sup> See Morrill v. Skinner, 57 Neb. 164; De Leon v. Higuera, 15 Cal. 483; Jackson v. Carswell, 34 Ga. 279.

other instrument, in which the property is described, is sufficient for this purpose.<sup>42</sup>

The requisites as to execution are ordinarily expressly named in the statute. An acknowledgment is usually requisite, as in the case of absolute transfers of land,<sup>43</sup> only as a preliminary to the record of the conveyance.

A mortgage must be delivered as if an absolute conveyance,<sup>44</sup> and there are a number of decisions to the effect that the mortgage must be accepted by the mortgagee, and that, until such acceptance, other persons may acquire rights in the premises, as by judgment or attachment liens, which will take precedence of the unaccepted mortgage.<sup>45</sup>

A mortgage must, in all the states, be recorded in order to be effective to create a lien as against a subsequent purchaser of the land for value without notice of its existence.<sup>46</sup> In

<sup>42</sup> *De Leon v. Higuera*, 15 Cal. 483; *Freed v. Brown*, 41 Ark. 495; *Atkins v. Paul*, 67 Ga. 97; *Cochran v. Utt*, 42 Ind. 267; *Stead v. Grosfield*, 67 Mich. 289; *Wilson v. Boyce*, 92 U. S. 320; *Boon v. Pierpont*, 28 N. J. Eq. 7; *Tucker v. Field*, 51 Miss. 191; 1 *Jones, Mortgages*, §§ 66, 67.

<sup>43</sup> See ante, § 405.

<sup>44</sup> *Freeman v. Peay*, 23 Ark. 439; *Bell v. Farmers' Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Shirley v. Burch*, 16 Or. 83, 8 Am. St. Rep. 273; *Knapstein v. Tinette*, 156 Ill. 322; *Farmers' & Mechanics' Bank v. Drury*, 38 Vt. 426.

<sup>45</sup> *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Freeman v. Peay*, 23 Ark. 439; *Bell v. Farmers' Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205; *Adams v. Johnson*, 41 Miss. 258; *Wallis v. Taylor*, 67 Tex. 431; *Alliance Milling Co. v. Eaton*, 86 Tex. 401; *Welsh v. Sackett*, 12 Wis. 243, 3 Gray's Cas. 714; *Oxnard v. Blake*, 45 Me. 602; *Woodbury v. Fisher*, 20 Ind. 389. Contra, *Merrills v. Swift*, 18 Conn. 257, 3 Gray's Cas. 677, 46 Am. Dec. 315; *Elsberry v. Boykin*, 55 Ala. 336. See the discussion of the analogous question of the necessity of acceptance in the case of an absolute conveyance, ante, § 407.

<sup>46</sup> See 1 *Stimson's Am. St. Law*, § 1858; 1 *Jones, Mortgages*, § 456. (1176)

some states there are peculiar provisions in regard to mortgages, as distinguished from other instruments affecting land, which in effect make their record within a certain time after execution effective even as against conveyances made and recorded between the time of execution of the mortgage and its record, thus depriving a purchaser of land, in certain cases, of the right to rely on the record title as against a mortgage of which he has no notice because not recorded.<sup>47</sup>

### § 511. Separate defeasances.

Though the condition or proviso that the conveyance shall be void in case of compliance by the mortgagor with his contract, termed the "defeasance," is usually inserted in the conveyance to the mortgagee, this is not, in most jurisdictions, necessary, and it may be contained in a separate instrument.<sup>48</sup> This practice has, however, been criticised, as liable to be productive of injury to the mortgagor.<sup>49</sup>

In order that a mortgage with a separate defeasance be effective as such at law, it is necessary that the two instruments be delivered at approximately the same time, or at least that they be parts of the same transaction.<sup>50</sup> Likewise, in order to

<sup>47</sup> 1 Jones, Mortgages, § 458.

<sup>48</sup> Kent's Comm. 141; Chase's Case, 1 Bland's Ch. (Md.) 206, 17 Am. Dec. 277; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 253, 20 Am. Dec. 145; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Colwell v. Woods, 3 Watts (Pa.) 188, 27 Am. Dec. 345; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282; Teal v. Walker, 111 U. S. 242; Kelley v. Leachman, 2 Idaho, 1112; Ferris v. Wilcox, 51 Mich. 105, 47 Am. Rep. 551.

<sup>49</sup> 4 Kent's Comm. 141; Baker v. Wind, 1 Ves. Sr. 160.

<sup>50</sup> Nugent v. Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355; Bryan v. Cowart, 21 Ala. 92; Bennock v. Whipple, 12 Me. 348, 23 Am. Dec. 186; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Gunn's Appeal, 55 Conn. 149; Moores v. Wills, 69 Tex. 109; Bearss v. Ford, 108 Ill. 16; Radford v. Folsom, 53 Iowa, 473; Lane v. Shears, 1 Wend. (N. Y.) 433. See Willson v. Shoenberger's Ex'rs, 31 Pa. St. 295.

create a mortgage valid at law as well as in equity, the defeasance must be of as high a nature as the conveyance itself,—that is, if the latter is under seal, the defeasance must likewise be under seal, so that it may be regarded as a part of the same instrument, and it must be executed with the other formalities required in the case of a conveyance of land.<sup>51</sup>

The defeasance should be recorded with the absolute conveyance. In some states it is provided that, if the defeasance be not recorded, the grantee shall take nothing under the conveyance, or shall derive no benefit from the record of the conveyance,<sup>52</sup> while in others it is provided that, in such case, the conveyance shall pass an absolute title, except as against the maker of the instrument, his heirs and devisees, and, usually, persons having actual notice of the instrument of defeasance,<sup>53</sup> which is the rule in the absence of any statute on the subject.<sup>54</sup> In the first class of states, therefore, it is to the advantage of the mortgagee to see that the defeasance is recorded, while, in the latter class, the mortgagor or those claiming under him can alone suffer from the absence of the defeasance from the record.<sup>55</sup>

§ 512. Conveyance absolute in form.

While, as stated above, a defeasance in a separate instrument is not sufficient to create a legal mortgage if it is not exe-

<sup>51</sup> *Baker v. Wind*, 1 Vea. Sr. 160; *Lund v. Lund*, 1 N. H. 39, 8 Am. Dec. 29; *Kelleran v. Brown*, 4 Mass. 443, *Kirchwey's Cas.* 177; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Warren v. Lovis*, 53 Me. 463.

<sup>52</sup> 1 *Stimson's Am. St. Law*, § 1860. See *Friedley v. Hamilton*, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638; *Corpman v. Baccastow*, 84 Pa. St. 363; *Brown v. Dean*, 3 Wend. (N. Y.) 208.

<sup>53</sup> 1 *Stimson's Am. St. Law*, § 1860. See *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Carpenter v. Lewis*, 119 Cal. 18.

<sup>54</sup> *Knight v. Dyer*, 57 Me. 174, 99 Am. Dec. 765; *Koons v. Grooves*, 20 Iowa, 373; *Frink v. Adams*, 36 N. J. Eq. 485; *Turman v. Bell*, 54 Ark. 273.

<sup>55</sup> See 1 *Jones, Mortgages*, § 513.

outed with the same formalities as the deed of conveyance itself, in equity the rule is different, and there any agreement, however informally expressed or executed, showing an intention that an absolute conveyance should operate as a security for the repayment of money, is sufficient to make the transaction a mortgage.<sup>56</sup> Courts of equity, moreover, and, in some of the states, even courts of law, allow it to be shown by extrinsic evidence that a conveyance of land absolute in form, unaccompanied by a written defeasance, was intended as security merely, and such conveyance, shown to be so intended, is always regarded as a mortgage.<sup>57</sup>

<sup>56</sup> 4 Kent's Comm. 142; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Eaton v. Green*, 22 Pick. (Mass.) 526; *James v. Morey*, 2 Cow. (N. Y.) 246; *Brinkman v. Jones*, 44 Wis. 498; *Den d. Skinner v. Cox*, 15 N. C. 59.

<sup>57</sup> *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868; *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Cobb v. Day*, 106 Mo. 378; *Ahern v. McCarthy*, 107 Cal. 382; *Scott v. Henry*, 13 Ark. 112; *McNeel's Ex'rs v. Auldridge*, 34 W. Va. 748; *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St. Rep. 795; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289; *Morrow v. Jones*, 41 Neb. 867; *Horn v. Keteltas*, 46 N. Y. 605; *Finch's Cas.* 1106; *Plumer v. Guthrie*, 76 Pa. St. 441; *Hannay v. Thompson*, 14 Tex. 142; *Hills v. Loomis*, 42 Vt. 562.

That oral evidence is not admissible for this purpose in a court of law, see *Cotterell v. Purchase*, *Cas. temp. Talb.* 61, *Kirchwey's Cas.* 175; *Inhabitants of Reading v. Inhabitants of Weston*, 8 Conn. 117, 20 Am. Dec. 97, *Kirchwey's Cas.* 180; *Flint v. Sheldon*, 13 Mass. 443; *Stinchfield v. Milliken*, 71 Me. 567; *McClane v. White*, 5 Minn. 178 (*Gil.* 139); *Reilly v. Cullen*, 159 Mo. 322; *Gates v. Sutherland*, 76 Mich. 231. And this is the general rule in states in which the line of demarkation between equity and law is observed with considerable strictness. That such evidence is admissible at law, see *Swart v. Service*, 21 Wend. (N. Y.) 36, *Kirchwey's Cas.* 183; *Despard v. Walbridge*, 15 N. Y. 374, *Kirchwey's Cas.* 374, and (under statute) *German Ins. Co. of Freeport v. Gibe*, 162 Ill. 251.

In Pennsylvania, by statute, a conveyance made since June 6, 1881, cannot be shown to be a mortgage by oral evidence. *Sankey v. Hawley*, 118 Pa. St. 30; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868.

To show by oral evidence, however, that a conveyance absolute in form was intended to be a mortgage, the evidence must be clear and convincing, the presumption being that the instrument is what it purports to be.<sup>58</sup> In the case, moreover, of an oral defeasance, as in the case of a separate written defeasance, a purchaser for value from the mortgagee is not affected thereby unless he has notice of its existence.<sup>59</sup>

The admission of evidence for the purpose of showing an absolute conveyance to be a mortgage is evidently an exception to the rule which excludes extrinsic evidence to vary or control a written instrument, and there has been considerable discussion as to the principle on which the exception to the general rule can be allowed. In some cases the right to introduce such evidence is stated to exist only when the written defeasance has been omitted as the result of fraud, accident, or mistake,<sup>60</sup> while in others the attempt to utilize the absolute conveyance otherwise than as a mortgage, contrary to the intention of the parties, is regarded as itself constituting a fraud, authorizing the introduction of oral evidence of the

<sup>58</sup> *Coyle v. Davis*, 116 U. S. 108; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289; *Waters v. Crabtree*, 105 N. C. 394; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868.

<sup>59</sup> *Jackson v. Lawrence*, 117 U. S. 679; *Conner v. Chase*, 15 Vt. 775; *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 110; *Frink v. Adams*, 36 N. J. Eq. 485; *Meehan v. Forrester*, 52 N. Y. 277; *Pancake v. Cauffman*, 114 Pa. St. 113; *Waters v. Crabtree*, 105 N. C. 394. See *Knapp v. Balley*, 79 Me. 195, 1 Am. St. Rep. 295.

<sup>60</sup> 4 Kent's Comm. 142; *Blakemore v. Byrnside*, 7 Ark. 506; *Washburn v. Merrill*, 1 Day (Conn.) 139; *Crutcher v. Muir*, 90 Ky. 142, 29 Am. St. Rep. 366; *Lokerson v. Stillwell*, 13 N. J. Eq. 368; *Sprague v. Bond*, 115 N. C. 530; *McClane v. White*, 5 Minn. 178 (Gil. 139). In Georgia, the statute excludes parol evidence, except to show fraud in procuring the mortgage. *Hall v. Waller*, 66 Ga. 483.



real intention of the parties.<sup>61</sup> The courts, however, more usually, at the present day, give relief by treating an absolute conveyance as a mortgage, on oral evidence to that effect, without undertaking to base it upon any theory of fraud, accident, or mistake, but rather as an independent head of equity,<sup>62</sup> and it would seem that the recognition of a right to such relief is an almost necessary result of the equitable doctrine that any agreement or device by which it is sought to defeat the mortgagor's right of redemption is invalid.

—— Sale with right of repurchase.

The fact that an absolute conveyance is accompanied by an agreement, or is subject to a condition, that the grantor may repurchase within a given time, at the same or a different price, is not conclusive that the transaction is a mortgage. Such a transaction is perfectly valid if it is what it appears to be, and the right to repurchase is lost if not exercised within the stipulated time.<sup>63</sup> A difficult question, however, frequently arises, as to whether a transaction in form a conditional sale is not in fact a mortgage, as being intended to secure the payment of money, and a court of equity will closely scrutinize the transaction to see if such is the case, and will,

<sup>61</sup> *Babcock v. Wyman*, 19 How. (U. S.) 239; *Hershey v. Luce*, 56 Ark. 320; *Pierce v. Robinson*, 13 Cal. 116; *O'Neill v. Capelle*, 62 Mo. 202; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 368; *Wright v. Bates*, 13 Vt. 341. See *Ruckman v. Alwood*, 71 Ill. 155; *Hassam v. Barrett*, 115 Mass. 256; 3 Pomeroy, Eq. Jur. § 1196.

<sup>62</sup> See *Ruckman v. Alwood*, 71 Ill. 155, quoted in *Kirchwey's Cas.* 200.

<sup>63</sup> 4 Kent's Comm. 144; Pomeroy, Eq. Jur. § 1195; *Thornborough v. Baker*, 3 Swanst. 631, *Kirchwey's Cas.* 147; *Barrell v. Sabine*, 1 Vern. 268; *Conway's Executors & Devises v. Alexander*, 7 Cranch (U. S.) 218, *Kirchwey's Cas.* 151; *Horbach v. Hill*, 112 U. S. 144; *Macaulay v. Porter*, 71 N. Y. 173; *Moss v. Green*, 10 Leigh (Va.) 251, 34 Am. Dec. 731; *Rue v. Doie*, 107 Ill. 275; *Flagg v. Mann*, 14 Pick. (Mass.) 467, 478; *Rusler v. Womack*, 30 Tex. 332.

if it appears to be such, give the grantor the right to redeem, with any other rights which belong to a mortgagor. In case of doubt, the courts incline to consider the transaction a mortgage,<sup>64</sup> thus applying a different rule from that applied to an absolute conveyance not accompanied by an agreement for repurchase.

— Considerations determining character of conveyance.

In determining the question whether an absolute conveyance is a mortgage,—whether there is or is not an agreement giving the right of repurchase,—the fact that an indebtedness on the part of the grantor to the grantee is created by the transaction, or that a former indebtedness is thereby continued in force, is usually conclusive that it is a mortgage.<sup>65</sup> The absence of a covenant or other express agreement to repay the money is not, however, conclusive that the conveyance is not a mortgage.<sup>66</sup> Among the other circumstances tending

<sup>64</sup> *Conway's Executors & Devises v. Alexander*, 7 Cranch (U. S.) 218, *Kirchwey's Cas.* 151; *Russell v. Southard*, 12 How. (U. S.) 129, *Kirchwey's Cas.* 157; *Cosby v. Buchanan*, 81 Ala. 574; *Farmer v. Grose*, 42 Cal. 169; *Matthews v. Sheehan*, 69 N. Y. 585; *Trucks v. Lindsey*, 18 Iowa, 504; *Poindexter v. McCannon*, 16 N. C. 373, 18 Am. Dec. 591; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 354, 20 Am. Dec. 145; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *O'Neill v. Capelle*, 62 Mo. 202.

<sup>65</sup> 4 Kent's Comm. 144; 3 Pomeroy, Eq. Jur. § 1195; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, *Kirchwey's Cas.* 167; *Conway's Executors & Devises v. Alexander*, 7 Cranch (U. S.) 237, *Kirchwey's Cas.* 151; *Slowe v. McMurray*, 27 Mo. 118, 72 Am. Dec. 251; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *Montgomery v. Spect*, 55 Cal. 352; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 368; *Hopper v. Smyser*, 90 Md. 363; *Fisher v. Green*, 142 Ill. 80.

<sup>66</sup> *Matthews v. Sheehan*, 69 N. Y. 585, *Kirchwey's Cas.* 164; *Floyer v. Lavington*, 1 P. Wms. 268; *Russell v. Southard*, 12 How. (U. S.) 129, *Kirchwey's Cas.* 157; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, *Kirchwey's Cas.* 167; *Brown v. Dewe*, 1 Sandf. Ch. (N. Y.) 57; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, *Kirchwey's Cas.* 191; *Horn v. Keteltas*, 46 N. Y. 605, *Finch's Cas.* 1106.

to show that the transaction is a mortgage, and not an absolute conveyance, are the inadequacy of the sum paid by the grantee to the grantor as a consideration for the land, and the fact that the grantor remained in possession.<sup>67</sup>

§ 513. The obligation secured.

A mortgage is usually given to secure the payment of a sum of money, and the debt is usually evidenced by a note, bond, or other instrument, separate from the mortgage, though this is not necessary.<sup>68</sup>

Except as against creditors who may be defrauded thereby, a mortgage securing in terms the payment of a sum of money is valid, although the mortgagor received no part of such sum, or any other consideration for the making of the mortgage, the owner of land having the same right to make a present of a mortgage on the land as to give the land itself.<sup>69</sup> So the mortgage may be given to secure the payment of a debt which existed before the making of the mortgage;<sup>70</sup> but in such a

<sup>67</sup> *Conway's Executors & Devises v. Alexander*, 7 Cranch (U. S.) 218; *Kirchwey's Cas.* 151; *Russell v. Southard*, 12 How. (U. S.) 139; *Kirchwey's Cas.* 157; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847; *Kirchwey's Cas.* 167; *Bacon v. Brown*, 19 Conn. 34; *Hoffman v. Ryan*, 21 W. Va. 417; *Williams v. Reggan*, 111 Ala. 621; Co. Litt. 205a, Butlet's note.

<sup>68</sup> *Conway's Executors & Devises v. Alexander*, 7 Cranch (U. S.) 218; *Hickox v. Lowe*, 10 Cal. 197; *Jacques v. Weeks*, 7 Watts (Pa.) 268; *Smith v. People's Bank*, 24 Me. 185; *Hodgdon v. Shannon*, 44 N. H. 572; *Eacho v. Cosby*, 26 Grat. (Va.) 112; *Rice v. Rice*, 4 Pick. (Mass.) 849.

<sup>69</sup> *Bucklin v. Bucklin*, 1 Abb. Dec. (N. Y.) 242, *Kirchwey's Cas.* 203; *Campbell v. Tempkins*, 22 N. J. Eq. 170; *Brooks v. Dalrymple*, 12 Allen (Mass.) 102; *Brigham v. Brown*, 44 Mich. 59.

<sup>70</sup> *Morse v. Godfrey*, 8 Story, 364, Fed. Cas. No. 9,856; *Gafford v. Stearns*, 51 Ala. 434; *Rea v. Wilson*, 112 Iowa, 517; *De Lancey v. Stearns*, 66 N. Y. 157; *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753; *Mingus v. Condit*, 23 N. J. Eq. 313; 1 Jones, Mortgages, § 400.

case the mortgagee is not usually regarded as a purchaser for value, unless some additional consideration is given, and consequently is not protected as against a prior conveyance of which he had no notice.<sup>71</sup>

— Description of obligation.

A mortgage given to secure a debt existent at the making of the mortgage, or contemporaneous therewith, is valid, even as against subsequent purchasers and creditors, although it does not explicitly state the amount of such debt or liability, provided there are means of ascertaining such amount.<sup>72</sup> And extrinsic evidence is admissible for the purpose of showing the debt which the mortgage was intended to secure.<sup>73</sup> The statement in the mortgage as to the sum secured is not conclusive in that regard, and it may be shown by the mortgagor that the lien was for a less sum,<sup>74</sup> or even that the mort-

<sup>71</sup> *Morse v. Godfrey*, 3 Story, 364, Fed. Cas. No. 9,356; *Gafford v. Stearns*, 51 Ala. 434; *Mingus v. Condit*, 23 N. J. Eq. 313; *De Lancey v. Stearns*, 66 N. Y. 157; *Lewis v. Anderson*, 20 Ohio St. 281; *Schumpert v. Dillard*, 55 Miss. 348; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

<sup>72</sup> *Stoughton v. Pasco*, 5 Conn. 442, 13 Am. Dec. 72, *Kirchwey's Cas.* 268; *Robinson v. Williams*, 22 N. Y. 380, *Kirchwey's Cas.* 274; *Youngs v. Wilson*, 27 N. Y. 351, *Kirchwey's Cas.* 280; *Merrills v. Swift*, 13 Conn. 257, 46 Am. Dec. 315; *New v. Sailors*, 114 Ind. 407, 5 Am. St. Rep. 632; *Bowen v. Ratcliff*, 140 Ind. 393, 49 Am. St. Rep. 303; *Bullock v. Battenhausen*, 108 Ill. 28; *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160; *Shirras v. Calg*, 7 Cranch (U. S.) 84; *Hurd v. Robinson*, 11 Ohio St. 232.

<sup>73</sup> *Doe d. Duval's Heirs v. McLoakey*, 1 Ala. 708; *Aull v. Lee*, 61 Mo. 160; *Babcock v. Lisk*, 57 Ill. 327; *Moses v. Hatfield*, 27 S. C. 324; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Hurd v. Robinson*, 11 Ohio St. 232; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Baxter v. McIntire*, 13 Gray (Mass.) 163. In some jurisdictions, however, the statute requires a specific description of the debt. See *Mans v. McKellip*, 38 Md. 231; *Page v. Ordway*, 40 N. H. 253.

<sup>74</sup> *Mackey v. Brownfield*, 13 Serg. & R. (Pa.) 239; *Nazro v. Ware*, (1184)

gage was not a lien for the payment of money, as stated therein, but was given for a different purpose.<sup>75</sup>

A mortgage which is in terms security for a certain amount cannot, as against third persons, be extended by agreement between the mortgagor and mortgagee so as to cover sums subsequently advanced by the latter to the former.<sup>76</sup> But, as between the parties to the mortgage, a written agreement, made after its execution, that it shall be security for a debt other than that which it was first intended to secure, is effective,<sup>77</sup> this constituting in effect an equitable lien on the land for such additional sum.<sup>78</sup>

— Future advances.

A mortgage given to secure advances to be made in the future to the mortgagor, or liabilities to be assumed for him by the mortgagee in the future, is valid even as against creditors and subsequent purchasers.<sup>79</sup> It is, by the weight of

33 Minn. 443; *Burnett v. Wright*, 135 N. Y. 543; *Louisville Banking Co. v. Leonard*, 90 Ky. 106; *Ruloff v. Hazen*, 124 Mich. 570; *Huckaba v. Abbott*, 87 Ala. 409.

<sup>75</sup> *Baird v. Baird*, 145 N. Y. 659, *Kirchwey's Cas.* 211; *Hill v. Hoole*, 116 N. Y. 299; *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Hannan v. Hannan*, 123 Mass. 441; *Saunders v. Dunn*, 174 Mass. 164; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

<sup>76</sup> *Schiffer v. Feagin*, 51 Ala. 335; *Fuller v. Griffith*, 91 Iowa, 632; *Stone v. Lane*, 10 Allen (Mass.) 74; *Bramhall v. Flood*, 41 Conn. 68; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *McCaughrin v. Williams*, 15 S. C. 505; *Large v. Van Doren*, 14 N. J. Eq. 208; *McGready v. McGready*, 17 Mo. 597.

<sup>77</sup> See *Wylly v. Screven*, 98 Ga. 213; *Stoddard v. Hart*, 23 N. Y. 556, *Kirchwey's Cas.* 116. An oral agreement to this effect is insufficient, it would seem, under the Statute of Frauds, and it has been so decided. *Stoddard v. Hart*, 23 N. Y. 556, *Kirchwey's Cas.* 116; *Johnson v. Anderson*, 30 Ark. 745; *Ex parte Hooper*, 19 Ves. 477, 1 Mer. 7, *Kirchwey's Cas.* 114. Contra, *Walker v. Walker*, 17 S. C. 329. And see *Brown v. Gaffney*, 32 Ill. 251.

<sup>78</sup> See post, § 561.

<sup>79</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 34; *United States v. Hooe*, 3

(1185)

authority, sufficient if the mortgage states that it is to secure future advances, without stating the total amount of such advances, since a subsequent purchaser or incumbrancer is thereby put on inquiry as to the debt secured;<sup>80</sup> and the failure to state that future advances are secured is immaterial if the total amount of the debt secured is named.<sup>81</sup>

A mortgage securing future advances is valid, as against creditors and purchasers, to the amount to which advances have been made before the mortgagee obtains knowledge of the accrual of the rights of such third persons.<sup>82</sup> As to whether the mortgagee is affected with knowledge of a subsequent

*Cranch* (U. S.) 73; *Boswell v. Goodwin*, 31 Conn. 74, 31 Am. Dec. 169; *Robinson v. Williams*, 22 N. Y. 380, *Kirchwey's Cas.* 274; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622; *Kramer v. Trustees of Farmers' & Mechanics' Bank of Steubenville*, 15 Ohio, 263; *Nicklin v. Betts Spring Co.*, 11 Or. 406, 50 Am. Rep. 477; *Collins v. Carlile*, 13 Ill. 254.

<sup>80</sup> *Jarratt v. McDaniel*, 32 Ark. 598; *Allen v. Lathrop*, 46 Ga. 183; *Witczinski v. Everman*, 51 Miss. 841; *Michigan Ins. Co. of Detroit v. Brown*, 11 Mich. 266; *Robinson v. Williams*, 22 N. Y. 381. *Contra*, *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106, *Kirchwey's Cas.* 265. See *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

In some states there are statutory provisions, requiring the debt secured to be described in the mortgage, which restrict the right to make mortgages for future advances. See 1 *Jones, Mortgages*, § 366; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Maus v. McKellip*, 38 Md. 231; *Johnson v. Richardson*, 33 N. Y. 353.

<sup>81</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Collins v. Carlile*, 13 Ill. 254; *Louisville Banking Co. v. Leonard*, 90 Ky. 106; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

<sup>82</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 51; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Boswell v. Goodwin*, 31 Conn. 74; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; and cases cited in two notes next following.

mortgage or other incumbrance, within the rule, by the recording of such mortgage, the authorities are in conflict. Some decisions are to the effect that he is not so charged with notice, and consequently may with safety make advances until he has actual knowledge of such subsequent incumbrance,<sup>83</sup> while others hold that the mortgage constitutes a lien for each advance, at least when the making of advances is voluntary, only when the advance is made, and that an incumbrance appearing of record before the making of any advance takes precedence thereof, the mortgagee being thus bound to consult the records before making any advance.<sup>84</sup>

There are a number of decisions to the effect that, even though the advances are made with knowledge of an incumbrance accruing since the date of the mortgage in favor of a third person, they take precedence thereof, provided the making of such advances was not optional with the mortgagee, but he was bound by contract to make them.<sup>85</sup> And in at least one case it is decided that any mortgage purporting to secure future advances is security for the advances when made, even as against an incumbrance of which the mortgagee has notice, since the owner of the incumbrance has notice, from the record, of the possibility that such advances will be made.<sup>86</sup>

<sup>83</sup> *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Frye v. Bank of Illinois*, 11 Ill. 367; *Ward v. Cooke*, 17 N. J. Eq. 93; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Union Nat. Bank v. Milburn, etc., Co.*, 7 N. D. 201; 3 *Pomeroy*, Eq. Jur. § 1199.

<sup>84</sup> *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170.

<sup>85</sup> *Boswell v. Goodwin*, 31 Conn. 74; *Brinckmeyer v. Browneller*, 55 Ind. 487; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Ripley v. Harris*, 3 Biss. 199, Fed. Cas. No. 11,853. See *McClure v. Roman*, 52 Pa. St. 458.

<sup>86</sup> *Witczinski v. Everman*, 51 Miss. 841. This view is supported

— Mortgage to indemnify surety.

A mortgage is quite frequently made for the purpose of securing a guarantor or surety against loss by reason of his contract of guaranty or suretyship. Such a mortgage is, in its general effect, similar to one made to secure future advances, and is governed by the same rules.

— Change in amount or evidence of obligation.

Provided the debt secured remains the same, the fact that the evidence thereof is changed, as by the substitution of one note for another, or the giving of a renewal note, does not affect the validity of the mortgage,<sup>87</sup> and the amount of the debt may be changed, provided the sum originally secured is not exceeded.<sup>88</sup> The fact that the substituted note differs otherwise than in amount from the original note is immaterial;<sup>89</sup> and an instrument of an entirely different character may be substituted, provided the actual obligation secured by the mortgage remains the same.<sup>90</sup> Accordingly, the fact that the mortgage debt is merged in a judgment for the debt does not affect the lien of the mortgage as security for the debt.<sup>91</sup>

by Mr. Pomeroy, who discusses the whole question with his usual clearness and acumen. See 3 Pomeroy, Eq. Jur. §§ 1197-1199.

<sup>87</sup> Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538, Kirchwey's Cas. 742; Dunham v. Dey, 15 Johns. (N. Y.) 554, 8 Am. Dec. 282; Dumell v. Terstegge, 23 Ind. 397, 85 Am. Dec. 466; Bolles v. Chauncey, 8 Conn. 389; Cullum v. Branch Bank at Mobile, 23 Ala. 797; Flower v. Elwood, 66 Ill. 446; London & San Francisco Bank v. Bandmann, 120 Cal. 220, 65 Am. St. Rep. 179; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113.

<sup>88</sup> Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538, Kirchwey's Cas. 742; Chase v. Abbott, 20 Iowa, 154; McDonald v. McDonald, 16 Vt. 630; Walters v. Walters, 73 Ind. 425.

<sup>89</sup> Pond v. Clarke, 14 Conn. 334; Darst v. Bates, 51 Ill. 439; Pomeroy v. Rice, 16 Pick. (Mass.) 22; Port v. Robbins, 35 Iowa, 208.

<sup>90</sup> Davis v. Maynard, 9 Mass. 242; Hugunin v. Starkweather, 10 Ill. 492.

<sup>91</sup> Priest v. Wheelock, 58 Ill. 116; Jewett v. Hamlin, 68 Me. 172; (1188)



— Personal liability of mortgagor.

The mortgagor is personally liable for the amount of the mortgage debt, as a rule, by reason of his signature on the note or bond evidencing the debt, and sometimes by force of a covenant in the mortgage to pay the debt, but such liability is not necessary to the validity of the mortgage.<sup>92</sup> Accordingly, a mortgage by a married woman has been held to be valid and enforceable, though she could not be made liable personally for the debt;<sup>93</sup> and, in the majority of states, the mortgage remains valid, though an action to enforce the personal liability of the mortgagor is barred by limitations.<sup>94</sup> So, the fact that the maker of the note secured has been discharged from personal liability in a bankruptcy proceeding does not affect the lien of the mortgage nor the right to enforce it.<sup>95</sup>

— Mortgage to secure support.

As stated in the definition of a mortgage, it may be made to secure the performance of an obligation other than the payment of money. Among the occasional mortgages of this character may be mentioned those by which the mortgagor secures the performance of his contract to support the mortgagee or another person during his life. While such conveyances are usually spoken of as mortgages,<sup>96</sup> in some

Torrey v. Cook, 116 Mass. 168; Morrison v. Morrison, 38 Iowa, 73. See Butler v. Miller, 1 N. Y. 496, Kirchwey's Cas. 746.

<sup>92</sup> Floyer v. Lavington, 1 P. Wms. 268; Mills v. Darling, 43 Me. 565; Rice v. Rice, 4 Pick. (Mass.) 349; Glover v. Payn, 19 Wend. (N. Y.) 518; Davis v. Demming, 12 W. Va. 246.

<sup>93</sup> Brookings v. White, 49 Me. 479; Van Cott v. Heath, 9 Wis. 516; Haffey v. Carey, 73 Pa. St. 431. See, to the contrary, Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86, criticised in 10 Am. Law Rev. 371.

<sup>94</sup> See post, § 549.

<sup>95</sup> Bush v. Cooper, 26 Miss. 599, Kirchwey's Cas. 750; Brown v. Hoover, 77 N. C. 40; 2 Jones, Mortgages, § 1231.

<sup>96</sup> Chase v. Peck, 31 N. Y. 581, Kirchwey's Cas. 124; Gilson v. Gil-

states it is denied that they have any mortgage character, and they are regarded rather as conveyances on condition.<sup>97</sup> Occasionally, in case of nonperformance of the stipulation for support, the right of redemption by payment of adequate damages has been recognized.<sup>98</sup> Such an agreement is *prima facie* of a personal character, and consequently the mortgagor cannot, by transferring the property, relieve himself of the obligation of support, and place it on another person,<sup>99</sup> nor can the mortgagee, if he is the person to be supported, transfer his interest in the mortgage, so as to give another the right to such support.<sup>100</sup>

#### § 514. Illegality of purpose of mortgage.

If the mortgage is given for an illegal purpose, as when it is the price of future sexual intercourse,<sup>101</sup> or when it is

son, 2 Allen (Mass.) 115; Coleman v. Whitney, 62 Vt. 123; Powers v. Patten, 71 Me. 583; Hawkins v. Clermont, 15 Mich. 511. See 1 Jones, Mortgages, §§ 388-394.

<sup>97</sup> Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Soper v. Guernsey, 71 Pa. St. 219.

<sup>98</sup> See Henry v. Tupper, 29 Vt. 358; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700.

Sometimes, when the agreement for support was the consideration for the conveyance of the land to the mortgagor by the mortgagee, the forfeiture has been strictly enforced. Soper v. Guernsey, 71 Pa. St. 219; Bogle v. Bogle, 41 Wis. 209.

<sup>99</sup> Bryant v. Erskine, 55 Me. 153; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Flanders v. Lamphear, 9 N. H. 201. Compare Bodwell Granite Co. v. Lane, 83 Me. 168.

<sup>100</sup> Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Bryant v. Erskine, 55 Me. 153.

<sup>101</sup> W—— v. B——, 32 Beav. 574, Kirchwey's Cas. 219.

A mortgage given in consideration of past sexual intercourse would be a valid lien, since such intercourse is regarded, not as an illegal consideration, but as no consideration (Pollock, Cont. [6th Ed.] 288), and a consideration is unnecessary to support a mortgage, and, even though a consideration were necessary, a seal would be sufficient. (1190)

given to obtain the suppression of a criminal prosecution,<sup>102</sup> neither party can obtain relief in connection therewith by means of a legal proceeding; that is, the mortgagee cannot enforce the mortgage,<sup>103</sup> nor can the mortgagor have it canceled.<sup>104</sup> So, a mortgage given to secure a debt incurred for liquor sold in violation of law,<sup>105</sup> or a gambling debt,<sup>106</sup> will not be enforced. And a mortgage securing notes given in consideration of a payment of money of the Confederate States has been held to be illegal and unenforceable.<sup>107</sup>

When the purpose of a mortgage is to secure payment of a debt which is composed partly of legal and partly of illegal items, if those which are legal can be separated from the balance, the mortgage will be upheld as to them.<sup>108</sup> So, a mortgage undertaking to secure two or more notes has been upheld as security for a legal note, though invalid as to an illegal note.<sup>109</sup> But a mortgage securing but one note, if that

See *Gray v. Mathias*, 5 Ves. 286; *Vallance v. Blagden*, 26 Ch. Div. 353; *Brown v. Kinsey*, 81 N. C. 245; *Wyant v. Leshner*, 23 Pa. St. 338.

<sup>102</sup> *Atwood v. Fisk*, 101 Mass. 363, *Kirchwey's Cas.* 253; *Pearce v. Wilson*, 111 Pa. St. 14, 56 Am. Rep. 243; *Peed v. McKee*, 42 Iowa, 689.

<sup>103</sup> *McQuade v. Rosecrans*, 36 Ohio St. 442, *Kirchwey's Cas.* 248; *Gilbert v. Holmes*, 64 Ill. 548; *Hyatt v. James' Adm'r*, 2 Bush (Ky.) 463, 92 Am. Dec. 505.

After foreclosure, however, of a mortgage given for an illegal debt, even though the mortgagee obtains the title to the land under the foreclosure, the mortgagor cannot recover the land, in the absence of specific statutory authority therefor, the same rule applying as in the case of an absolute conveyance of land on an illegal consideration. *McLaughlin v. Cosgrove*, 99 Mass. 4, *Kirchwey's Cas.* 252.

<sup>104</sup> *Atwood v. Fisk*, 101 Mass. 363, *Kirchwey's Cas.* 253.

<sup>105</sup> *Baker v. Collins*, 9 Allen (Mass.) 253.

<sup>106</sup> *International Bank of Chicago v. Vankirk*, 39 Ill. App. 23; *Barnard v. Backhaus*, 52 Wis. 593.

<sup>107</sup> *Stillman v. Looney*, 3 Cold. (Tenn.) 20, *Kirchwey's Cas.* 251. *Contra*, *Scheible v. Bacho*, 41 Ala. 423.

<sup>108</sup> 1 Jones, *Mortgages*, § 620.

<sup>109</sup> *Morris v. Way*, 16 Ohio, 469.

note is based in part on an illegal consideration, would seem to be void, since the note is void as a whole.<sup>110</sup>

At the present day, in but few of the states is a mortgage totally invalid because it is security for a debt bearing an illegal rate of interest; it being more usually provided merely that the usurious interest shall be forfeited, or, in some states, all interest. In a number of states there is no restriction upon the rate of interest.<sup>111</sup>

§ 515. Agreements for collateral advantage.

There are, in decisions rendered in England and Ireland, *dicta* to the effect that, if the making of a mortgage is accompanied by an agreement in reference either to the mortgaged premises or to another subject, by which the mortgagor obtains some "collateral advantage," such agreement is void.<sup>112</sup> This theory has, however, been exploded by recent decisions, and the rule established that any agreement between the mortgagor and mortgagee, however advantageous to the latter, if not attended with fraud or oppression, is valid, provided it does not interfere with the right of redeeming from the mortgage.<sup>113</sup> So, in this country it has been decided, in at least

<sup>110</sup> *McQuade v. Rosecrans*, 36 Ohio St. 442, *Kirchwey's Cas.* 248; *Brigham v. Potter*, 14 Gray (Mass.) 522; *Bick v. Seal*, 45 Mo. App. 475. But in *Shaw v. Carpenter*, 54 Vt. 155, *Kirchwey's Cas.* 256, it was held that, in such a case, the mortgage was valid to the extent to which the consideration for the note was legal, such part of the consideration being, by well-settled principles, recoverable by the proper action, without reference to the note. See 1 Daniel, Neg. Inst. (4th Ed.) § 204.

<sup>111</sup> See 1 Jones, Mortgages, § 633 et seq.

<sup>112</sup> See Coote, Mortgages, 19, 20; *Jennings v. Ward*, 2 Vern. 520. *Kirchwey's Cas.* 471; *In re Edwards' Estate*, 11 Ir. Ch. 367, *Kirchwey's Cas.* 471; *Broad v. Selfe*, 11 Wkly. Rep. 1036, *Kirchwey's Cas.* 473.

<sup>113</sup> *Biggs v. Hoddinott* [1898] 2 Ch. 307, *Kirchwey's Cas.* 475; *Santley v. Wilde* [1899] 2 Ch. 474, *Kirchwey's Cas.* 488. See *Noakes v.* (1192)

one case, that any agreement made at the time of executing the mortgage, if not affecting the right of redemption, and not intended for the purpose of evading the usury laws, is valid.<sup>114</sup>

## II. RIGHTS AND LIABILITIES INCIDENT TO THE MORTGAGE RELATION.

The mortgagor, as being the owner of the land, has the same right of control thereover as before the making of the mortgage, except as against the owner of the mortgage. The interest of the owner of the mortgage, even in states where he has the legal title, is regarded, for most purposes, as a mere chose in action, and is personal property.

The relation of mortgagee and mortgagor is not that of trustee and cestui que trust, but the former cannot, by virtue of his position, make a profit at the expense of the latter, and in some states he cannot purchase the land if sold for taxes.

In states where the mortgagee has the legal title, he is usually entitled to possession of the land, in the absence of a statute or an agreement to the contrary. In other states the mortgagor is entitled to the possession. The mortgagee must account to the mortgagor for all rents and profits received by him while in possession, or which he might have received by the exercise of diligence, while the mortgagor, if in possession, owes no such duty to the mortgagee.

Upon the making of a mortgage of land subject to a previous lease, the mortgagee, if having the legal title, is entitled to the rent as the assignee of the reversion, but he cannot disturb the lessee's occupancy. If a lease is made by the mortgagor after the mortgage, the mortgagee may enforce his right to possession against the lessee, but the latter, to avoid ejection, may attorn and pay the rent to the mortgagee.

The mortgagee is entitled to make such expenditures on ac-

Rice, [1902] App. Cas. 24, and 13 Harv. Law Rev. 595, 15 Harv. Law Rev. 661.

<sup>114</sup> Gleason's *Adm'x v. Burke*, 20 N. J. Eq. 300, *Kirchwey's Cas.* 496. See, also, *Uhlfelder v. Carter*, 64 Ala. 527.

count of the mortgagor as are necessary to preserve his lien unimpaired, and to make necessary repairs on the premises, but is not usually entitled to credit for improvements made by him while in possession.

The mortgagor and mortgagee have each an insurable interest, the former to the value of the land, and the latter to the extent of his debt.

The mortgagee has a right to an injunction to restrain impairment of his security by injuries to the land, and has also, in most states, a right of action for damages on account of such injuries. In states where he has the legal title he has certain rights of action based thereon for acts of spoliation by the mortgagor or by third persons.

§ 516. The nature of the mortgagor's interest.

Whichever theory as to the character of the mortgagee's interest be adopted, the mortgagor is always regarded as the substantial owner of the land.<sup>115</sup> He may convey or devise<sup>116</sup> or lease it.<sup>117</sup> Upon his death, his estate in the land passes to his heirs or otherwise, in the same way as if there were no mortgage,<sup>118</sup> and the widow of the mortgagor is entitled to

<sup>115</sup> *Casborne v. Scarfe*, 1 Atk. 603; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Willington v. Gale*, 7 Mass. 138; *Trustees of Donations v. Streeter*, 64 N. H. 106; *Jackson v. Willard*, 4 Johns. (N. Y.) 42; *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Den d. Dimon v. Dimon*, 10 N. J. Law, 156; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331; *Wilkins v. French*, 20 Me. 111; *White v. Rittenmyer*, 30 Iowa, 268; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Howard v. Robinson*, 5 Cush. (Mass.) 119; *Whittemore v. Gibbs*, 24 N. H. 484; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

<sup>116</sup> 3 *Pomeroy*, Eq. Jur. § 1204; *Casborne v. Scarfe*, 1 Atk. 603; *White v. Whitney*, 3 Metc. (Mass.) 81; *Clark v. Reyburn*, 3 Wall. (U. S.) 318; *Moore v. Anders*, 14 Ark. 630, 60 Am. Dec. 551. See post, § 525.

<sup>117</sup> *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Hutchinson v. Dearing*, 20 Ala. 798; *Kennett v. Plummer*, 28 Mo. 142. See post, § 521.

<sup>118</sup> *Burgess v. Wheate*, 1 W. Bl. 123; *White v. Rittenmyer*, 30 Iowa, 268; *Packer v. Rochester & S. R. Co.*, 17 N. Y. 233.

dower, and the husband to curtesy.<sup>119</sup> Likewise, the mortgagor may make a second mortgage of the property, or, in fact, any number of mortgages in succession, each mortgagee taking subject to prior mortgages of which he has notice.<sup>120</sup>

— Liability to execution.

The mortgagor's interest is liable to sale under execution for his debts;<sup>121</sup> but it is not, in a number of jurisdictions, liable to execution under a judgment for the mortgage debt, on the ground that this would in effect involve a foreclosure of the mortgage in an unauthorized way.<sup>122</sup> In other jurisdictions it is held that this may be done, the sale under execution being of the land free from the burden of the mortgage.<sup>123</sup>

<sup>119</sup> See ante, §§ 184, 208.

<sup>120</sup> Coote, Mortgages, 371. See post, §§ 541, 545.

<sup>121</sup> *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, *Kirchwey's Cas.* 299; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; *Wiggin v. Heywood*, 118 Mass. 514; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Clinton Nat. Bank v. Manwarring*, 39 Iowa, 281; *Turner v. Watkins*, 31 Ark. 429; *Finley v. Thayer*, 42 Ill. 350; *Lord v. Crowell*, 75 Me. 399; *Gassenheimer v. Molton*, 80 Ala. 521; *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Punderson v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53; *Harwell v. Fitts*, 20 Ga. 723. The common-law rule was otherwise. 4 *Kent's Comm.* 160; *Plunket v. Penson*, 2 Atk. 290; *Van Ness v. Hyatt*, 13 Pet. (U. S.) 294.

<sup>122</sup> *Pugh v. Fairmount Gold & Silver Min. Co.*, 112 U. S. 238; *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 14; *Camp v. Coxe*, 18 N. C. 52; *Palmer v. Foote*, 7 Paige (N. Y.) 437; *Carpenter v. Bowen*, 42 Miss. 28; *Thornton v. Pigg*, 24 Mo. 249; *Goring's Ex'x v. Shreve*, 7 Dana (Ky.) 64; *Boone v. Armstrong*, 87 Ind. 168.

Execution may, however, be levied on the premises in behalf of one to whom the note was assigned without the mortgage. *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329.

<sup>123</sup> *Hollister v. Dillon*, 4 Ohio St. 197; *Cottingham v. Springer*, 23 Ill. 90; *Lydecker v. Bogert*, 38 N. J. Eq. 136; *Whitmore v. Tatum*,

## § 517. Nature of the mortgagee's interest.

The mortgagee has, as before stated, in England and in some of the states, the legal title to the land. This title, however, does not make him the owner of the land, except in so far as the exercise of the rights of an owner is necessary or desirable for the protection of his security.<sup>124</sup> Accordingly, his interest, as being a mere chose in action, is regarded as personal property, although the property mortgaged be freehold, and, on his death intestate, it passes to his personal representatives, and not to his heirs.<sup>125</sup> So, the mortgagee's interest before foreclosure is, as being a mere chose in action, not subject to levy under execution against him.<sup>126</sup>

In jurisdictions where the mortgagee has the legal title, he may bring ejectment against any person wrongfully in possession of the land,<sup>127</sup> and, being entitled to the possession as

54 Ark. 457; *Crooker v. Frazier*, 52 Me. 406. See *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, *Kirchwey's Cas.* 299.

<sup>124</sup> *Wilkins v. French*, 20 Me. 111; *Ellison v. Daniels*, 11 N. H. 374; *Shields v. Lozeur*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Norcross v. Norcross*, 105 Mass. 265.

<sup>125</sup> *Collamer v. Langdon*, 29 Vt. 32; *Webster v. Calden*, 56 Me. 204; *Ladd v. Wiggin*, 35 N. H. 421; *Stevenson v. Polk*, 71 Iowa, 278, 290; *Baldwin v. Hatchett*, 56 Ala. 461; *Mills v. Shepard*, 30 Conn. 98; *Steel v. Steel*, 4 Allen (Mass.) 417; *Buckley v. Daley*, 45 Miss. 338; *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54.

Formerly, in England, the mortgage passed to the heir as real estate, but he held it in trust for the personal representative. *Williams*, Real Prop. 427. This rule was changed by statute providing that the mortgagee's interest should pass to the personal representative. 44 & 45 Vict. c. 41, § 30.

<sup>126</sup> *Huntington v. Smith*, 4 Conn. 235, *Kirchwey's Cas.* 295; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Trapnall's Adm'x v. State Bank*, 18 Ark. 53; *Eaton v. Whiting*, 3 Pick. (Mass.) 484, *Kirchwey's Cas.* 298; *Glass v. Ellison*, 9 N. H. 69; *Jackson v. Willard*, 4 Johns. (N. Y.) 41; *Rickert v. Madeira*, 1 Rawle (Pa.) 325; *Butman v. James*, 34 Minn. 547.

<sup>127</sup> 4 Kent's Comm. 164; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. (1196)



against the mortgagor,<sup>128</sup> may sue him in that form of action.<sup>129</sup> But even in such states, a third person sued in ejectment by the mortgagor is usually not allowed to set up as a defense the outstanding legal title in the mortgagee.<sup>130</sup> In some of such states, the foreclosure of the equity of redemption is usually by means of a common-law action based on the existence of a legal title in the mortgagee.<sup>131</sup>

In jurisdictions where the theory of a legal title in the mortgagee is adopted, the mortgagee of a leasehold estate has been held liable, as an assignee, upon covenants contained in the lease.<sup>132</sup> Where, however, the purely equitable conception of a mortgage prevails, the rule is otherwise, except, perhaps, when the mortgagee takes possession.<sup>133</sup>

854; *Keith v. Swan*, 11 Mass. 216; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Drayton v. Marshall*, 1 Rice Eq. (S. C.) 373, 38 Am. Dec. 84; *Buckley v. Daley*, 45 Miss. 333.

<sup>128</sup> See post, § 519.

<sup>129</sup> *Keech v. Hall*, 1 Doug. 21, *Kirchwey's Cas.* 314; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Doe d. Shute v. Grimes*, 7 Blackf. (Ind.) 1; *Brastow v. Barrett*, 82 Me. 456; *Tryon v. Munson*, 77 Pa. St. 250, *Finch's Cas.* 533.

<sup>130</sup> *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52; *Burr v. Spencer*, 26 Conn. 159, 68 Am. Dec. 379; *Allen v. Kellam*, 69 Ala. 447; *Denby v. Mellgrew*, 58 Ala. 147; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Hall v. Lance*, 25 Ill. 277; *Ellison v. Daniels*, 11 N. H. 274 (writ of entry); *Den d. Dimon v. Dimon*, 10 N. J. Law, 156; *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591 (writ of entry). But in Maryland the mortgagor cannot sue in ejectment. *Beall v. Harwood*, 2 Har. & J. (Md.) 167, 3 Am. Dec. 532; *Berry v. Derwart*, 55 Md. 66.

<sup>131</sup> See post, § 552.

<sup>132</sup> *McMurphy v. Minot*, 4 N. H. 251, *Kirchwey's Cas.* 289, 2 *Gray's Cas.* 743 (compare *Trustees of Donations v. Streeter*, 64 N. H. 106); *Williams v. Bosanquet*, 1 Brod. & B. 238; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69; *Mayhew v. Hardesty*, 8 Md. 479.

<sup>133</sup> *Astor v. Hoyt*, 5 Wend. (N. Y.) 603, *Kirchwey's Cas.* 292; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *McKee v. Angelrodt*, 16 Mo. 283.

## § 518. The relation not fiduciary.

Though the mortgagee has, in those states in which the common-law theory of a mortgage is adopted, the legal title, while the mortgagor has an equitable interest merely, the relation is not one of trust, but is adversary, rather, in its nature.<sup>134</sup> The position of the mortgagee is, however, similar to that of a trustee, in that, having procured the title, and perhaps the right of possession, for one purpose,—that is, to secure his debt,—he cannot utilize it for another purpose,—that is, to make profits for his own advantage. Accordingly, the mortgagee is required to account for the rents and profits received by him while in possession.<sup>135</sup> So, if the mortgagee, by reason of his position, obtains a new lease upon the land, such lease is regarded, not as belonging to him absolutely, but as a part of the interest mortgaged, and so subject to the right of redemption.<sup>136</sup>

In some jurisdictions, however, it is held that if the mortgagee buys the land at tax sale, he cannot assert the title so acquired as against the mortgagor or other lienors.<sup>137</sup> In stating this view, the courts sometimes tend to base it on a *quasi* trust relation existing between the mortgagor and mortgagee, though it might perhaps be as well supported, in the majority of cases, on the ground that the mortgagee, as well as the mortgagor, is under an obligation to pay the taxes.<sup>138</sup> In some

<sup>134</sup> *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 177, *Kirchwey's Cas.* 570; *King v. State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 7; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130, 142; *Ten Eyck v. Craig*, 62 N. Y. 406, *Kirchwey's Cas.* 590.

<sup>135</sup> See post, § 520.

<sup>136</sup> *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30, *Kirchwey's Cas.* 579; *Manlove v. Bale*, 2 Vern. 84, *Kirchwey's Cas.* 569. See *Moore v. Titman*, 44 Ill. 367.

<sup>137</sup> *Hall v. Westcott*, 15 R. I. 373, *Kirchwey's Cas.* 598; *Woodbury v. Swan*, 59 N. H. 22; *Moore v. Titman*, 44 Ill. 367; *Fair v. Brown*, 40 Iowa, 209; *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113.

<sup>138</sup> See *Cooley, Taxation*, 508; *Schenck v. Kelley*, 88 Ind. 444.

jurisdictions, however, a purchase at tax sale by the mortgagee is valid, as he owes no duty to the mortgagor or other persons interested in the land to pay the taxes.<sup>139</sup>

Apart from the question as to his right to purchase at tax sale, it is generally agreed that he may purchase any outstanding title,<sup>140</sup> provided he does not do so to the injury of the mortgagor,<sup>141</sup> and may accordingly purchase at a sale under a prior mortgage, judgment, or other lien.<sup>142</sup>

§ 519. The right to possession of the land.

Under the common-law view of a mortgage as passing the legal title, the mortgagee is entitled to the possession of the premises, and this is still generally the rule in states where the legal theory of a mortgage is held, except in so far as it may be changed by statute.<sup>143</sup> When, however, the security is sufficient, the mortgagee rarely asserts his right to possession, although entitled thereto, since he is bound, if he does take possession, to account for the rents and profits of the land,<sup>144</sup> and there is nothing to be gained by taking possession.<sup>145</sup>

<sup>139</sup> *Williams v. Townsend*, 31 N. Y. 411, *Kirchwey's Cas.* 585; *Waterson v. Devoe*, 18 Kan. 223.

<sup>140</sup> *Walthall's Ex'rs v. Rives*, 34 Ala. 92; *Waterson v. Devoe*, 18 Kan. 223; *Cameron v. Irwin*, 5 Hill (N. Y.) 280; *Harrison v. Roberts*, 6 Fla. 711.

<sup>141</sup> See *Griffin v. Marine Co. of Chicago*, 52 Ill. 130.

<sup>142</sup> *Kirkwood v. Thompson*, 2 De Gex, J. & S. 613, *Kirchwey's Cas.* 574; *Ten Eyck v. Craig*, 62 N. Y. 406, *Kirchwey's Cas.* 590; *Woodlee v. Burch*, 43 Mo. 231; *Walthall's Ex'rs v. Rives*, 34 Ala. 92; *Harrison v. Roberts*, 6 Fla. 711; *Roberts v. Fleming*, 53 Ill. 196.

<sup>143</sup> 4 Kent's Comm. 155; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Knox v. Eaton*, 38 Ala. 345; *Lackey v. Holbrook*, 11 Metc. (Mass.) 458; *Kannady v. McCarron*, 18 Ark. 166; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 433; *Gray v. Gillespie*, 59 N. H. 469; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Brastow v. Barrett*, 82 Me. 456; *Youngman v. Railroad Co.*, 65 Pa. St. 278. Contra, *Shields v. Lozeau*, 34 N. J. Law, 496, 8 Am. Rep. 256, *Kirchwey's Cas.* 728; *Allen v. Everly*, 24 Ohio St. 97.

<sup>144</sup> See post, § 520.

In states where the equitable theory of a mortgage prevails, and the mortgagee has no legal title, the mortgagee is not entitled to the possession as against the mortgagor, since he has merely a lien on the land. As a matter of fact, however, there appears to be, in all such states, a statutory provision that the mortgagor shall remain in possession till foreclosure.<sup>146</sup> But even in the latter class of states it is held that the mortgagor cannot, after default, recover possession of the land from the mortgagee, his only remedy being to redeem,<sup>147</sup> and by some cases it is apparently asserted that he has no such right against the mortgagee even before default.<sup>148</sup>

— Agreement as to possession.

The rule prevailing in the particular jurisdiction as to the possession of the mortgaged land may be changed by agreement, express or implied. Accordingly, where the mortgagee is otherwise entitled to possession, it may be agreed that the mortgagor shall have it,<sup>149</sup> and such an agreement is implied

<sup>146</sup> See 4 Kent's Comm. 155.

<sup>146</sup> See 1 Stimson's Am. St. Law, §§ 1832, 1833; 1 Jones, Mortgages, § 18-57.

<sup>147</sup> *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Pell v. Ulmar*, 18 N. Y. 139; *Fee v. Swingly*, 6 Mont. 596; *Frink v. Le Roy*, 49 Cal. 314; *Jones v. Rigby*, 41 Minn. 530; *Cooke v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; 1 Jones, Mortgages, § 715.

The fact that the mortgagee in possession may have received rents and profits from the land to an amount greater than the sum due on the mortgage does not affect his right to retain possession until they are applied by judgment of a court in satisfaction of the mortgage. *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334.

<sup>148</sup> *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314; *Duke v. Reed*, 64 Tex. 705; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334 (semble). Compare *Howell v. Leavitt*, 95 N. Y. 617, *Finch's Cas.* 1043.

<sup>149</sup> *Youngman v. Railroad Co.*, 65 Pa. St. 278; *Furbush v. Goodwin*, 29 N. H. 321.

if the provisions of the mortgage evidently contemplate the mortgagor's possession,<sup>150</sup> as when the mortgagor agrees to cultivate the land.<sup>151</sup> So, on the other hand, in states where the rule is that the mortgagee is entitled to possession, it may by agreement be given to the mortgagor.<sup>152</sup>

§ 520. Rents and profits—Mortgagor in possession.

A mortgagor who is in possession, either by consent of the mortgagee or otherwise, is entitled to receive and apply to his own use the rents and profits of the land;<sup>153</sup> and this is so, even when the mortgage expressly includes rents and profits.<sup>154</sup> But if the property is insufficient in value to afford proper security to the mortgagee, and the mortgagor is insolvent, and the mortgagee is without other means of protection, a court of equity will generally appoint a receiver to take charge of the rents and profits.<sup>155</sup>

<sup>150</sup> *Soper v. Guernsey*, 71 Pa. St. 219; *Clay v. Wren*, 34 Me. 187; *Dearborn v. Dearborn*, 9 N. H. 117; *Wales v. Mellen*, 1 Gray (Mass.) 512.

<sup>151</sup> *Flagg v. Flagg*, 11 Pick. (Mass.) 475.

<sup>152</sup> *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613; *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314.

<sup>153</sup> 4 Kent's Comm. 157; *Teal v. Walker*, 111 U. S. 242, *Kirchwey's Case*, 340; *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201; *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786; *Boston Bank v. Reed*, 8 Pick. (Mass.) 462; *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672; *Childs v. Hurd*, 32 W. Va. 66, 87.

<sup>154</sup> *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *In re Life Ass'n of America*, 96 Mo. 632; *Mississippi Valley & W. Ry. Co. v. United States Express Co.*, 81 Ill. 534. But see *Dunham v. Isett*, 15 Iowa, 284.

<sup>155</sup> *Price v. Dowdy*, 34 Ark. 285; *Haas v. Chicago Building Soc.*, 89 Ill. 498; *Phillips v. Elland*, 52 Miss. 721; *Astor v. Turner*, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; *Schreiber v. Carey*, 48 Wis. 208. See, on this question, note to *Hardin v. Hardin*, 27 Am. St. Rep. 794. Sometimes the court will not appoint a receiver on account of the

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— Mortgagee in possession.

The mortgagee, if in possession, is entitled to the rents and profits, but he is bound to account therefor on redemption by the mortgagor, or on foreclosure, and apply them on the mortgage debt.<sup>156</sup> And the mortgagee in possession is bound to account not only for rents and profits actually received by him, but also for what he might have received by the exercise of reasonable diligence in renting or otherwise utilizing the mortgaged premises.<sup>157</sup> If he does exercise such diligence, he is liable only for what he has received.<sup>158</sup> If the mortgagee himself occupies the premises, he is liable for a reasonable rent;<sup>159</sup> but he is not liable for an increase of rent-

mere inadequacy of the security and insolvency of the mortgagor, but requires a showing of waste, or bad faith of some sort. See *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 40, 64 Am. Dec. 478. See, also, *Haas v. Chicago Building Soc.*, 89 Ill. 498.

<sup>156</sup> *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Murdock v. Clarke*, 59 Cal. 683; *Peugh v. Davis*, 113 U. S. 542; *Dawson v. Drake*, 20 N. J. Eq. 601; *Ten Eyck v. Casad*, 15 Iowa, 524; *Caldwell v. Hall*, 49 Ark. 509, 4 Am. St. Rep. 64; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Brown v. South Boston Sav. Bank*, 148 Mass. 300; *Irwin v. Davidson*, 38 N. C. 311; *Clark v. Finlon*, 90 Ill. 245; *Seaver v. Durant*, 39 Vt. 103.

<sup>157</sup> Anonymous, 1 Vern. 45, *Kirchwey's Cas.* 543; *Hughes v. Williams*, 12 Ves. 493, *Kirchwey's Cas.* 543; *Schaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, *Kirchwey's Cas.* 548; *Daniel v. Coker*, 70 Ala. 260; *Miller v. Lincoln*, 6 Gray (Mass.) 556; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281; *Sanders v. Wilson*, 34 Vt. 318; *Clark v. Finlon*, 90 Ill. 245; *Milliken v. Bailey*, 61 Me. 316; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. (N. Y.) 33.

<sup>158</sup> Anonymous, 1 Vern. 45, *Kirchwey's Cas.* 543; *Brown v. South Boston Sav. Bank*, 148 Mass. 300; *Felch v. Felch* (Vt.) 9 Law Rep 217, *Kirchwey's Cas.* 545; *Moshier v. Norton*, 100 Ill. 63; *Gerrish v. Black*, 104 Mass. 400; *Hogan v. Stone*, 1 Ala. 496; *Peugh v. Davis*, 113 U. S. 542.

<sup>159</sup> 4 Kent's Comm. 166; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Strong v. Blanchard*, 4 Allen (Mass.) 538; *Sanders v. Wilson*, 34 Vt. 318; *Barnett v. Nelson*, 54 Iowa, 41, 37 Am. Rep. 183.

al value or profits arising from improvements made by himself, with the cost of which he is not credited.<sup>100</sup>

In order thus to charge one, as a mortgagee in possession, with the profits which he might have received by the exercise of reasonable diligence, it is necessary that he be in possession as mortgagee, and with knowledge that he occupies such a relation, and he is not so liable if he is in possession otherwise, or he believes himself to be a purchaser, and it afterwards turns out that he has merely a mortgage or other lien on the land.<sup>101</sup>

— Annual rests.

The mortgagee is usually required, in accounting for the rents and profits received, to make a rest at the end of each year, if at that time the rents and profits received exceed the interest due, and to deduct such excess from the principal sum in determining the amount to bear interest during the following year, since otherwise the mortgagee would have the use of such excess without paying therefor.<sup>102</sup> Occasionally the court will require the rests to be made more frequently than once a year.<sup>103</sup>

<sup>100</sup> 4 Kent's Comm. 166; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 335; *Kirchwey's Cas.* 524; *Jones v. Fletcher*, 42 Ark. 422; *Dozier v. Mitchell*, 65 Ala. 511; *Montgomery v. Chadwick*, 7 Iowa, 114; *McArthur v. Franklin*, 16 Ohio St. 193; *Hidden v. Jordan*, 28 Cal. 302.

<sup>101</sup> *Parkinson v. Hanbury*, L. R. 2 H. L. 1, *Kirchwey's Cas.* 550; *Morris v. Budlong*, 78 N. Y. 555, *Kirchwey's Cas.* 559; *Daniel v. Coker*, 70 Ala. 260; *Young v. Omohundro*, 69 Md. 424; *Gaskell v. Viquesney*, 122 Ind. 244; *Hall v. Westcott*, 17 R. L. 504. See *Barnard v. Jennison*, 27 Mich. 230.

<sup>102</sup> *Van Vronker v. Eastman*, 7 Metc. (Mass.) 157, *Kirchwey's Cas.* 561; *Moshier v. Norton*, 100 Ill. 63, 73; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, *Kirchwey's Cas.* 548; *Gladding v. Warner*, 36 Vt. 54; *Snively v. Pickle*, 29 Grat. (Va.) 27; *Green v. Wescott*, 13 Wis. 606; *Gordon v. Lewis*, 2 Sumn. 143, Fed. Cas. No. 5,613.

<sup>103</sup> *Adams v. Sayre*, 76 Ala. 509; *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

**§ 521. Effect of a lease of the land—Lease before mortgage.**

In the case of a lease made by the mortgagor before making the mortgage, the mortgagee, if entitled to the possession as having the legal title, may at any time demand that the lessee pay the rent to him instead of to the mortgagor, and the lessee, after such notice, is liable to the mortgagee for rent, accruing since the date of the mortgage, which is due and as yet unpaid, and likewise for all rent thereafter becoming due,<sup>164</sup> unless, perhaps, this has been paid in advance.<sup>165</sup> The rights of the tenant under such lease to possession of the premises cannot, however, be affected by the making of a subsequent mortgage.<sup>166</sup>

**— Lease after mortgage.**

After making the mortgage, the mortgagor cannot, even though in possession, make a lease of the land which will affect any right which the mortgagee may have, by virtue of his legal title, to obtain possession, and the latter may, if entitled to possession, eject the lessee.<sup>167</sup> In the case of a lease thus made by the mortgagor, the mortgage previously

<sup>164</sup> *Moss v. Gallimore*, 1 Doug. 279, *Kirchwey's Cas.* 316; *King v. Housatonic R. Co.*, 45 Conn. 226, *Kirchwey's Cas.* 338; *White v. Whitney*, 3 Metc. (Mass.) 87; *Mirick v. Hoppin*, 118 Mass. 582; *Kimball v. Lockwood*, 6 R. I. 138, *Kirchwey's Cas.* 332; *Comer v. Sheehan*, 74 Ala. 452.

<sup>165</sup> By some decisions, he is liable to the mortgagee for rent due after the notice, even though he paid it in advance before receiving notice. *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132. Contra, *Stone v. Patterson*, 19 Pick. (Mass.) 476, *Kirchwey's Cas.* 331.

<sup>166</sup> *Moss v. Gallimore*, 1 Doug. 279, *Kirchwey's Cas.* 316.

<sup>167</sup> *Keech v. Hall*, 1 Doug. 21, *Kirchwey's Cas.* 314; *Doe d. Roby v. Maisey*, 8 Barn. & C. 767; *McDermott v. Burke*, 16 Cal. 580; *Comer v. Sheehan*, 74 Ala. 452; *Russum v. Wanser*, 53 Md. 92; *Stedman v. Gassett*, 13 Vt. 346; *Gartside v. Outley*, 58 Ill. 210; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Downard v. Goff*, 40 Iowa, 597; *Lane v. King*, 8 Wend. (N. Y.) 584, *Finch's Cas.* 197.



made is not regarded as vesting in the mortgagee a title to the reversion to which the rent is incident, and consequently, since there is no privity of estate or contract between him and the lessee, he cannot, by action or by distress, proceed for the recovery of rent.<sup>168</sup> The tenant under such lease may, however, in order to avoid eviction by the mortgagee, "attorn" to the mortgagee by recognizing him as his landlord, thus creating a new tenancy, and such attornment is a good defense to the claim of the mortgagor for rent.<sup>169</sup> Such a new tenancy under the mortgagee has been held to be sufficiently shown by the fact that the mortgagee has notified the mortgagor's lessee to pay the rent to him, and the latter has not repudiated the demand;<sup>170</sup> and likewise by the fact that the tenant continues to occupy the premises after the mortgagee has entered thereon under his mortgage.<sup>171</sup>

#### § 522. Expenditures by mortgagee.

The mortgagee is entitled to pay off an incumbrance on the land prior to his mortgage, in order to protect the latter, and may claim a credit for the amount so paid;<sup>172</sup> and

<sup>168</sup> *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Massachusetts Hospital Life Ins. Co. v. Wilson*, 10 Metc. (Mass.) 126; *Teal v. Walker*, 111 U. S. 242; *Kirchwey's Cas.* 332; *Kimball v. Lockwood*, 6 R. I. 138; *Kirchwey's Cas.* 332; *Evans v. Elliot*, 9 Adol. & E. 342; *Drakford v. Turk*, 75 Ala. 339; *Stedman v. Gassett*, 18 Vt. 346; *Hogsett v. Ellis*, 17 Mich. 351; *Bartlett v. Hitchcock*, 10 Ill. App. 87.

<sup>169</sup> *Jones v. Clark*, 20 Johns. (N. Y.) 51; *Kirchwey's Cas.* 322; *Magill v. Hinsdale*, 6 Conn. 464a; *Sanderson v. Price*, 21 N. J. Law, 637; *Gartside v. Outley*, 58 Ill. 210; *Kimball v. Lockwood*, 6 R. I. 138; *Kirchwey's Cas.* 332; *Comer v. Sheehan*, 74 Ala. 452. *Contra*, *Hogsett v. Ellis*, 17 Mich. 351.

<sup>170</sup> *Brown v. Storey*, 1 Man. & G. 117; *Stedman v. Gassett*, 18 Vt. 346. Compare *Bartlett v. Hitchcock*, 10 Ill. App. 87.

<sup>171</sup> *Massachusetts Hospital Life Ins. Co. v. Willson*, 10 Metc. (Mass.) 126; *Gartside v. Outley*, 58 Ill. 210.

<sup>172</sup> *McCormick v. Knox*, 105 U. S. 122; *Harper v. Ely*, 70 Ill. 531; *Kirchwey's Cas.* 562; *Weld v. Sabin*, 20 N. H. 538, 51 Am. Dec. 240;

on this principle he is entitled to be repaid, as part of the mortgage debt, any expenditures by him for taxes on the property.<sup>173</sup> He is also entitled to recover reasonable expenses incurred in defending the mortgagor's title.<sup>174</sup> He can claim reimbursement for insurance premiums paid by him when the mortgagor agreed to insure, and failed to do so.<sup>175</sup>

The mortgagee is not usually allowed for personal services in connection with the management of the premises, though he may charge for the services of a bailiff whom it is necessary to employ.<sup>176</sup>

— Repairs and improvements.

The mortgagee in possession is allowed for the cost of any necessary repairs made by him.<sup>177</sup> He can claim to be reimbursed for improvements, as distinct from repairs, if these are necessary for the proper enjoyment of the premises, but

*Davis v. Winn*, 2 Allen (Mass.) 111; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334; *Comstock v. Michael*, 17 Neb. 288.

<sup>173</sup> *Sidenberg v. Ely*, 90 N. Y. 257, *Kirchwey's Cas.* 564; *McCormick v. Knox*, 105 U. S. 122; *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 85 Me. 547, 58 Am. Dec. 729; *Gooch v. Botts*, 110 Mo. 419.

<sup>174</sup> *Godfrey v. Watson*, 3 Atk. 517, *Kirchwey's Cas.* 563; *Miller v. Whittier*, 36 Me. 577; *Riddle v. Bowman*, 27 N. H. 236; *Clark v. Smith*, 1 N. J. Eq. 122.

<sup>175</sup> *Harper v. Ely*, 70 Ill. 581; *Stinchfield v. Milliken*, 71 Me. 567; *Fowley v. Palmer*, 5 Gray (Mass.) 549.

<sup>176</sup> 4 Kent's Comm. 166; *Godfrey v. Watson*, 3 Atk. 517; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Harper v. Ely*, 70 Ill. 581; *Elmer v. Loper*, 25 N. J. Eq. 475; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62. By some cases, however, the mortgagee has been allowed a commission on rents collected by him. *Waterman v. Curtis*, 26 Conn. 241; *Gerrish v. Black*, 104 Mass. 400.

<sup>177</sup> *McCumber v. Gilman*, 15 Ill. 381, *Kirchwey's Cas.* 536; *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Harper's Appeal*, 64 Pa. St. 315; *Dewey v. Brownell*, 54 Vt. 441. *Contra*, *Barthell v. Syverson*, 54 Iowa, 160.

not usually if they are merely calculated to render the property more desirable.<sup>178</sup> But a mortgagee in possession or one standing in his place, as a purchaser under a void foreclosure sale,<sup>179</sup> who, in the reasonable belief that he has the absolute title to the land, makes lasting improvements thereon, is usually allowed therefor in a proceeding by the mortgagor for redemption,<sup>180</sup> on the general equitable principle before referred to.<sup>181</sup>

§ 523. Insurance—By mortgagor.

The mortgagor has an insurable interest in the land,<sup>182</sup> and may insure to the full value of the property, even though

<sup>178</sup> *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385, *Kirchwey's Cas.* 524; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231; *Bradley v. Merrill*, 88 Me. 319; *Malone v. Roy*, 107 Cal. 518; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *McCumber v. Gilman*, 15 Ill. 381, *Kirchwey's Cas.* 536; *Miller v. Curry*, 124 Ind. 48; *Adkins v. Lewis*, 5 Or. 292; *Wells v. Van Dyke*, 109 Pa. St. 330.

The mortgagor is, of course, bound to allow for the improvements if he consented to the making of them by the mortgagee. *Bradey v. Merrill*, 88 Me. 319; *Cazenove v. Cutler*, 4 Metc. (Mass.) 246; *Shepard v. Jones*, 21 Ch. Div. 469, *Kirchwey's Cas.* 514, per *Jessel, M. R.*

In England the rule is more liberal to the mortgagee, and he is allowed for lasting improvements of a reasonable character, increasing the value of the property. *Sandon v. Hooper*, 6 Beav. 246, *Kirchwey's Cas.* 511; *Shepard v. Jones*, 21 Ch. Div. 469, *Kirchwey's Cas.* 514; *Henderson v. Astwood* [1894] App. Cas. 150.

<sup>179</sup> See post, § 554.

<sup>180</sup> *Mickles v. Dillaye*, 17 N. Y. 80, *Kirchwey's Cas.* 526; *Morgan v. Walbridge*, 56 Vt. 405, *Kirchwey's Cas.* 539; *Hicklin v. Marco*, 46 Fed. 424; *Ensign v. Batterson*, 68 Conn. 298; *Bradley v. Merrill*, 88 Me. 319; *Gillis v. Martin*, 17 N. C. 470, 25 Am. Dec. 729; *McSorley v. Larissa*, 100 Mass. 270; *Millard v. Truax*, 73 Mich. 381; *Harper's Appeal*, 64 Pa. St. 315; *Bacon v. Cottrell*, 13 Minn. 194 (Gill. 183); *Hadley v. Stewart*, 65 Wis. 481. But see *Miller v. Curry*, 124 Ind. 48.

<sup>181</sup> See ante, § 241.

<sup>182</sup> *Royal Ins. Co. v. Stinson*, 103 U. S. 29; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69;

the mortgage be for such value.<sup>183</sup> His insurable interest continues even after foreclosure, and until his right to redeem is barred;<sup>184</sup> and his mere personal liability for the debt gives him an insurable interest, even when he has conveyed the mortgaged land to another.<sup>185</sup>

If, as is usually the case, the mortgagor, in compliance with stipulations in the mortgage, takes out insurance for the mortgagee's benefit, or assigns his policy to the mortgagee, the latter is entitled to the proceeds of the insurance to the extent of the mortgage debt, and has an equitable lien thereon.<sup>186</sup> But if the insurance is taken out by the mortgagor purely for his own account, in the absence of any agreement in that regard with the mortgagee, the latter has no claim on the proceeds.<sup>187</sup>

*Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98.

The giving of a mortgage does not involve breach of a condition in the insurance policy against alienation. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. St. Rep. 582; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 44 Am. St. Rep. 859.

<sup>183</sup> *Royal Ins. Co. v. Stinson*, 103 U. S. 25; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448.

<sup>184</sup> *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Richland County Mut. Ins. Co. v. Sampson*, 38 Ohio St. 672.

<sup>185</sup> *Waring v. Loder*, 53 N. Y. 581.

<sup>186</sup> *Wheeler v. Factors' & Traders' Ins. Co.*, 101 U. S. 439; *Thomas Adm'r v. Vonkapff's Ex'rs*, 6 Gill & J. (Md.) 372; *In re Sands Ale Brewing Co.*, 3 Biss. 175, Fed. Cas. No. 12,307; *Ames v. Richardson*, 29 Minn. 330; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Miller v. Aldrich*, 31 Mich. 408; *Nichols v. Baxter*, 5 R. I. 491; *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393, 39 Am. St. Rep. 906; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641.

<sup>187</sup> *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet. (U. S.) 507; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) (1208)

## — By the mortgagee.

The mortgagee also has an insurable interest,<sup>188</sup> but only to the amount of the mortgage debt;<sup>189</sup> and this interest continues till the mortgage debt is paid, or the land passes into other hands by foreclosure.<sup>190</sup> The mortgagee's right to the proceeds of the insurance taken out by him is not affected by the fact that the property is still, even after the loss insured against, sufficient security for the amount of the mortgage.<sup>191</sup> The interests of the mortgagor and mortgagee are so distinct that both may be insured at the same time.<sup>192</sup>

495; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, Fed. Cas. No. 6,013; *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389, 29 Am. Dec. 256; *Ryan v. Adamson*, 57 Iowa, 30; *Ames v. Richardson*, 29 Minn. 330; *Nichols v. Barter*, 5 R. I. 491; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219.

<sup>188</sup> *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683; *Grevemeyer v. Southern Mut. Fire Ins. Co.*, 62 Pa. St. 340, 1 Am. Rep. 420; *Clark v. Washington Ins. Co.*, 100 Mass. 509, 1 Am. Rep. 135; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, 22 Am. St. Rep. 324.

<sup>189</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 499; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546; *Hadley v. New Hampshire Ins. Co.*, 55 N. H. 110.

<sup>190</sup> *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, 22 Am. St. Rep. 324; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683.

His insurable interest continues even after his assignment of the note, if he is liable as an indorser on the mortgage note. *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41.

<sup>191</sup> *Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.) 216; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546; *Aetna Ins. Co. of Hartford v. Baker*, 71 Ind. 102.

<sup>192</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.)

If there is no provision in the mortgage requiring the mortgagor to insure the premises, or other agreement on the subject, insurance effected by the mortgagee is purely for his own account, and in case of loss he is entitled to the proceeds of insurance free from any claim by the mortgagor to have it applied on the mortgage debt.<sup>193</sup> If, however, the mortgagee insures the property on account of the mortgagor, or by his request, or at his expense, because the latter fails to comply with his covenant to insure, the proceeds of the policy must be applied on the mortgage debt.<sup>194</sup>

In most states it is held that, upon receipt of the proceeds of insurance by the mortgagee, the insurance company becomes subrogated to the rights of the mortgagee to the extent of the amount thus paid, the mortgagee not being allowed the proceeds of both the mortgage and insurance.<sup>195</sup>

495; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 54 Am. Rep. 578.

<sup>193</sup> *Russell v. Southard*, 12 How. (U. S.) 139; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Stinchfield v. Milliken*, 71 Me. 567; *McIntire v. Plalsted*, 68 Me. 363; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *White v. Brown*, 2 Cush. (Mass.) 412.

<sup>194</sup> *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Nichols v. Baxter*, 5 R. I. 491.

<sup>195</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447. In Massachusetts the contrary view is taken,—that the mortgagee may recover both the proceeds of insurance and the full amount of the mortgage. *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.) 123.

## § 524. Injuries to the land—Remedies of the mortgagee.

The owner of land subject to a mortgage may do such acts thereon, even though these involve the cutting of timber or severance of other parts of the realty, as are incident to the use, occupation, or improvement of the land in the ordinary manner, and for the purposes for which such land is ordinarily used;<sup>196</sup> but he cannot so use the land as to substantially impair the value of the premises as security by cutting timber, removing buildings, and the like, this being regarded as waste on his part.<sup>197</sup> Such commission of waste by him, if calculated to render the security of questionable sufficiency, but not otherwise, will be restrained by injunction at the suit of the holder of the mortgage.<sup>198</sup>

In a few states it seems that the mortgagee's only remedy for such acts by the mortgagor is by injunction, and that he cannot recover at law for any waste or injury to the land.<sup>199</sup> In most of the states, however, although the legal

<sup>196</sup> *Judkins v. Woodman*, 81 Me. 351; *Smith v. Moore*, 11 N. H. 55; *Hapgood v. Blood*, 11 Gray (Mass.) 400; *Wright v. Lake*, 30 Vt. 206; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624; *Hoskin v. Woodward*, 45 Pa. St. 42; *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425, *Kirchwey's Cas.* 427; *In re Phillips*, 16 Ch. Div. 104.

<sup>197</sup> *Simmins v. Shirley*, 6 Ch. Div. 173; *Maples v. Millon*, 31 Conn. 598; *Dorr v. Dudderar*, 88 Ill. 107; *Langdon v. Paul*, 22 Vt. 205; *Sanders v. Reed*, 12 N. H. 558; *Wilmarth v. Bancroft*, 10 Allen (Mass.) 348. But that he can cut timber or take minerals, see *Hoskin v. Woodward*, 45 Pa. St. 44; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624.

<sup>198</sup> *King v. Smith*, 2 Hare, 239, *Kirchwey's Cas.* 410; *Buckout v. Swift*, 27 Cal. 434, 37 Am. Dec. 90; *Coker v. Whitlock*, 54 Ala. 180; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203; *Webster v. Peet*, 97 Mich. 326; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387; *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Fairbank v. Cudworth*, 33 Wis. 358; *Dorr v. Dudderar*, 88 Ill. 107; *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

<sup>199</sup> *Cooper v. Davis*, 15 Conn. 556, *Kirchwey's Cas.* 416; *Vanderlice v. Knapp*, 20 Kan. 647; *Tomlinson v. Thompson*, 27 Kan. 70. See

title is not in the mortgagee, he has a right of action against either the owner of the mortgaged land<sup>200</sup> or a third person<sup>201</sup> for injury to his security by acts of spoliation on the land.

In most of the states where the mortgagee has the legal title, accompanied by the right of possession, he has usually the remedies incident to such title or right. He may, it has been held, recover in trespass *quare clausum fregit* against one injuring the land;<sup>202</sup> and when timber or fixtures are removed from the land, his title thereto is not affected by the wrongful severance, and he may recover their value in an action of trover or trespass *de bonis asportatis* from the person, whether the owner of the land or another, who committed the wrong,<sup>203</sup> or he may recover the articles them-

Triplett v. Parmlee, 16 Neb. 649. These decisions place the mortgagee rather at the mercy of an unscrupulous mortgagor, and there would seem, on principle, no reason why one injured as regards a proprietary right, even though it be a lien right only, should not have an action of tort against the person committing the injury.

<sup>200</sup> Jackson v. Turrell, 39 N. J. Law, 329; Carpenter v. Cincinnati & Whitewater Canal Co., 35 Ohio St. 307; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147; Van Pelt v. McGraw, 4 N. Y. 110, Kirchwey's Cas. 421; Searle v. Sawyer, 127 Mass. 491, Kirchwey's Cas. 427; Langdon v. Paul, 22 Vt. 205.

<sup>201</sup> Van Pelt v. McGraw, 4 N. Y. 110, Kirchwey's Cas. 421; Webber v. Ramsey, 100 Mich. 53, 43 Am. St. Rep. 429, note; Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605; Gooding v. Shea, 103 Mass. 360; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147, note; Atkinson v. Hewett, 63 Wis. 396. The mortgagee cannot, however, recover, it has been decided in New York, for injury to the land, as by cutting timber, against one so doing in ignorance of the existence of the mortgage, and under contract with the owner of the land. Wilson v. Maltby, 59 N. Y. 126, Kirchwey's Cas. 424. Compare Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425, Kirchwey's Cas. 427.

<sup>202</sup> Stowell v. Pike, 2 Me. 387, Kirchwey's Cas. 414; Smith v. Goodwin, 2 Me. 173; Leavitt v. Eastman, 77 Me. 117; Sanders v. Read, 13 N. H. 558.

<sup>203</sup> Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425, Kirchwey's Cas. 427; Cole v. Stewart, 11 Cush. (Mass.) 181; Burnside v. Twitch (1212)



selves in replevin.<sup>204</sup> In some of the states, however, in which the legal title is regarded as in the mortgagee, as well as in those in which the equitable theory prevails, the mortgagee's lien or title is regarded as divested by the severance, so that he cannot assert any rights in the things severed.<sup>205</sup>

Occasionally it is said that there is no right of action as for the injury to the security unless such injury is shown by the existence of a deficiency on foreclosure,<sup>206</sup>—a rule calculated to affect the mortgagee adversely by compelling him to defer his action for damages until after foreclosure. In states where the legal title is in the mortgagee, however, the mortgagee's right of action is independent of the sufficiency of the security, he being entitled to the whole security pledged.<sup>207</sup>

—Remedies of the mortgagor.

The mortgagee, if in possession, owes the duty to the mortgagor not to commit waste, and may be restrained from so doing by injunction,<sup>208</sup> and may be required to account for

all, 43 N. H. 390; Frothingham v. McKusick, 24 Me. 403; Angier v. Agnew, 98 Pa. St. 587, 42 Am. Rep. 624.

<sup>204</sup> *Dorr v. Dudderar*, 88 Ill. 107. And see *Mosher v. Vehne*, 77 Me. 169; *Searle v. Sawyer*, 127 Mass. 491, *Kirchwey's Cas.* 427.

<sup>205</sup> *Cooper v. Davis*, 15 Conn. 556, *Kirchwey's Cas.* 416; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Harris v. Bannon*, 78 Ky. 568; *Clark v. Reyburn*, 1 Kan. 281; *Kircher v. Schalk*, 39 N. J. Law, 335; *Peterson v. Clark*, 15 Johns. (N. Y.) 205; *Hamlin v. Parsons*, 12 Minn. 103 (Gil. 59), 90 Am. Dec. 284. Compare *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387.

<sup>206</sup> *Taylor v. McConnell*, 53 Mich. 587; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147. And see *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213; *Gardner v. Heartt*, 3 Denio (N. Y.) 232.

<sup>207</sup> *Byrom v. Chapin*, 113 Mass. 308; *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563. See *Leavitt v. Eastman*, 77 Me. 117. But in *King v. Bangs*, 120 Mass. 514, the fact that the premises were sold under the mortgage for sufficient to pay the debt was held to be admissible in mitigation of damages.

<sup>208</sup> *Farrant v. Lovel*, 3 Atk. 723; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Givens v. McCalmont*, 4 Watts (Pa.) 460.

any loss resulting therefrom.<sup>209</sup> He is not, however, liable as for permissive waste in failing to keep the premises in repair, or for improper cultivation of the land, unless he has been guilty of gross negligence in that respect.<sup>210</sup>

### III. THE TRANSFER OF MORTGAGED LAND.

The mortgagor may transfer the mortgaged land to another person, in which case the transferee succeeds to the rights and liabilities of the mortgagor.

The transferee, by an express stipulation to that effect with the mortgagor, may become personally liable for the mortgage debt, and, as regards the latter, he is in such case the principal debtor to the mortgagee, while the mortgagor is surety only. While this change of relation does not effect the right of the mortgagee to enforce the personal obligation of the mortgagor, he is, by some decisions, bound to recognize it. The personal liability of the transferee may usually be enforced by the mortgagor, though in some states this can be done in equity only.

The transferee of land who agrees to pay the mortgage, or takes a transfer expressly stating that the land is subject to the mortgage, cannot question the validity of the mortgage.

In case of the transfer of different parts of the land at different times by conveyances which do not impose any obligation on the transferees of paying the mortgage, and which do, by reason of covenants for title or otherwise, impose such obligation on the transferrer, the parts are liable to the enforcement of the mortgage lien in the inverse order of alienation.

#### § 525. General considerations.

The mortgagor may, as before stated, convey or devise the mortgaged land, it may be sold on execution, and it passes,

<sup>209</sup> *Sandon v. Hooper*, 6 Beav. 246, *Kirchwey's Cas.* 511; *Perdue v. Brooks*, 85 Ala. 459.

<sup>210</sup> *Russel v. Smithies*, 1 Anstr. 96, *Kirchwey's Cas.* 507; *Wragg v. Denham*, 2 Younge & C. 117, *Kirchwey's Cas.* 507; *Dexter v. Arnold*, 2 Sumn. 108, *Fed. Cas. No.* 3,858, *Kirchwey's Cas.* 522.

on his death intestate, to his heirs, or to his personal representatives, if his estate is less than freehold. The grantee, devisee, heir, or personal representative takes the land subject to the mortgage, but with the rights of the mortgagor. He may redeem from the mortgage,<sup>211</sup> and may require a mortgagee in possession to account for the rents and profits.<sup>212</sup> He stands generally in the same position as regards the mortgage on the land as did his predecessor in interest, and he has no greater rights, since the rights of the mortgagee cannot be impaired by a transfer of the land.

— Transfer to mortgagee.

After the making of the mortgage, the mortgagor and mortgagee may deal with each other as any other individuals, and a conveyance or release by the mortgagor to the mortgagee of his interest in the mortgaged land is valid, provided, in view of the peculiar relation of the parties, the absence of circumstances of fraud and oppression is clearly shown.<sup>213</sup> Occasionally it is stated that such a transfer by

<sup>211</sup> See post, § 541.

<sup>212</sup> *Strang v. Allen*, 44 Ill. 428; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364; *Long v. Richards*, 170 Mass. 120; *Ruckman v. Astor*, 9 Paige (N. Y.) 517.

<sup>213</sup> *Peugh v. Davis*, 96 U. S. 382; *Seymour v. Mackay*, 126 Ill. 341; *Wynkoop v. Cowing*, 21 Ill. 570; *Baughner v. Merryman*, 32 Md. 185; *Trull v. Skinner*, 17 Pick. (Mass.) 213, *Kirchwey's Cas.* 445; *Odeh v. Montross*, 68 N. Y. 499, *Kirchwey's Cas.* 460; *Shaw v. Walbridge*, 23 Ohio St. 1; *Hall v. Hall*, 41 S. C. 163, 44 Am. St. Rep. 696; *Green v. Butler*, 26 Cal. 595, *Kirchwey's Cas.* 448.

Such a conveyance by a mortgagor to the mortgagee, which takes effect, strictly speaking, by way of release, is to be distinguished from an attempted release or waiver by the mortgagor of the right to redeem. The statement quite frequently made, that the mortgagor may release his equity of redemption by an agreement, subsequent to the mortgage, but not contemporaneous therewith, seems to involve a confusion of thought, arising from the double use of the term "equity of redemption." See ante, note 7. The time of the transaction is immaterial. The mortgagor cannot waive his right of re-

the mortgagor to the mortgagee must be supported by an adequate consideration,<sup>214</sup> but in other cases this is denied, and it would seem that this requirement, so far as it exists, merely means that the fact that the mortgagor could obtain a higher price from another purchaser is strong, if not conclusive, evidence of fraud or oppression.<sup>215</sup> Such subsequent transfer, moreover, though absolute in form, may, like any other absolute transfer, be shown not to be so intended, but to be merely for the purpose of enabling the mortgagee to secure his debt.<sup>216</sup>

§ 526. Personal liability of the transferee.

The mortgagor's transferee is not personally liable for the mortgage debt unless he expressly or impliedly agrees to pay it, though the land is always liable for the amount of the mortgage, provided the transferee has actual or constructive notice of its existence.<sup>217</sup> And so the fact that the land

demption by an agreement contemporaneous with or subsequent to the mortgage, because a mortgage without the right of redemption is not recognized by the courts. He may, however, convey the land to the mortgagee,—not, of course, contemporaneously with the mortgage, because that would be impossible, but subsequently thereto,—and this he can do for the simple reason that he is owner of the land.

<sup>214</sup> *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, *Kirchwey's Cas.* 453; *Odell v. Montross*, 68 N. Y. 499, *Kirchwey's Cas.* 460; *Linnell v. Lyford*, 73 Me. 280; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171. The transfer "must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity." *Pough v. Davis*, 96 U. S. 332.

<sup>215</sup> That the consideration need not be adequate, see *Coote, Mortgages*, 21; *Waters v. Groom*, 11 Clark & F. 684; *De Martin v. Phelan* 115 Cal. 538, *Kirchwey's Cas.* 465; *West v. Reed*, 55 Ill. 242. See *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Trull v. Skinner*, 17 Pick. (Mass.) 213, *Kirchwey's Cas.* 445.

<sup>216</sup> *Vernon v. Bethell*, 2 Eden, 110; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, *Kirchwey's Cas.* 453; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St. Rep. 795; *Baughner v. Merryman*, 32 Md. 185. See, ante, § 512.

<sup>217</sup> *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 722; *Com-* (1216)

is in terms conveyed "subject to" the mortgage imposes no personal liability on him.<sup>218</sup>

An agreement by the grantee to pay the mortgage, or a statement that he assumes it, makes him personally liable for the amount thereof.<sup>219</sup> In order thus to impose a personal liability on him by reason of a clause in the conveyance, it is not necessary that the grantee himself sign the conveyance, its acceptance by him being regarded as sufficient.<sup>220</sup> Even though there is no clause in the conveyance imposing a personal liability upon the transferee, he may assume such liability by a collateral agreement, either writ-

stock v. Hitt, 37 Ill. 542; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 187; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Fowler v. Fay, 62 Ill. 375; Lewis v. Day, 53 Iowa, 575; Tanguay v. Felthousen, 45 Wis. 30; Elliott v. Sackett, 108 U. S. 132; Hall v. Mobile & M. Ry. Co., 58 Ala. 10; Green v. Hall, 45 Neb. 89; Guernsey v. Kendall, 55 Vt. 201; Gerdine v. Menage, 41 Minn. 417.

<sup>218</sup> Elliott v. Sackett, 108 U. S. 132; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Lewis v. Day, 53 Iowa, 575; Shepherd v. May, 115 U. S. 505; Moore's Appeal, 88 Pa. St. 450; Dunn v. Rodgers, 43 Ill. 260; Post v. Tradesmen's Bank, 28 Conn. 420; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Green v. Turner, 38 Iowa, 112; Woodbury v. Swan, 58 N. H. 380; Bennett v. Bates, 94 N. Y. 354; Green v. Hall, 45 Neb. 89; Tanguay v. Felthousen, 45 Wis. 30; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213.

<sup>219</sup> Farmers' Nat. Bank v. Gates, 33 Or. 388, 72 Am. St. Rep. 724; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Keller v. Ashford, 133 U. S. 610; Taylor v. Whitmore, 25 Mich. 97; Taylor v. Preston, 79 Pa. St. 436; Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474; Rice v. Sanders, 152 Mass. 108, 23 Am. St. Rep. 804; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

<sup>220</sup> Finley v. Simpson, 22 N. J. Law, 311, 53 Am. Dec. 252; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Davis v. Hulett, 58 Vt. 90; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 18 Am. Rep. 556; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Keller v. Ashford, 133 U. S. 610; Crawford v. Edwards, 33

(1917)

ten or oral;<sup>221</sup> and, according to a number of decisions, such an agreement is implied from the fact that, when a purchaser has agreed to pay a particular sum for the mortgaged land, the amount of the mortgage is deducted from this sum in fixing the amount actually paid by him, and the land is conveyed to him subject to the mortgage.<sup>222</sup>

§ 527. Mortgagor becoming surety.

Upon the assumption of the mortgage debt by the transferee, he becomes, according to the current of authority, as regards the transferrer, the principal debtor, while the mortgagor becomes a surety merely for its payment.<sup>223</sup> The mortgagee's right of action to enforce the personal liability of the mortgagor is not affected by the fact that, as between the parties to the transfer, the mortgagor is surety only.<sup>224</sup> But he is, according to a number of decisions, bound to rec-

Mich. 354; *O'Conner v. O'Conner*, 88 Tenn. 76; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Bishop v. Douglass*, 25 Wis. 696.

<sup>221</sup> *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Strohauer v. Voltz*, 42 Mich. 444; *Merriman v. Moore*, 90 Pa. St. 78; *Wright v. Briggs*, 99 Ind. 563; *Bowen v. Kurtz*, 37 Iowa, 239; *Bolles v. Beach*, 22 N. J. Law, 680, 53 Am. Dec. 268; *Society of Friends v. Haines*, 47 Ohio St. 423.

<sup>222</sup> *Twitchell v. Mearns*, 8 Biss. 211, Fed. Cas. No. 14,286; *Townsend v. Ward*, 27 Conn. 610; *Comstock v. Hitt*, 37 Ill. 542; *Bristol Sav. Bank v. Stiger*, 86 Iowa, 344; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Herd v. Vreeland*, 30 N. J. Eq. 591; *Rockwell v. Blair Sav. Bank*, 31 Neb. 128, as explained in *Green v. Hall*, 45 Neb. 89; *Thompson v. Thompson*, 4 Ohio St. 333. But see *Belmont v. Coman*, 23 N. Y. 438, 78 Am. Dec. 213; *Bennett v. Bates*, 94 N. Y. 354; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Granger v. Roll*, 6 S. D. 611; *Moore's Appeal*, 38 Pa. St. 450.

<sup>223</sup> *Boardman v. Larrabee*, 51 Conn. 39; *Flagg v. Geltmacher*, 98 Ill. 293; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Ellis v. Johnson*, 96 Ind. 377; *Willson v. Burton*, 52 Vt. 394; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Metz v. Todd*, 36 Mich. 473.

<sup>224</sup> *Flagg v. Geltmacher*, 98 Ill. 293; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713

ognize this new relation of principal and surety in his dealings with the principal,—that is, the transferee,—and consequently the mortgagor as surety is discharged from his personal liability in case the mortgagee, after knowledge of the transfer and the terms thereof, extends the time of payment in favor of the transferee, or makes other material concessions to him.<sup>225</sup> By other decisions, the mortgagee must in some way recognize this new relation of principal and surety in order that he may be affected thereby.<sup>226</sup>

§ 528. Enforcement of personal liability by transferee.

The transferee of the premises who agrees to pay the mortgage is, by the weight of authority, liable directly to the mortgagee, who may recover by virtue of the agreement, though not a party thereto. This right of recovery by the mortgagee is sometimes based upon the theory that a person for whose benefit a contract is made may sue thereon, and that the mortgagee may accordingly sue the transferee at law.<sup>227</sup> In other cases the mortgagee's right of recovery against the transferee is based on the theory that since, by

<sup>225</sup> *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Paine v. Jones*, 76 N. Y. 274; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; *Union Stove & Mach. Works v. Caswell*, 48 Kan. 689, 16 L. R. A. 85; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731. See 15 Harv. Law Rev. 398.

<sup>226</sup> *Shepherd v. May*, 115 U. S. 505; *Boardman v. Larrabee*, 51 Conn. 39; *Corbett v. Waterman*, 11 Iowa, 87.

<sup>227</sup> *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 103; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Gifford v. Corrigan*, 117 N. Y. 257; *Urquhart v. Brayton*, 12 R. I. 169; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Follansbee v. Johnson*, 28 Minn. 311; *Poe v. Dixon*, 60 Ohio St. 133, 71 Am. St. Rep. 713; *Merriman v. Moore*, 90 Pa. St. 78; *Enos v. Sanger*, 96 Wis. 150, 65 Am. St. Rep. 38. See cases collected, 15 Harv. Law Rev. 808.

his agreement to pay the mortgage, the transferee becomes the principal debtor, and his grantor the surety, and since, in equity, a creditor is entitled to be subrogated to any security which the surety has for his indemnity, the mortgagee is subrogated to the right of the mortgagor against the transferee.<sup>228</sup>

When the assumption of the mortgage is not by a transferee of the land, but by a second mortgagee, his promise to pay cannot be regarded as a promise to pay his own debt, nor as a contract to indemnify the mortgagor against liability thereon, as it is in the case of an absolute conveyance, but it is in effect a mere promise to advance the amount of the prior mortgage to the mortgagor, and there is no right of recovery against such second mortgagee in favor of the first mortgagee.<sup>229</sup>

Until the mortgagee has in some manner accepted the as-

<sup>228</sup> *Keller v. Ashford*, 133 U. S. 610; *Osborne v. Cabell*, 77 Va. 462; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Biddell v. Brizzolara*, 64 Cal. 354; *Miller v. Thompson*, 34 Mich. 10; *Wager v. Link*, 134 N. Y. 122; *Hopkins v. Warner*, 109 Cal. 136. See the discussion of the subject in article by Samuel Williston, Esq., in 15 Harv. Law Rev. 767, 787, on "Contracts for the Benefit of a Third Person."

Since, on this theory, the mortgagee's right of recovery arises from the liability of the grantor, there is no such right if the grantor is under no liability, as when the clause assuming the mortgage is in a deed from a grantee of the mortgagor, who was not himself liable. *Ward v. De Oca*, 120 Cal. 102; *Osborne v. Cabell*, 77 Va. 462; *Trotter v. Hughes*, 12 N. Y. 74; *Wise v. Fuller*, 29 N. J. Eq. 257, 266. See 15 Harv. Law Rev. 104. When the mortgagee's right of recovery exists at law, it would seem that the nonliability of the grantor is immaterial. *Dean v. Walker*, 107 Ill. 541, 47 Am. Rep. 467; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Merriman v. Moore*, 90 Pa. St. 78; *Hare v. Murphy*, 45 Neb. 809; *Encos v. Sanger*, 96 Wis. 151, 65 Am. St. Rep. 38. But see *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Brown v. Stillman*, 43 Minn. 126.

<sup>229</sup> *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Bassett v. Bradley*, 48 Conn. 284; *Pardee v. Treat*, 82 N. Y. 335. See *Gaffney v. Hicks*, 131 Mass. 124.



sumption of the mortgage debt by the transferee of the land, the mortgagor may, it seems, release the transferee from his contract of assumption,<sup>230</sup> and, according to some cases, this may be done even after such acceptance by the mortgagee.<sup>231</sup>

§ 529. The transferee's right to question mortgage.

The transferee assuming the mortgage cannot show that it is invalid, or that it is not all due, since the full amount of the mortgage was deducted in fixing the purchase price paid by him, and the mortgagor thereby devoted that portion of the price to the payment of the mortgage,<sup>232</sup> and the same rule applies when the property is conveyed without any clause of assumption, but expressly subject to the mortgage.<sup>233</sup>

§ 530. Transfer of part of land.

In case distinct portions of the land are conveyed to different persons by simultaneous and similar conveyances, and

<sup>230</sup> *Carnahan v. Tousey*, 93 Ind. 561; *Gilbert v. Sanders*, 56 Iowa, 349, 41 Am. Rep. 103; *Gifford v. Corrigan*, 105 N. Y. 223, 15 Am. St. Rep. 508; *Jones v. Higgins*, 80 Ky. 409. But that the grantee's liability on his contract of assumption cannot be released by the grantor, see *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; 2 Pomeroy, Eq. Jur. § 1206, p. 1846, note.

<sup>231</sup> *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Biddell v. Brizzolara*, 64 Cal. 354.

<sup>232</sup> *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ritter v. Phillips*, 53 N. Y. 586; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Clapp v. Halliday*, 48 Ark. 258; *Crawford v. Edwards*, 33 Mich. 354; *Fitzgerald v. Barker*, 85 Mo. 13; *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367; *Hough v. Horsey*, 36 Md. 181, 11 Am. Rep. 484; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Skinner v. Reynick*, 10 Neb. 323, 35 Am. Rep. 479.

<sup>233</sup> *Sweetzer v. Jones*, 35 Vt. 317; *Riley v. Rice*, 40 Ohio St. 441; *Green v. Turner*, 38 Iowa, 112; *Sands v. Church*, 6 N. Y. 347; *Maher v. Lanfrom*, 86 Ill. 513; *Freeman v. Auld*, 44 N. Y. 50; *Pratt v. Nixon*, 91 Ala. 192; *Johnson v. Thompson*, 129 Mass. 398; *Alt. v. Banholzer*, 36 Minn. 57. See *Bennett v. Bates*, 94 N. Y. 354.

there is in no one of such conveyances a clause by which the transferee assumes the mortgage, each portion is liable for a part of the mortgage debt, proportioned to the value of his portion of the land, and, if one such person pays an amount greater than his proportional share, he is entitled to contribution from the owners of the other portions.<sup>284</sup>

This requirement of proportional contribution is, however, frequently modified in consideration of the equities of the case. The most ordinary instance of such equitable modification of the rule occurs when the original mortgagor, or a subsequent owner of the whole, has transferred part of the mortgaged land to one person, either retaining the residue, or transferring it subsequently to another. If the owner transfers a part of the land by warranty deed or its equivalent, and retains the residue, it is considered equitable that the part retained should be liable for the whole incumbrance, rather than that payment should be partly imposed on the part transferred; and if the transferee pays the mortgage debt, he is entitled to contribution from the grantor to the extent of the value of the land retained, and, if this exceeds the debt, to complete exoneration.<sup>285</sup> On the other hand, if the original owner pays the amount of the mortgage, since

<sup>284</sup> 3 Pomeroy, Eq. Jur. § 1222; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Bailey v. Myrick*, 50 Me. 171; *Hall v. Morgan*, 79 Mo. 47; *Brown v. Simons*, 44 N. H. 475; *Alley v. Rogers*, 19 Grat. (Va.) 366.

So, if one tenant in common pays a greater part of the mortgage debt than is proportioned to his interest in the land, he is entitled to contribution from the other tenants in common. *Simpson v. Gardiner*, 97 Ill. 237; *Lyon v. Robbins*, 45 Conn. 513.

<sup>285</sup> *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. p. 291 et seq., notes; *Lock v. Fulford*, 52 Ill. 166; *Windsor v. Evans*, 72 Iowa, 692; *Cumming v. Cumming*, 3 Ga. 460; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 634; *Caruthers v. Hall*, 10 Mich. 40.

this is merely a compliance with his legal obligation, he cannot demand any contribution from his transferee.<sup>226</sup>

If, after having thus conveyed part of the mortgaged land, the original owner conveys the part retained to another person, the second transferee stands in his place, and, as against the prior transferee, the land last transferred is liable for the mortgage debt. If, instead of transferring the whole of the land retained by him, the original owner transfers a part thereof only, the part still retained by him is equitably first liable for the whole debt, and, if that is insufficient, then the part last transferred should be charged for the deficiency, rather than that first transferred, since the second transferee took the land in the same condition in which it was in the hands of the grantor. Thus, the different parts of the mortgaged land are liable "in the inverse order of alienation."<sup>227</sup> In two or three states only does a contrary rule prevail, to the effect that transferees at different times are liable in proportion to the amount of their interests.<sup>228</sup>

Since this doctrine of liability in the inverse order of alienation arises from the obligation of the common grantor, as against the various grantees, to pay off the mortgage, it does not arise when no such obligation exists. Consequently, if the transferee assumes payment of the mortgage, the gran-

<sup>226</sup> Chase v. Woodbury, 6 Cush. (Mass.) 143; Pollard v. Noyes, 60 N. H. 184; Henderson v. Truitt, 95 Ind. 309; 3 Pomeroy, Eq. Jur. § 1234; 2 Jones, Mortgages, § 1090. See post, § 545.

<sup>227</sup> Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235; Cumming v. Cumming, 3 Ga. 460; George v. Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Crosby v. Farmers' Bank of Andrew County, 107 Mo. 436; Brown v. Simons, 44 N. H. 475; Cheever v. Fair, 5 Cal. 337; Sternberger v. Hanna, 42 Ohio St. 305; Miller v. Rogers, 49 Tex. 398; Iglehart v. Crane, 42 Ill. 261; Ireland v. Woolman, 15 Mich. 253; Sanford v. Hill, 46 Conn. 42; Sheperd v. Adams, 32 Me. 63; Cowden's Estate, 1 Pa. St. 267; Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151.

<sup>228</sup> Dickey v. Thompson, 3 B. Mon. (Ky.) 312; Bates v. Ruddick, 3 Iowa, 423; Barney v. Myers, 23 Iowa, 472.

tee's land becomes primarily liable for the mortgage debt;<sup>239</sup> and the same result follows if the transfer is expressly "subject" to the mortgage,<sup>240</sup> and in such cases the grantor and his subsequent transferees are entitled to contribution or exoneration at the expense of the grantee's land. Moreover, the doctrine is not applied in case the prior conveyance by the original owner is not a warranty deed, or otherwise such a conveyance as to render it the duty of such owner to discharge the mortgage.<sup>241</sup> Although the transferee be otherwise entitled to have the land of a subsequent transferee first applied upon the mortgage, he may lose this right by failure to record his transfer, if the result is that the subsequent transferee takes without notice of the previous transfer, and of the consequent increased burden on the land transferred to him;<sup>242</sup> and the rule may be made inapplicable by a stipulation between the persons interested, charging the mortgage upon the land in a different manner.<sup>243</sup>

The mortgagee, if he has notice of the transfer of a part or parts of the mortgaged land, cannot release any part, to

<sup>239</sup> *Thompson v. Bird*, 57 N. J. Eq. 175; *Bowne v. Lynde*, 91 N. Y. 92; *Drury v. Holden*, 121 Ill. 130; *Welch v. Beers*, 8 Allen (Mass.) 151.

<sup>240</sup> 3 *Pomeroy*, Eq. Jur. §§ 1205, 1225; *Engle v. Haines*, 5 N. J. Eq. 186; *Johnson v. Zink*, 51 N. Y. 333; *Sweetzer v. Jones*, 35 Vt. 317, 32 Am. Dec. 639; *Briscoe v. Power*, 47 Ill. 447; *Burger v. Grief*, 55 Md. 518; *Carpenter v. Koons*, 20 Pa. St. 222.

<sup>241</sup> 3 *Pomeroy*, Eq. Jur. § 1225; 2 *White & T. Lead. Cas. Eq.* (4th Am. Ed.) 296, 303; *Alken v. Gale*, 37 N. H. 501; *Carpenter v. Koons*, 20 Pa. St. 222; *Erlinger v. Boul*, 7 Ill. App. 40; *Aderholt v. Henry*, 37 Ala. 415; *Steinmeyer v. Steinmeyer*, 55 S. C. 9. See *In re Jones* [1893] 2 Ch. 461.

<sup>242</sup> 3 *Pomeroy*, Eq. Jur. § 1225; 2 *White & T. Lead. Cas. Eq.* 297; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Brown v. Simons*, 44 N. H. 475; *Hunt v. Mansfield*, 31 Conn. 488.

<sup>243</sup> *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Hopkins v. Wolley*, 81 N. Y. 77; *Zabriskie v. Salter*, 80 N. Y. 555; *Moore v. Shurtleff*, 128 Ill. 370; *Mickle v. Maxfield*, 42 Mich. 304.

the injury of the owners of other parts, and, by a release of a part which is either concurrently or primarily liable, he to that extent extinguishes the lien. So, when the several parts in the hands of different grantees are liable in proportion to their value, as having been conveyed by concurrent and similar conveyances, a release of one part extinguishes the mortgage lien in favor of the other parts, to the extent to which such part would be liable, measured by its proportional value;<sup>244</sup> and so, when a part primarily liable, as having been last transferred, is released, the lien is extinguished to the extent of the value of the land so released.<sup>245</sup>

#### IV. THE TRANSFER OF A MORTGAGE.

A mortgage may, except in rare cases, be transferred by the mortgagee. The transfer may be by an express writing to that effect, or may be by a mere assignment of the debt secured by the mortgage. An assignment of the mortgage without the debt vests in the transferee, at most, a bare legal title, which he holds in trust for the owner of the debt.

An assignment of a mortgage must generally be recorded in order to be effective as against one claiming under a subsequent transfer or release of the mortgage by the mortgagee.

#### § 531. Express transfer of mortgage.

The form of transfer or assignment of a mortgage differs greatly in the different states, a concise form being frequently specified by statute as sufficient. Generally, as will

<sup>244</sup> 3 Pomeroy, Eq. Jur. § 1226; *Taylor v. Short's Adm'r*, 27 Iowa, 361, 1 Am. Rep. 280; *Birnie v. Main*, 29 Ark. 591; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Deuster v. McCamus*, 14 Wis. 307.

<sup>245</sup> *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Gas-kill v. Sine*, 18 N. J. Eq. 400, 78 Am. Dec. 105; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Paxton v. Harrier*, 11 Pa. St. 312; *Burson v. Blackley*, 67 Tex. 5; *Brown v. Simons*, 44 N. H. 475.

appear hereafter, the mortgage debt, as well as the mortgage, should be expressly assigned, or the evidence thereof delivered, and the assignment should be recorded.

On the common-law theory of the character of a mortgage, which regards the legal title as vested in the mortgagee, the only mode of transferring such title is by a formal conveyance similar to that required in the case of other transfers of estates in land, and, accordingly, such a conveyance is in some states necessary for the transfer of all the rights of the mortgagee.<sup>246</sup> Provided the mortgagee's interest in the land is transferred, the exact form of the conveyance is immaterial, and, accordingly, either a warranty or quitclaim deed, or a deed of release, is sufficient to transfer the legal title, although the mortgage is not specifically referred to.<sup>247</sup>

#### § 532. Transfer of mortgage debt.

In addition to the modes of transfer involving an express conveyance of the mortgagee's interest in the land, or an assignment of the mortgage *eo nomine*, there is a mode of assignment, of even greater importance, growing out of the equitable principle that the debt secured is the principal thing, and the mortgage securing it merely an incident. Upon this principle it is recognized, in some states in courts of equity only, but in others in courts of law as well, that an assignment of the debt, however evidenced, effects an assignment of the mortgage, conferring upon the assignee of the

<sup>246</sup> *Douglass v. Durin*, 51 Me. 121; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Warden v. Adams*, 15 Mass. 233, *Kirchwey's Cas.* 626; *Adams v. Parker*, 12 Gray (Mass.) 53; *Torrey v. Deavitt*, 53 Vt. 331; *Sanders v. Cassady*, 86 Ala. 246; *Barrett v. Hinckley*, 124 Ill. 32, 57 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Williams v. Teachey*, 85 N. C. 402; *Givan v. Doe*, 7 Blackf. (Ind.) 210.

<sup>247</sup> *Welsh v. Phillips*, 54 Ala. 309; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Douglass v. Durin*, 51 Me. 121; *Welch v. Priest*, 3 Allen (Mass.) 165; *Ruggles v. Barton*, 13 Gray (Mass.) 506; *Collamer v. Langdon*, 29 Vt. 32; *Cole v. Edgerly*, 48 Me. 102 (1226)

debt the rights and remedies of the original mortgagee, except in so far as these are based upon a legal title in the mortgagee.<sup>248</sup> And a merely oral assignment of the debt is sufficient to transfer the mortgage under this rule.<sup>249</sup> Such a transfer of the debt cannot, however, in those states in which a legal title to the land is regarded as existent in the mortgage, have the effect of transferring such title,<sup>250</sup> but it will be regarded as held in trust for the transferee of the debt.<sup>251</sup>

### § 533. Transfer of part of debt.

The principle that an assignment of the debt involves an assignment of the mortgage security applies in the case of an assignment of a part only of the debt, which is usually effected by a transfer of one of several notes evidencing the debt, and in such cases the assignee is entitled to share in

<sup>248</sup> *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Green v. Hart*, 1 Johns. (N. Y.) 580, *Kirchwey's Cas.* 622; *Lawrence v. Knap*, 1 Root (Conn.) 248, 1 Am. Dec. 42, *Kirchwey's Cas.* 621; *Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 873, 3 Am. St. Rep. 655; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17; *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; 3 *Pomeroy*, Eq. Jur. § 1210.

<sup>249</sup> *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Rigney v. Lovejoy*, 13 N. H. 247; *Pratt v. Bennington Bank*, 10 Vt. 293, 33 Am. Dec. 201; *Fred Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 Am. St. Rep. 854; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393.

<sup>250</sup> *Cottrell v. Adams*, 2 Biss. 351, Fed. Cas. No. 3,272; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Bailey v. Winn*, 101 Mo. 649; *Young v. Miller*, 6 Gray (Mass.) 152; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634.

<sup>251</sup> *Jordan v. Cheney*, 74 Me. 359; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17.

the benefit of the mortgage security.<sup>253</sup> When the various notes secured by the mortgage are transferred to different persons, a question arises as to the respective priorities of those persons in case the mortgaged land is not sufficient to pay all the notes in full. In some states the rule has been adopted that, if the notes in the hands of different persons mature at different times, as is usually the case, they are entitled to priority, as regards the benefit of the mortgage, in the order of their maturity.<sup>253</sup> In other states, the assignees of the different notes are entitled to share in the proceeds of the mortgaged land in proportion to the amounts of their respective notes, without reference to the time of their maturity.<sup>254</sup> The rights of the assignees of the notes in this respect may also be controlled by an express stipulation in

<sup>253</sup> *Page v. Pierce*, 26 N. H. 317, *Kirchwey's Cas.* 630; *Sargent v. Howe*, 21 Ill. 148; *Anderson v. Baumgartner*, 27 Mo. 80; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Patrick's Appeal*, 105 Pa. St. 856; *Miller v. Rutland & W. R. Co.*, 40 Vt. 399, 94 Am. Dec. 414.

<sup>253</sup> *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572; *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447, 46 Am. Dec. 486; *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71; *Winters v. Franklin Bank of Cincinnati*, 33 Ohio St. 250; *Funk v. McReynold's Adm'rs*, 33 Ill. 481; *Wilson v. Hayward*, 6 Fla. 171; *Anderson v. Sharp*, 44 Ohio St. 260.

But even where this rule is recognized, if the mortgage provides that, on default in payment of one of the notes, all shall become due, upon such default all are entitled to share equally. *Bushfield v. Meyer*, 10 Ohio St. 334; *Pierce v. Shaw*, 51 Wis. 316; *Whitehead v. Morrill*, 108 N. C. 65. Contra, *Leavitt v. Reynolds*, 79 Iowa, 348; *Horn v. Bennett*, 135 Ind. 158, 24 L. R. A. 800.

<sup>254</sup> *Donley v. Hays*, 17 Serg. & R. (Pa.) 400; *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438; *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601; *Perry's Appeal*, 22 Pa. St. 43, 60 Am. Dec. 63; *Dixon v. Clayville*, 44 Md. 573; *Lovell v. Cragin*, 136 U. S. 147; *Eastman v. Foster*, 8 Metc. (Mass.) 19.



the mortgage, or by an agreement made at the time of assigning a note, as to the order of priority.<sup>255</sup>

Occasionally, though not usually, the view has been taken that a mortgagee who assigns one or more of the notes, retaining the balance, cannot claim to share in the benefit of the mortgage security as against his assignee, since he is presumed to have been paid by the latter the value of the notes assigned,<sup>256</sup> and it seems to be agreed that a contract to this effect is to be presumed from the fact that the mortgage is assigned with the notes.<sup>257</sup> Likewise, if the mortgagee is a surety for the payment of the note, he cannot claim a part of the benefit of the mortgage as against his assignee.<sup>258</sup>

§ 534. Transfer of mortgage without debt.

Even in the states which adhere to the common-law view of a mortgage, the assignment of the mortgage merely, or of the mortgagee's interest in the land, without an assignment of the debt, or of the note or bond evidencing the debt, transfers, at most, the bare legal title, which the assignee will hold in trust for the owner of the debt.<sup>259</sup> In the states which

<sup>255</sup> Walker v. Dement, 42 Ill. 272; Granger v. Crouch, 86 N. Y. 494; Morgan v. Kline, 77 Iowa, 681; Norton v. Palmer, 142 Mass. 433; Ellis v. Lamme, 42 Mo. 153; Howard v. Schmidt, 29 La. Ann. 129; Chew v. Buchanan, 30 Md. 367; McLean's Appeal, 103 Pa. St. 255.

<sup>256</sup> Parkhurst v. Watertown Steam Engine Co., 107 Ind. 595; Knight v. Ray, 75 Ala. 383. Contra, Dixon v. Clayville, 44 Md. 573; Donley v. Hays, 17 Serg. & R. (Pa.) 400; Patrick's Appeal, 105 Pa. St. 356; Keyes v. Wood, 21 Vt. 331.

<sup>257</sup> Bryant v. Damon, 6 Gray (Mass.) 564; Foley v. Rose, 123 Mass. 557; Langdon v. Keith, 9 Vt. 300; Solberg v. Wright, 33 Minn. 224; Miller v. Washington Sav. Bank, 5 Wash. 200.

<sup>258</sup> Whitehead v. Morrill, 108 N. C. 65; Fourth Nat. Bank's Appeal, 123 Pa. St. 484, 10 Am. St. Rep. 538.

<sup>259</sup> Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679; Farrell v. Lewis, 56 Conn. 280; Sanger v. Bancroft, 12 Gray (Mass.) 365; Williams v. Teachey, 85 N. C. 402; Collamer v. Johnson, 29 Vt. 32; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, Kirchwey's Cas. 634.

A transfer by the mortgagee of his interest in the land, without

have adopted the lien theory, the assignment of the mortgage, or conveyance of the land by the mortgagee, without reference to the debt, is regarded as a mere nullity.<sup>260</sup>

§ 535. Freedom of transfer from equities.

If the note or other obligation secured by the mortgage is not negotiable, the assignee thereof, like any other assignee of a non-negotiable chose in action, takes it subject to all equities and defenses which existed as between the original parties, such as illegality, failure of consideration, part payment, and the like.<sup>261</sup> In some cases, however, one who makes and delivers a mortgage in favor of another person, which is valid on its face, is estopped, as against an assignee of such mortgage, to assert the invalidity of the mortgage.<sup>262</sup>

the debt, is, even in some of these states, regarded as an absolute nullity. *Devlin v. Collier*, 58 N. J. Law, 422; *Delano v. Bennett*, 90 Ill. 533; *Lunt v. Lunt*, 71 Me. 377; *Ellison v. Daniels*, 11 N. H. 275. But sometimes, apparently, a conveyance by the mortgagee of the land is construed as intended to transfer the mortgage debt also. *Woods v. Woods*, 66 Me. 206; *Connor v. Whitmore*, 52 Me. 186; *Ruggles v. Barton*, 13 Gray (Mass.) 506; *Dearnaley v. Chase*, 126 Mass. 290.

<sup>260</sup> *Jackson v. Bronson*, 19 Johns. (N. Y.) 325, *Kirchwey's Cas.* 629; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134; *Jordan v. Sayre*, 29 Fla. 100; *Johnson v. Cornett*, 29 Ind. 59; *Merritt v. Bartholick*, 36 N. Y. 44, *Finch's Cas.* 1113; *Swan v. Yapple*, 35 Iowa, 248; *Greve v. Coffin*, 14 Minn. 345 (Gil. 263), 100 Am. Dec. 229; *McCammant v. Roberts*, 87 Tex. 241; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72.

<sup>261</sup> *Matthews v. Wallwyn*, 4 Ves. 118, *Kirchwey's Cas.* 643; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Ingraham v. Disborough*, 47 N. Y. 421; *Crane v. Turner*, 67 N. Y. 437; *Moffatt v. Hardin*, 22 S. C. 9; *Olds v. Cummings*, 31 Ill. 188, *Kirchwey's Cas.* 662; *Nichols v. Lee*, 10 Mich. 526, 82 Am. Dec. 57; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501; *Fish v. French*, 15 Gray (Mass.) 520; *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319.

<sup>262</sup> *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, *Kirchwey's Cas.* 649; *Com. v. City of Pittsburgh*, 34 Pa. St. 496, 520; *Mo* (1230)

The question whether the assignee of the mortgage takes free from the equities of others than the mortgagor is determined by the general rule prevailing in the particular jurisdiction as to the rights of assignees of choses in action. The more usual rule is that the assignee of any non-negotiable chose in action takes it free from any latent equities in favor of persons other than the obligor, since he has no means of knowing where to inquire as to such equities, and this rule has been applied in favor of the assignee of a mortgage.<sup>263</sup>

In some cases the view is taken that, since the mortgage is merely an incident to the debt, if the note secured is negotiable, the benefit of the rule applicable to negotiable instruments will extend to the mortgage, and render it enforceable for the full amount, without reference to equities existing between the original parties;<sup>264</sup> but in others it is held that the negotiability of the note secured is immaterial, and that the assignee of the mortgage, whether by mere transfer of

*Masters v. Wilhelm*, 85 Pa. St. 218; *First Nat. Bank v. Stiles*, 22 Hun (N. Y.) 339; *State Bank v. Flathers*, 45 La. Ann. 75. And see *Bickerton v. Walker*, 31 Ch. Div. 151. But see, to the contrary, *Davis v. Bechstein*, 69 N. Y. 440, *Kirchwey's Cas.* 691; *Hill v. Hoole*, 116 N. Y. 299.

<sup>263</sup> *Goldthwaite v. First Nat. Bank of Montgomery*, 67 Ala. 549; *Silverman v. Bullock*, 98 Ill. 11; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319; *Losey v. Simpson*, 11 N. J. Eq. 246; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566. The New York rule is that the assignee takes subject to such equities. *Bush v. Lathrop*, 22 N. Y. 535; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, *Kirchwey's Cas.* 681.

<sup>264</sup> *Carpenter v. Longan*, 16 Wall. (U. S.) 271, *Kirchwey's Cas.* 675; *Paige v. Chapman*, 58 N. H. 333, *Kirchwey's Cas.* 679; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274; *Duncan v. City of Louisville*, 13 Bush (Ky.) 378, 36 Am. Rep. 201; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Taylor v. Page*, 6 Allen (Mass.) 86; *Keyes v. Wood*, 21 Vt. 331; *Pierce v. Faunce*, 47 Me. 507; *Barnum v. Phenix*, 60 Mich. 388; *Thompson v. Maddux*, 117 Ala. 468. Compare *Blumenthal v. Jassey*, 29 Minn. 177. See 1 Daniel, *Neg. Inst.* (4th Ed.) §§ 824-824b.

the note or otherwise, takes subject to all existing equities, in favor of the mortgagor at least.<sup>265</sup>

§ 536. Record and notice.

Assignments of mortgages are usually regarded as being within the operation of the recording acts, this being sometimes expressly provided by the statute.<sup>266</sup> The requirement that the assignment shall be recorded does not, however, render an unrecorded assignment invalid, but merely prevents the assignee in such an assignment from asserting any rights as against persons who acted on the assumption that the mortgage still belonged to the mortgagee.<sup>267</sup> An ordi-

<sup>265</sup> *Bally v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385, *Kirchwey's Cas.* 667; *Tabor v. Foy*, 56 Iowa, 539; *Kleeman v. Frisbie*, 63 Ill. 482; *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120).

<sup>266</sup> *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844; *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572; *Bacon v. Van Schoonhoven*, 87 N. Y. 446; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Pepper's Appeal*, 77 Pa. St. 373; *Henderson v. Pilgrim*, 22 Tex. 464. But see *Reeves v. Hayes*, 95 Ind. 521; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474.

The word "conveyance" in a recording act has been held to include an assignment of mortgage. *Decker v. Bolce*, 83 N. Y. 220; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844; *Burns v. Berry*, 42 Mich. 176. Contra, *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474.

<sup>267</sup> *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Greene v. Warnick*, 64 N. Y. 220; *Bridges v. Bidwell*, 20 Neb. 185; *Sprague v. Rockwell*, 51 Vt. 401.

If the mortgagee purchases the land after assigning the mortgage, a subsequent purchaser from him cannot claim that the mortgage was, as against him, extinguished by merger, on the ground that, because the assignment was not recorded, he had reason to believe that the mortgage belonged to the mortgagee at the time when the latter owned the land. *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Oregon & Washington Trust Inv. Co. v. Shaw*, 5 Sawy. 336, Fed. Cas. No. 10,556; 1 Jones, *Mortgages*, § 482. Contra, *Bowling v. Cook*, 39 Iowa, 200. Compare *International Bank of Chicago v. Willshire*, 108 Ill. 143.

nary instance of the failure to record the assignment thus resulting in misleading third persons occurs in the case of a purchase of the land by one in the belief that a satisfaction by the mortgagee was valid, when in fact the mortgagee had no right to give a satisfaction, having assigned the mortgage, and in such case the assignee, having failed to record his assignment, can assert no claim as against such innocent purchaser.<sup>268</sup> The same principle applies in favor of any person who in good faith deals with the mortgagee on the assumption that he still owns the mortgage.<sup>269</sup>

The record of the assignment is not constructive notice to the mortgagor, since the latter's interest antedates the assignment, and consequently the mortgagor may make payments on the mortgage to the mortgagee, so long as he is without actual notice of the assignment.<sup>270</sup>

As the failure to record an assignment may, in certain cases, postpone the assignee, so the recording of the assignment will enable him to fully assert his rights under the mortgage. Accordingly, a purchaser of the premises or of an interest therein, after the recording of the assignment, is charged with notice thereof, and is not justified in paying the mortgage debt to the assignor.<sup>271</sup>

<sup>268</sup> *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 359; *Ladd v. Campbell*, 56 Vt. 529; *Fisher v. Cowles*, 41 Kan. 418; *Swartz's Ex'rs v. Leist*, 13 Ohio St. 419; *Henderson v. Pilgrim*, 22 Tex. 464; *Vann v. Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70.

<sup>269</sup> *Parmenter v. Oakley*, 69 Iowa, 388. So the assignee, not having recorded the assignment, cannot assert his rights as against one who, without notice of the assignment, redeemed from a sale under a foreclosure proceeding instituted by the mortgagee after making the assignment. *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 344.

<sup>270</sup> *Foster v. Carson*, 159 Pa. St. 477, 39 Am. St. Rep. 696; *Van Keuren v. Corkins*, 66 N. Y. 77; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475; *Rodgers v. Peckham*, 120 Cal. 238. So, by statute, in a number of states. 1 *Stimson's Am. St. Law*, § 1870.

<sup>271</sup> *Brewster v. Carner*, 103 N. Y. 556; *Viele v. Judson*, 82 N. Y. 32.

An assignee of a mortgage is not only usually required by the recording acts to record his assignment, but he is also entitled to the protection of such acts, and consequently his rights are superior to the rights of persons claiming under prior unrecorded conveyances, including assignments of the same mortgage,<sup>272</sup> though he takes subject to rights existing under instruments which have been duly recorded.<sup>273</sup>

When the mortgagee makes successive assignments of the mortgage, the assignee later in time is usually charged with notice of the prior assignment by the fact that the mortgagee has delivered the notes or other evidence of the debt to the prior assignee, and consequently the failure to record the prior assignment is usually immaterial.<sup>274</sup> But when this circumstance does not control, the assignee who first records his assignment has precedence.<sup>275</sup>

#### V. PAYMENT, REDEMPTION, AND DISCHARGE.

Payment or tender of the sum or obligation secured, if made before default, will usually revert the title in the mortgagor or his transferee, free from any claim by the mortgagee, unless the mortgage expressly requires a retransfer of the legal title. A payment or tender after default will also have that effect, except in some of the states in which the legal title is in the mortgagee.

<sup>272</sup> Burns v. Berry, 42 Mich. 176; Pepper's Appeal, 77 Pa. St. 373; Decker v. Boice, 83 N. Y. 215; Jackson v. Reid, 30 Kan. 10; Blunt v. Norris, 123 Mass. 55, 25 Am. Rep. 14. But when the statute gives one priority, as against an earlier unrecorded conveyance, only if his own conveyance is first recorded, an assignee of a mortgage must first record his assignment in order to claim priority. Westbrook v. Gleason, 79 N. Y. 23.

<sup>273</sup> Robbins v. Larson, 69 Minn. 436, 65 Am. St. Rep. 572; Brower v. Witmeyer, 121 Ind. 83.

<sup>274</sup> Kellogg v. Smith, 26 N. Y. 18; Porter v. King, 1 Fed. 755; 1 Jones, Mortgages, § 483. And see Byles v. Tome, 39 Md. 461.

<sup>275</sup> Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Wiley v. Williamson, 68 Ala. 71; Potter v. Stransky, 48 Wis. 235.

Any person having an estate in or lien on the land which is subsequent to the mortgage lien may redeem from the mortgage by paying the amount of the obligation secured thereby. A person so redeeming, if not himself primarily liable for the whole obligation, may compel those primarily liable, or jointly liable with him, to exonerate him, or to contribute their proper share, and, for the purpose of enforcing this right, he is entitled to be subrogated to the rights of the mortgagee as against the land.

When the mortgage and the mortgaged land become the property of one person, the mortgage is merged or extinguished, unless a contrary intention appears, or can be presumed.

§ 537. Payment or tender before default.

Even at common law, the payment of the sum named in the mortgage, or other compliance with the terms of the condition therein, if made at or before the time named therein,<sup>276</sup> operated to terminate the estate of the mortgagee, and the absolute title became revested in the mortgagor, upon entry by him, without any reconveyance or other act on the part of the mortgagee.<sup>277</sup>

<sup>276</sup> The mortgagor or other owner of the land cannot insist on paying off the debt secured before the time at which it is due by the terms of the contract, except by consent of the creditor. *Brown v. Cole*, 14 Sim. 427, 9 Jur. 290, *Kirchwey's Cas.* 698; *Weldon v. Tollman*, 67 Fed. 986; *Bowen v. Julius*, 141 Ind. 310; *Moore v. Kime*, 43 Neb. 517. In case of such payment by consent, the effect on the mortgage lien is the same as in the case of payment at maturity. *Burgaine v. Spurling*, Cro. Car. 283, *Kirchwey's Cas.* 697; *Holman v. Bailey*, 3 Metc. (Mass.) 55, and authorities cited.

<sup>277</sup> *Litt.* § 334; *Coote, Mortgages*, 4; 4 *Kent's Comm.* 193; *Merrill v. Chase*, 3 Allen (Mass.) 339; *Grover v. Flye*, 5 Allen (Mass.) 543, *Kirchwey's Cas.* 702; *Perkins' Lessee v. Dibble*, 10 Ohio, 433; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *McNair v. Picotte*, 33 Mo. 57.

In England, however, at the present day, the mortgage usually provides, not that it shall be void upon compliance with the condition, but that the mortgagee shall make a reconveyance, and

In equity, and in those states in which the equitable theory of mortgages has been adopted, the payment of the mortgage debt at maturity, by the person whose duty it is to pay it, will extinguish the lien.<sup>278</sup>

In order to terminate the interest of the mortgagee, a legal and sufficient tender of payment before default is equivalent to payment, and thereafter, though the mortgagee may have a right to enforce a personal liability for the debt, he cannot enforce any liability on the part of the land.<sup>279</sup>

§ 538. Payment or tender after default.

At common law, since, by the breach of condition, an absolute estate became vested in the mortgagee, a payment after default, although accepted by the mortgagee, could not re-vest the legal title in the mortgagor, and a reconveyance or release was necessary for this purpose.<sup>280</sup> This view has been accepted in some of the states in which the common-law theory of mortgages is adopted,<sup>281</sup> though not in all.<sup>282</sup>

consequently the legal title remains outstanding in the mortgagee until he makes such reconveyance. See Williams, *Real Property* (18th Ed.) 513; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709.

<sup>278</sup> See post, § 545.

<sup>279</sup> Litt. §§ 335, 338; Co. Litt. 209; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Lynch v. Hancock*, 14 S. C. 66; *Merritt v. Lambert*, 7 Paige (N. Y.) 344; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Willard v. Harvey*, 5 N. H. 252; *Schearff v. Dodge*, 33 Ark. 346.

<sup>280</sup> Litt. § 332; 4 Kent's Comm. 193. Reading on Mortgages, by Judge Trowbridge, 8 Mass. 551, 553, 558.

<sup>281</sup> *Phelps v. Sage*, 2 Day (Conn.) 151; *Doton v. Russell*, 17 Conn. 146; *Shields v. Lozeau*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *Parsons v. Welles*, 17 Mass. 419; *Smith v. Doe*, 26 Miss. 291; *Brobst v. Brock*, 10 Wall. (U. S.) 519, 536.

<sup>282</sup> *Brown v. Stewart*, 56 Md. 430; *Morgan's Lessee v. Davis*, 2 Har. & McH. (Md.) 9, 17; *Maxwell v. Moore*, 95 Ala. 166, 36 Am. St. Rep. 190; *Perkins' Lessee v. Dibble*, 10 Ohio, 433. See 4 Kent's Comm. 194, note. In some states, payment has, by statute, the effect of re-vesting title in the mortgagee. See *Griffin v. Lovell*, 42 Miss. 402; *Swett v. Horn*, 1 N. H. 332; *Hussey v. Fisher*, 94 Me. 301.



In jurisdictions where payment after default is thus insufficient to divest the mortgagee's legal title, a mere tender of payment after default can have no greater effect;<sup>283</sup> but even in those jurisdictions the legal title cannot, after such payment or tender, be utilized for the purpose of foreclosing the mortgage or depriving the mortgagor of possession of the land.<sup>284</sup>

In those states which have adopted the equitable or lien theory of mortgages, since the payment of the debt after default completely extinguishes the lien, and there is no title or estate in the mortgagee, no act on his part is necessary to free the land from all claim by him.<sup>285</sup> A tender of payment after default is, in a few of these states, regarded as sufficient to divest the lien of the mortgage, even though not kept good, and, after a refusal of a tender once made, the mortgagee, though he may enforce the personal liability of the mortgagor, cannot enforce the mortgage lien.<sup>286</sup> In

<sup>283</sup> *Phelps v. Sage*, 2 Day (Conn.) 151; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Rowell v. Mitchell*, 68 Me. 21; *Maynard v. Hunt*, 5 Pick. (Mass.) 240, *Kirchwey's Cas.* 706; *Currier v. Gale*, 9 Allen (Mass.) 522; *Parker v. Beasley*, 116 N. C. 1.

<sup>284</sup> *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *Robinson v. Cross*, 22 Conn. 171; *Wade v. Howard*, 11 Pick. (Mass.) 289; *Baker v. Gavitt*, 128 Mass. 93; *Harrison v. Eldridge*, 7 N. J. Law, 392, 407; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728.

<sup>285</sup> *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, *Kirchwey's Cas.* 713; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Potts v. Plaisted*, 30 Mich. 149.

But in some cases the mortgage may be kept alive in favor of the person making the payment, he being "subrogated" to the rights of the mortgagee in order that he may enforce "contribution" or "exoneration." See post, §§ 544, 545.

<sup>286</sup> *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, *Kirchwey's Cas.* 713; *McClung v. Missouri Trust Co.*, 137 Mo. 106; *Caruthers v. Humphrey*, 12 Mich. 270; *McClellan v. Coffin*, 93 Ind. 456; *Sager v. Tupper*, 35 Mich. 134; *Eslow v. Mitchell*, 26 Mich. 500; *Salinas*

others of such states it is necessary that the tender be kept good by the mortgagor;<sup>287</sup> and this view—that the tender must be kept good in order to affect the mortgage security—has been adopted in states where the common-law theory of mortgages controls.<sup>288</sup>

The right to pay the debt after default, and to thereby extinguish the claim of the mortgagee against the land, is what we have before referred to as the right of redemption,<sup>289</sup> it being, in the English court of chancery, regarded as a right to regain what has been forfeited and lost. In this country the same term is applied in states where the equitable or lien theory of mortgages is accepted, as well as in those adopting the English theory; but it is plainly a misnomer in the former class of states, since the failure to pay at maturity does not in any sense cause a forfeiture of the mortgagor's rights, it merely giving the mortgagee a right to foreclose or to recover on the mortgagor's personal obligation.

§ 539. Formal discharge or satisfaction.

Though it is unnecessary, in order to divest the lien of the mortgage, that payment be followed by a formal discharge, the mortgagor or other owner of the property almost invariably requires such a discharge, in order that the mort-

v. Ellis, 26 S. C. 337. See *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247. But in some of these states it is held that, if the mortgagor seeks affirmative relief in equity, he must keep his tender good. *Tuthill v. Morris*, 81 N. Y. 94, *Kirchwey's Cas.* 736; *Cowles v. Marble*, 37 Mich. 158.

<sup>287</sup> *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Matthews v. Lindsay*, 20 Fla. 973.

<sup>288</sup> *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Parker v. Beasley*, 116 N. C. 1; *Maxwell v. Moore*, 95 Ala. 166, 36 Am. St. Rep. 190; *Bailey v. Metcalf*, 6 N. H. 156.

<sup>289</sup> See ante, § 508.

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gage may not constitute a cloud on his title, and he may usually compel it to be given by bill in equity or equivalent statutory proceeding.<sup>290</sup> The discharge may be by a formal deed of release or reconveyance;<sup>291</sup> but the statute usually provides for an entry of satisfaction on the margin of the official record in which the mortgage has been enrolled.<sup>292</sup> A penalty is frequently imposed by statute in case the mortgagee, or the person who has succeeded to his interest, refuses to make such entry.<sup>293</sup>

#### § 540. Enforcement of right of redemption.

The mortgagee occasionally refuses to allow the mortgagor, or other person entitled to redeem, to exercise such right, thereby subjecting the land to a continuance of the mortgage lien, and perhaps impairing the validity or vendibility of the title. In such a case, and likewise when the mortgagee claims that the conveyance to him was absolute, and not by way of mortgage, or when there is a dispute as to the amount due, the mortgagor or other person entitled to redeem may proceed in equity to enforce the right of redemption, and may obtain a decree compelling the mortgagee, upon payment of the debt, to release or discharge the

<sup>290</sup> *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Kingman v. Sinclair*, 80 Mich. 427; *Booth v. Hoskins*, 75 Cal. 271.

<sup>291</sup> *Allen v. Leominster Sav. Bank*, 134 Mass. 580; *Mutual Building & Loan Ass'n v. Wyeth*, 105 Ala. 639; *Hoyt v. Swift*, 13 Vt. 129, 37 Am. Dec. 586.

<sup>292</sup> See *Beal v. Stevens*, 72 Cal. 451; *Allen v. Leominster Sav. Bank*, 134 Mass. 580; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256; *Hoyt v. Swift*, 13 Vt. 129, 37 Am. Dec. 586; 1 *Jones, Mortgages*, §§ 989-1037.

<sup>293</sup> See *Jarratt v. McCabe*, 75 Ala. 325; *Judy v. Thompson*, 156 Ind. 533; *Kennedy v. Moore*, 91 Iowa, 39; *Malarkey v. O'Leary*, 34 Or. 493; *Crawford v. Simon*, 159 Pa. St. 585.

mortgage.<sup>294</sup> The mortgagor must, in his bill, offer to pay the amount due, including interest.<sup>295</sup>

The decree, if in favor of the plaintiff, provides that the mortgagee shall satisfy or release the mortgage and deliver up the instrument of indebtedness upon the payment by the mortgagor of the amount due within a time named.<sup>296</sup> A dismissal of the bill cuts off any right of redemption, and is thus equivalent to a decree of foreclosure.<sup>297</sup>

— Bar by lapse of time.

A mortgagor may be barred of his right to redeem by the lapse of time; equity usually adopting for this purpose the period of limitation applicable to suits for the recovery of land, after which time the equity of redemption is presumed to be extinguished.<sup>298</sup> But in order that the mortgagor's rights may be thus extinguished by lapse of time, it is necessary that the mortgagee be in possession, and that this possession be adverse to the mortgagor.<sup>299</sup>

<sup>294</sup> 3 Pomeroy, Eq. Jur. § 1219; 2 Jones, Mortgages, § 1093.

<sup>295</sup> Adams v. Sayre, 70 Ala. 318; Way v. Mullett, 143 Mass. 49; Eastman v. Thayer, 60 N. H. 408; Berkman v. Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

<sup>296</sup> See 2 Jones, Mortgages, § 1106; Bremer v. Calumet & Chicago Canal & Dock Co., 127 Ill. 464; Dennett v. Codman, 158 Mass. 371; McKenna v. Kirkwood, 50 Mich. 544; Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140; Martin v. Ratcliff, 101 Mo. 254.

<sup>297</sup> Winchester v. Paine, 11 Ves. 194, 199; Casserly v. Witherbee, 119 N. Y. 522; Flanders v. Hall, 159 Mass. 95.

<sup>298</sup> Hughes v. Edwards, 9 Wheat. (U. S.) 489; Slicer v. Pittsburgh Bank, 16 How. (U. S.) 571; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; Finch's Cas. 1047; Jarvis v. Woodruff, 23 Conn. 548; Morgan v. Morgan, 10 Ga. 297; Dexter v. Arnold, 1 Sumn. 109, Fed. Cas. No. 3,857; Roberts v. Littlefield, 48 Me. 61; McNair v. Lot, 34 Mo. 285, 84 Am. Dec. 78; Robinson v. Fife, 3 Ohio St. 551.

<sup>299</sup> Green v. Turner, 38 Iowa, 112; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Bird v. Keller, 77 Me. 270; Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658; Hubbell v. Sibley, 50 N. Y. 468; Simmons v. Ballard, 103 N. C. 105; Knowlton v. Walker, 13 Wis. 264; Frink v. Le Roy, 49 Cal. 314.

## § 541. Persons entitled to redeem.

Any persons who are interested in the mortgaged land, or have a legal or equitable lien thereon, and are in privity with and claim under the mortgagor, may redeem from the mortgage.<sup>300</sup> Accordingly, the right may be exercised by a purchaser of the whole or a part of the mortgaged premises from the mortgagor, or from one claiming under the mortgagor,<sup>301</sup> by a subsequent mortgagee or holder of a judgment lien,<sup>302</sup> an heir or devisee of the owner of the land,<sup>303</sup> or by one entitled to dower or curtesy therein.<sup>304</sup> A person, however, who is not affected by the mortgage, and whose rights are prior thereto, or who has no interest whatever in the land, cannot redeem.<sup>305</sup>

<sup>300</sup> 4 Kent's Comm. 162; *Sellwood v. Gray*, 11 Or. 534; *Platt v. Squire*, 12 Metc. (Mass.) 494; *Grant v. Duane*, 9 Johns. (N. Y.) 611; *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Smith v. Austin*, 9 Mich. 475.

<sup>301</sup> *Scott v. Henry*, 13 Ark. 112; *Dunlap v. Wilson*, 32 Ill. 517; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

<sup>302</sup> *Stonehewer v. Thompson*, 2 Atk. 440; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Sager v. Tupper*, 35 Mich. 134; *Rogers v. Heron*, 92 Ill. 583; *Knowles v. Rablin*, 20 Iowa, 101; *McIntier v. Shaw*, 6 Allen (Mass.) 83; *Loomis v. Knox*, 60 Conn. 343; *Todd v. Johnson*, 56 Minn. 60.

<sup>303</sup> *Chew v. Hyman*, 10 Biss. 240, 7 Fed. 7; *Zægel v. Kuster*, 51 Wis. 31; *Hunter v. Dennis*, 112 Ill. 568; *Lewis v. Nangle*, 2 Ves. Sr. 431.

<sup>304</sup> *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Kirchwey's Cas.* 698; *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177; *Mills v. Van Voorhies*, 20 N. Y. 412; *Gatewood v. Gatewood*, 75 Va. 407; *Vaughan v. Dowden*, 126 Ind. 406; *McArthur v. Franklin*, 16 Ohio St. 193; *Rossiter v. Cossit*, 15 N. H. 33.

<sup>305</sup> *Lomax v. Bird*, 1 Vern. 182; *Rapier v. Gulf City Paper Co.*, 64 Ala. 332; *Byington v. Buckwalter*, 7 Iowa, 512, 74 Am. Dec. 279; *Grant v. Duane*, 9 Johns. (N. Y.) 591; *Sinclair v. Learned*, 51 Mich. 335; 3 Jones, Mortgages, § 1055.

## § 542. Amount necessary for redemption.

In order to redeem from a mortgage, it is necessary to pay the entire mortgage debt, if due, or so much thereof as may be due, together with interest to the time of redemption.<sup>306</sup> Though a person has an undivided interest only in the mortgaged premises, or owns a part only in severalty, he must, as a general rule, offer to pay the entire mortgage debt, since the mortgagee is entitled to retain his lien on every part of the land until his debt is entirely paid.<sup>307</sup> And, accordingly, a widow, entitled to dower, who desires to redeem, must pay the whole amount of the debt, and not merely one-third thereof.<sup>308</sup>

## § 543. Tacking and consolidation.

By the doctrine of "tacking," which has long prevailed in England, a mortgagee, having the legal estate, may, upon

<sup>306</sup> 4 Kent's Comm. 163; *Cowles v. Marble*, 37 Mich. 158; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Meacham v. Steele*, 93 Ill. 135; *Merritt v. Hoemer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713.

This is so even when a sale under the mortgage has taken place, and the property was sold for less than the amount of the mortgage. *Collins v. Riggs*, 14 Wall. (U. S.) 491; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Martin v. Fridley*, 23 Minn. 13.

<sup>307</sup> *Titely v. Davis*, 2 Eq. Cas. Abr. 604, *Kirchwey's Cas.* 697; *Palk v. Clinton*, 12 Ves. 59; *Gibson v. Crehore*, 5 Pick. (Mass.) 146, *Kirchwey's Cas.* 698; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Meacham v. Steele*, 93 Ill. 135; *Merritt v. Hoemer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Bell v. City of New York*, 10 Paige (N. Y.) 49; *Coffin v. Parker*, 127 N. Y. 117; *Andreas v. Hubbard*, 50 Conn. 351; *Franklin v. Gorham*, 2 Day (Conn.) 1421, 2 Am. Dec. 86.

One may, however, redeem part of the land by payment of part of the debt if the holder of the mortgage assents thereto. *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368; *Kerse v. Miller*, 169 Mass. 44.

<sup>308</sup> *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Mersells v. Van Riper*, 55 N. J. Eq. 618.

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making a further advance or acquiring a further charge on the same land, tack or add the further charge to his original debt, and hold the legal estate as against intermediate incumbrancers until he is satisfied in full; and, by an extension of the same doctrine, a third mortgagee, who has advanced his money without notice of a second mortgage or charge, may, on taking an assignment of the first mortgage, and thus acquiring the legal title, "tack" it to the third mortgage, and "squeeze out" the intervening mortgage or charge. The doctrine is based on the theory that the equities of the second and third incumbrancers are equal, and that therefore the legal title will prevail.<sup>309</sup> The third mortgagee must, however, be without notice of the second mortgage or incumbrance at the time of making the advance, and it results from this requirement that in the United States, where constructive knowledge of the second incumbrance is given to the third incumbrancer by the record, there is no room for the application of the principle;<sup>310</sup> and even apart from the question of notice, it could have no application in states in which a mortgage does not convey a legal title.

The doctrine of "consolidation," as applied to mortgages in England, consists in the right of the holder of two mortgages on different pieces of land, which belong to the same person, to retain each mortgage as a subsisting lien on the land until the debts secured by both the mortgages are paid.<sup>311</sup> The equity of the doctrine, especially against in-

<sup>309</sup> *Marsh v. Lee*, 2 Vent. 337, 1 White & T. Lead. Cas. Eq. 337, notes; *Brace v. Marlborough*, 3 P. Wms. 491; 1 Leake, 507, 509; 2 Robbins, Mortgages, 1219.

<sup>310</sup> *Grant v. Bissett*, 1 Caines Cas. (N. Y.) 112; *Osborn v. Carr*, 12 Conn. 208; *Averill v. Guthrie*, 8 Dana (Ky.) 84; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Brazee v. Lancaster Bank*, 14 Ohio, 321; *Anderson v. Neff*, 11 Serg. & R. (Pa.) 223; *Siter v. McClanachan*, 2 Grat. (Va.) 280; 4 Kent's Comm. 178; *Marsh v. Lee*, 1 White & T. Lead. Cas. Eq. 353.

<sup>311</sup> 2 Robbins, Mortgages, 855; *Williams, Real Prop.* 441; 1 Leake, 513; 4 Kent's Comm. 179, note 1(d) B.

nocent purchasers, has been frequently questioned, and by a modern enactment it applies to mortgages only when an intention that it shall apply is apparent.<sup>312</sup> It has never been adopted in this country.<sup>313</sup>

—Tacking unsecured claims.

Applying the maxim that he who seeks equity must do equity, it has been held in some states that the mortgagor cannot obtain a decree for redemption unless he pays not only the mortgage debt and interest, but also all other debts due by him to the mortgagee.<sup>314</sup> In other states, however, as in England, it is held that the mortgagee cannot thus charge collateral debts against the mortgaged property.<sup>315</sup>

<sup>312</sup> Conveyancing and Law of Property Act 1881, § 17.

<sup>313</sup> See 2 Jones, Mortgages, § 1083.

<sup>314</sup> *Scripture v. Johnson*, 3 Comm. 211; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Lake v. Shumate*, 20 S. C. 23; *Anthony v. Anthony*, 23 Ark 479 (but see *Cohn v. Hoffman*, 56 Ark. 119); *Brown v. Gaffney*, 32 Ill. 251; *Chase v. McDonald*, 7 Har. & J. (Md.) 161, 196; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64, 70; *Siter v. McClanachan*, 2 Grat. (Va.) 280, 299; *Walling v. Aiken*, 1 McMul. Eq. (S. C.) 2, 10; *Leeds v. Gifford*, 41 N. J. Eq. 464.

<sup>315</sup> *Challis v. Casborn*, Finch, Prec. Ch. 407, *Kirchwey's Cas.* 500; *Coleman v. Winch*, 1 P. Wms. 775, *Kirchwey's Cas.* 501; *Jones v. Smith*, 2 Ves. Jr. 372, 376; *Mahoney v. Bostwick*, 96 Cal. 53; *Brooks v. Brooks*, 169 Mass. 38; *Corporation for Relief of Poor Distressed Presbyterian Ministers v. Wallace*, 3 Rawle (Pa.) 109, 155.

In Massachusetts, however, the mortgagee has this right if there was an oral agreement that the mortgage should be security for such debts. *Joalyn v. Wyman*, 5 Allen (Mass.) 62; *Taft v. Stoddard*, 142 Mass. 545.

Even in England it is held that an heir or devisee seeking to redeem must pay, in addition to the mortgage debt, a debt of the deceased which is payable out of the land as being assets in the hands of such heir or devisee, this being stated to be for the purpose of avoiding circuity of action. *Coleman v. Winch*, 1 P. Wms. 777, *Kirchwey's Cas.* 501; *Rolfe v. Chester*, 20 Beav. 610; *Elvy v. Norwood*, 21 Law J. Ch. 716. But this rule is not there applied to the detriment of other creditors of equal degree, or incumbrancers (1944)



The right to thus tack collateral debts for the purpose of foreclosure, as distinct from redemption, has never been recognized.<sup>316</sup>

§ 544. Exoneration and contribution.

In the absence of a statutory provision to the contrary, or a different intention apparent from the will, the heir or devisee may require the executor or administrator to pay off a mortgage on the land securing a debt for which the deceased was personally liable, the theory being that it was the personal estate which received the benefit from the creation of the debt, and that it therefore should pay it.<sup>317</sup> This rule is now changed in England by statute.<sup>318</sup> In a number of states in this country, likewise, the matter is covered by statutory provisions of varying character, prescribing the order of payment of a decedent's debts, and determining the order of liability of the different classes of property and rights of contribution between them.<sup>319</sup>

The common-law rule never applied to cases in which the mortgage debt was neither created by the deceased nor in some way made by him his own debt;<sup>320</sup> and the right does

whose rights have accrued between the time of the mortgage and the creation of the debt. *Powis v. Corbet*, 3 Atk. 556, *Kirchwey's Cas.* 502; 1 Story, Eq. Jur. §§ 418, 419; *Hamerton v. Rogers*, 1 Ves. Jr. 513, and Sumner's note.

<sup>316</sup> *Lee v. Stone*, 5 Gill & J. (Md.) 1, *Kirchwey's Cas.* 504; *Anthony v. Anthony*, 23 Ark. 479; *Tunno v. Robert*, 16 Fla. 783.

<sup>317</sup> *Lutkins v. Leigh*, Cas. t. Talb. 54; *Ancaster v. Mayer*, 1 Brown Ch. 454, 1 White & T. Lead. Cas. Eq. 881, notes; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Sutherland v. Harrison*, 86 Ill. 363; *Brown v. Baron*, 162 Mass. 56, 44 Am. St. Rep. 331; *Hoff's Appeal*, 24 Pa. St. 200, 4 Gray's Cas. 832; *Gould v. Winthrop*, 5 R. I. 319; 2 Woerner, Administration, § 494; 9 Am. & Eng. Enc. Law (2d Ed.) 1317 et seq.

<sup>318</sup> 17 & 18 Vict. c. 113 (Locke King's Act, A. D. 1854).

<sup>319</sup> See 11 Am. & Eng. Enc. Law (2d Ed.) 1063; 19 Am. & Eng. Enc. Law (2d Ed.) 1333; 2 Woerner, Administration, § 497.

<sup>320</sup> 2 Williams, Executors (9th. Ed.) 1565 et seq.; *Evelyn v. Evelyn*, (1245)

not exist in favor of the heir or devisee as against a legatee, other than the residuary legatee.<sup>521</sup>

The equitable doctrine of contribution is applied, as before indicated, in favor of a person interested in the land who pays the whole mortgage debt, when he should properly, as against others interested in the land, pay a part only; and in case he pays off a debt which should be entirely satisfied by another person interested in the land, he is entitled to complete "exoneration,"—that is, to recover the whole amount paid from the person primarily liable. This right to contribution or exoneration is usually enforced by means of the doctrine of subrogation, discussed in the next section.

### § 545. Subrogation of person redeeming.

In the law of mortgages there is frequent occasion for the application of the equitable doctrine of subrogation, by which one who, in order to protect his interests, is compelled to pay a debt for which he is not primarily liable, is entitled to stand in the place of the original creditor, with all the rights belonging to the latter, including particularly the right to enforce any securities which the latter may have held for the payment of the debt. This right is sometimes given the name of "equitable assignment," as being in effect an assignment, implied by equity, to the person making the payment, and, since an assignment is thus implied, it is usually imma-

2 P. Wms. 659; *Scott v. Beecher*, 5 Madd. 96; *Hoff's Appeal*, 24 Pa. St. 200; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Creasy v. Willis*, 159 Mass. 249; *Minter v. Burnett*, 90 Tex. 245.

<sup>521</sup> 2 Williams, Executors, 1564; *Hamilton v. Worley*, 2 Ves. Jr. 65; *Hoff's Appeal*, 24 Pa. St. 206; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Mollan v. Griffith*, 3 Paige (N. Y.) 402. In Massachusetts the devisee or heir is exonerated as against a general legatee. *Hewes v. Dehon*, 3 Gray (Mass.) 205; *Pilington v. Fuller*, 11 Allen (Mass.) 139; *Brown v. Baron*, 162 Mass. 56.

terial whether he takes an actual assignment of the rights and securities of the original creditor.

The doctrine is applied for the benefit of a surety, who, upon paying his principal's debt, thereby becomes entitled to stand in the place of the creditor, in order to obtain indemnity; and, accordingly, when the debt is secured by mortgage, the surety is, on paying it, entitled to the benefit of such mortgage, being in equity regarded as the assignee thereof.<sup>322</sup> Likewise, a person who, as having an interest in the property subsequent to the mortgage, is obliged to redeem from the mortgage in order to protect his interest, may be subrogated to the right of the mortgagee to enforce the mortgage, in order to compel contribution by the other persons interested in the property.<sup>323</sup>

As a general rule, any person who is entitled to redeem, as having an interest in the land, is entitled to be subrogated on making such redemption, provided he be not primarily and solely liable for the mortgage debt. The right exists in favor of the mortgagor if, by reason of his grantee's assumption of the mortgage debt, he has himself ceased to be primarily liable therefor;<sup>324</sup> and this is so even when the gran-

<sup>322</sup> *Taylor v. Tarr*, 84 Mo. 420; *Matthews v. Fidelity Title & Trust Co. (C. C.)* 52 Fed. 687; *Conner v. Howe*, 35 Minn. 518; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Telford v. Garrels*, 132 Ill. 550; *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92.

<sup>323</sup> *Muir v. Berkshire*, 52 Ind. 149; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Arnold v. Green*, 116 N. Y. 566, *Finch's Cas.* 1115; *Gatewood v. Gatewood*, 75 Va. 407; *Champlin v. Williams*, 9 Pa. St. 341; *Young v. Morgan*, 89 Ill. 199; *Swain v. Stockton Sav. & Loan Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118.

The right to subrogation exists even though the mortgage is discharged upon the record. *Arnold v. Green*, 116 N. Y. 566; *Cobb v. Dyer*, 69 Me. 494; *Tyrrell v. Ward*, 102 Ill. 29; *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83; *Hammond v. Barker*, 61 N. H. 53.

<sup>324</sup> *Begein v. Brehm*, 123 Ind. 160; *Stillman's Ex'rs v. Stillman*, 21 N. J. Eq. 126; *Flagg v. Geltmacher*, 98 Ill. 293; *Risk v. Hoffman*, 69

tee does not assume the mortgage, but, the conveyance being stated to be subject to the mortgage, the mortgaged land becomes primarily liable for the debt.<sup>325</sup> It also exists in favor of a junior mortgagee,<sup>326</sup> and of one who purchases the mortgaged land without assuming its payment, and without any express statement that the land is subject to the mortgage.<sup>327</sup>

The right of subrogation also exists in favor of one who, though not personally liable, and without any interest in the land to protect, pays off the mortgage at the request and for the benefit of the person primarily liable, with an express or implied agreement that he shall have the benefit of the existing mortgage, or of a new one to be given.<sup>328</sup> So, one who loans money to the owner of the land in order to pay off the mortgage, and takes another mortgage in order to secure him, is entitled to the benefit of the prior mortgage if the new mortgage turns out to be defective, and there are no intervening incumbrances.<sup>329</sup>

Ind. 137; *Kinnear v. Lowell*, 34 Me. 299; *Ayers v. Dixon*, 73 N. Y. 318.

<sup>325</sup> *Greenwell v. Heritage*, 71 Mo. 459; *Jumel v. Jumel*, 7 Paige, N. Y. 591; *Johnson v. Zink*, 51 N. Y. 333, *Finch's Cas.* 1111; *Gerdine v. Menage*, 41 Minn. 417; *Kinnear v. Lowell*, 34 Me. 299.

<sup>326</sup> *Worcester Nat. Bank v. Cheeney*, 37 Ill. 602; *Ketchum v. Crippen*, 37 Cal. 223; *Ellsworth v. Lockwood*, 42 N. Y. 89, 96; *Ward v. Seymour*, 51 Vt. 320; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240; *Erwin v. Acker*, 126 Ind. 133; *Milligan's Appeal*, 104 Pa. St. 503; *Cobb v. Dyer*, 69 Me. 494.

<sup>327</sup> *Watson v. Gardner*, 119 Ill. 312; *Walker v. King*, 45 Vt. 525; *Braden v. Graves*, 85 Ind. 92; *Gleason v. Dyke*, 22 Pick. (Mass.) 390.

<sup>328</sup> *Gans v. Thieme*, 93 N. Y. 225; *Robertson v. Mowell*, 66 Md. 530; *Borland v. Meurer*, 139 Pa. St. 513; *Fears v. Albea*, 69 Tex. 437, 5 Am. St. Rep. 78; *Lockwood v. Marsh*, 3 Nev. 138; *Tolman v. Smith*, 85 Cal. 280.

<sup>329</sup> *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83; *Milholand v. Tiffany*, 64 Md. 455; *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Cripp* (1248)

When land is sold under a foreclosure sale which turns out to be invalid, the purchaser who has paid the price is subrogated to the rights of the holder of the mortgage under which the sale took place.<sup>320</sup>

A payment of part only of the debt gives no right of subrogation, in the absence of express agreement therefor at the time of payment, or unless the balance of the debt has been previously paid, but the person so paying may take an assignment of part of the mortgage to secure him.<sup>321</sup>

The right does not exist in favor of a mere stranger who voluntarily pays off the mortgage, but by such payment the mortgage is extinguished.<sup>322</sup> Nor does it exist in favor of one who is primarily bound to pay the debt, whether he be the original mortgagor or a grantee of the property who has assumed payment of the mortgage.<sup>323</sup>

#### § 546. Marshaling of securities.

When one holds a mortgage on two tracts of land, and a second mortgage or other lien in the hands of another person covers but one of these tracts, the prior mortgagee may be

pen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187; Wilton v. Mayberry, 75 Wis. 191, 17 Am. St. Rep. 193.

<sup>320</sup> Wilson v. Brown, 82 Ind. 471; Martin v. Kelly, 59 Miss. 652; Crosby v. Farmers' Bank of Andrew County, 107 Mo. 436; Johnson v. Robertson, 34 Md. 165; Jones v. McKenna, 4 Lea (Tenn.) 630; Brobst v. Brock, 10 Wall. (U. S.) 519.

<sup>321</sup> Commonwealth of Virginia v. State, 32 Md. 501, 545; Troxell v. Silverthorn, 45 N. J. Eq. 330; Kyner v. Kyner, 6 Watts (Pa.) 221; Sheldon, Subrogation, § 127.

<sup>322</sup> Guy v. De Uprey, 16 Cal. 195, 76 Am. Dec. 518; Van Winkle v. Williams, 38 N. J. Eq. 105; Arnold v. Green, 116 N. Y. 566; Rodman v. Sanders, 44 Ark. 504; Sheldon, Subrogation, § 241.

<sup>323</sup> Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474; Goodyear v. Goodyear, 72 Iowa, 329; Willson v. Burton, 52 Vt. 394; Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509; McCabe v. Swap, 14 Allen (Mass.) 188; Butler v. Seward, 10 Allen (Mass.) 466; Probstfield v. Csizsek, 31 Minn. 420.

(1249)

compelled to resort first to the parcel not covered by the inferior lien, in order to leave the other, so far as possible, to the second lienor, and the latter is, in case the prior mortgagee does proceed against such other land in the first place, entitled to be subrogated to the rights of the prior mortgagee against the land covered by the first mortgage only, this being an application of the general equitable principle that one having two funds to satisfy his demands shall not, by his election, disappoint a person who has only one fund.<sup>334</sup> The principle will not be applied, however, if it will in any way prejudice the first mortgagee, the mortgagor, or third persons.<sup>335</sup>

#### § 547. Merger of mortgage.

The principle that, if the owner of the legal estate in the land becomes also the owner of a charge or lien thereon, the latter will be merged or extinguished, is frequently applied in the case of mortgages. Equity, however, applies the principle only when it accords with the actual or presumed intention of the parties.<sup>336</sup> This intention may be expressly stated in the conveyance of the land or the assignment of the incumbrance which brings the two interests together, or may be made apparent by the acts of the parties or the character of the conveyance, or the circumstances under which the conveyance is made.<sup>337</sup> When there is, as is frequently the

<sup>334</sup> 3 Pomeroy, Eq. Jur. § 1414; Aldrich v. Cooper, 2 White & T. Lead. Cas. Eq. 228, notes; Hannah v. Carrington, 18 Ark. 85; Andreas v. Hubbard, 50 Conn. 351; White v. Polleys, 30 Wis. 505; Abbott v. Powell, 6 Sawy. 91, Fed. Cas. No. 13; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; Brooks v. Maltledge, 100 Ga. 367; Ball v. Setzer, 33 W. Va. 444.

<sup>335</sup> Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22; Boone v. Clark, 129 Ill. 466; McGinnis' Appeal, 16 Pa. St. 445; Detroit Sav. Bank v. Truesdall, 38 Mich. 480; 3 Pomeroy, Eq. Jur. § 1414.

<sup>336</sup> 2 Pomeroy, Eq. Jur. §§ 789-795.

<sup>337</sup> See Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117; (1250)

case, nothing to show the intention, in such a case equity will usually presume that the owner of the two interests intended that they should merge, or the contrary, according as merger would be most for his benefit.<sup>338</sup> In case there is an incumbrance or equity intervening between the mortgage and the estate of the owner of the property, as, for example, when there is a second mortgage, it will be presumed that the owner of the premises and of the first mortgage did not intend that his mortgage should be merged in his estate in the land, since the effect of such merger would be to accord priority to the second mortgage or other intervening incumbrance.<sup>339</sup>

Merger does not result when the mortgage is assigned to one of two or more tenants in common of the mortgaged premises;<sup>340</sup> nor, under the modern statutes giving married

*Agnew v. Charlotte, C. & A. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237; *Gresham v. Ware*, 79 Ala. 192; *Goodwin v. Keney*, 47 Conn. 486; *Smith v. Roberts*, 91 N. Y. 470; *Campbell v. Knights*, 24 Me. 332; *Matthews v. Jones* (Neb.) 66 N. W. 622.

The expressed or implied intention which controls is, it seems, that existing at the time the two estates come together, and not that which may be afterwards formed. *Given v. Marr*, 27 Me. 212; 2 Pomeroy, Eq. Jur. § 792.

<sup>338</sup> *Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738; *Adams v. Angell*, 5 Ch. Div. 634; *Mallory v. Hitchcock*, 29 Conn. 127; *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223; *Bullard v. Leach*, 27 Vt. 491; *Den d. Van Wagenen v. Brown*, 26 N. J. Law, 196; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474; *Patterson v. Mills*, 69 Iowa, 755; *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Duncan v. Drury*, 9 Pa. St. 332, 49 Am. Dec. 565; *Aetna Life Ins. Co. v. Corn*, 89 Ill. 170; *Silliman v. Gam-mage*, 55 Tex. 365.

<sup>339</sup> *Lowman v. Lowman*, 118 Ill. 582; *Stantons v. Thompson*, 49 N. H. 272; *Duffy v. McGuinness*, 13 R. I. 595; *Hanlon v. Doherty*, 109 Ind. 37; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Ryer v. Gass*, 130 Mass. 227.

<sup>340</sup> *Titworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Barker v. Flood* 103 Mass. 474.

women control of their real estate, does the fact that the owners of the mortgage and the mortgaged property are husband and wife cause a merger.<sup>341</sup>

A merger will always be enforced when to keep the mortgage alive would involve a fraud or wrong upon some innocent party, since equity undertakes to prevent a merger only when this is necessary for purposes of justice.<sup>342</sup> There is necessarily a merger if an owner of the mortgaged land, who is under an obligation to pay the debt, acquires the title to the mortgage, since he cannot keep the mortgage alive to the prejudice of other persons;<sup>343</sup> and in such a case, even if he takes an assignment of the mortgage, the mortgage is extinguished.<sup>344</sup>

#### VI. FORECLOSURE

The right to foreclose accrues upon the breach of a condition of the mortgage as ascertained by the terms of the mortgage, or of the instrument secured thereby, or both.

In the absence of a statute expressly naming the period within which suit to foreclose may be brought, the limitation period

<sup>341</sup> *Bean v. Boothby*, 57 Me. 395; *Power v. Lester*, 23 N. Y. 527; *Bemis v. Call*, 10 Allen (Mass.) 512.

<sup>342</sup> *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Miller v. Whelan*, 158 Ill. 555; *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53, 8 Am. Dec. 465; 2 Pomeroy, Eq. Jur. § 794.

<sup>343</sup> *Mickles v. Townsend*, 13 N. Y. 575; *Brown v. Lapham*, 3 Cush. (Mass.) 551.

<sup>344</sup> *Jones v. Lamar*, 34 Fed. 454; *Bunch v. Grave*, 111 Ind. 351; *Brown v. Lapham*, 3 Cush. (Mass.) 554; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Lilly v. Palmer*, 51 Ill. 331; *Theisen v. Dayton*, 32 Iowa, 74; *Burnham v. Dorr*, 72 Me. 198; *Frey v. Vanderhoo*, 15 Wis. 436.

One who has conveyed the mortgaged premises with a covenant against incumbrances cannot pay off the mortgage and take an assignment, or otherwise keep it alive, in direct violation of his covenant. *Jones v. Lamar* (C. C.) 34 Fed. 454; *Mickles v. Townsend*, 13 N. Y. 575; *Butler v. Seward*, 10 Allen (Mass.) 466.



applicable to actions to recover land is adopted in equity. In the majority of states, the right to foreclose is not affected by the fact that the personal remedy on the obligation secured is barred by the statute of limitations.

Foreclosure in this country is usually by means of an equitable proceeding to obtain a sale of the land, and payment from the proceeds of the obligation secured. The same end is frequently attained by a sale under a power in the mortgage, without any judicial proceeding. In most of the New England states foreclosure is usually by entry or writ of entry, which gives the mortgagee the land itself, as in the "strict foreclosure" of equity, now but seldom employed outside of one or two states. *Scire facias* is, in one state, the recognized mode of foreclosure. The personal liability of the mortgagor can be enforced only by a distinct action at law, except in those states where a decree for a deficiency is by statute allowed in the foreclosure proceeding.

§ 548. Accrual of the right to foreclose.

Foreclosure is the proceeding by which a mortgagor or other owner of an interest in the land is, upon his failure to comply with the stipulations of the mortgage or of the instrument secured thereby, deprived of his right to discharge the land from the lien of the mortgage.<sup>345</sup>

The right to foreclose the mortgage accrues upon a non-compliance with a stipulation, the performance of which the mortgage is intended to secure, and not before.<sup>346</sup>

Usually, the mortgage, or the instrument secured thereby, provides that a default in the payment of an installment of principal or interest shall cause the whole principal to immediately become due, at the mortgagee's option, thus au-

<sup>345</sup> Though we usually speak of the "foreclosure of a mortgage," what is really foreclosed is the right to redeem or discharge the mortgage. See *Shepard v. Richardson*, 145 Mass. 32.

<sup>346</sup> See *Trayser v. Trustees of Indiana Asbury University*, 39 Ind. 556; *James v. Fisk*, 9 Smedes & M. (Miss.) 144, 47 Am. Dec. 111.

garded, not as raising a presumption of payment or satisfaction, but as barring the foreclosure proceeding by analogy to the bar in an action to recover land.<sup>556</sup>

— Bar of obligation secured.

By the weight of authority, the expiration of the period allowed for bringing suit on the personal obligation secured by the mortgage does not bar suit to foreclose.<sup>557</sup> In some states, however, a different view is taken, and the running of the statute against the personal obligation defeats the right of foreclosure.<sup>558</sup>

<sup>556</sup> *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78. See *Bacon v. McIntire*, 8 Metc. (Mass.) 87.

A few cases apparently adopt this theory to the extent of holding that, since the defendant's possession must be adverse in order to bar an action to recover land, and since a mortgagor's possession is not adverse to the mortgagee (see ante, § 443), the right of foreclosure is not barred, as against a mortgagor in possession, even by the lapse of the statutory period after default, unless the mortgagor's possession has become adverse by a repudiation of the mortgagee's rights. *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572 (semble); *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511; *Combs v. Goldsworthy*, 109 Mo. 151; *Chouteau v. Riddle*, 110 Mo. 366; *Hodgdon v. Heidman*, 66 Iowa, 645; *Ellsberry v. Boykin*, 65 Ala. 336.

<sup>557</sup> *Pratt v. Huggins*, 29 Barb. (N. Y.) 277, *Kirchwey's Cas.* 753; *Hulbert v. Clark*, 128 N. Y. 295; *Bizzell v. Nix*, 60 Ala. 231, 31 Am. Rep. 38; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Demuth v. Old Town Bank of Baltimore*, 85 Md. 315, 60 Am. St. Rep. 322; *Myer v. Beal*, 5 Or. 130; *Crain v. Paine*, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; *Cookes v. Culbertson*, 9 Nev. 199; *Fisher's Ex'r v. Mossman*, 11 Ohio St. 42; *Wood v. Augustine*, 61 Mo. 46; *Norton v. Palmer*, 142 Mass. 433; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Richmond v. Aiken*, 25 Vt. 324.

<sup>558</sup> *Coles v. Withers*, 33 Grat. (Va.) 136; *Lord v. Morris*, 13 Cal. 432, *Kirchwey's Cas.* 763; *Harris v. Mills*, 23 Ill. 44, 31 Am. Dec. 259, *Kirchwey's Cas.* 769; *Pollock v. Maison*, 41 Ill. 516; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Smith v. Foster*, 44 Iowa, 442.

## § 550. Strict foreclosure in equity.

Before the right of redemption was recognized by courts of equity, no foreclosure was necessary, since the mere breach of the condition vested an absolute estate in the mortgagee. When, however, the right of redemption came to be recognized, it was, in justice to the mortgagee, necessary that a time be limited within which this right should be exercised, and chancery accordingly adopted the practice of issuing a decree, upon the filing of a bill by the mortgagee, cutting off the right of redemption if not exercised by a time named.<sup>350</sup> Such a decree, in effect vesting the title to the land in the mortgagee unless there was a redemption within a period named, was at one time the only method of foreclosure; but since the introduction of a foreclosure by sale of the land, it has acquired the distinctive name of "strict foreclosure."<sup>350</sup>

This method of foreclosure has not been favored in this country, since it is liable to result in forfeiting the whole property to the mortgagee on account of a debt considerably less than the value of the property. It is however, recognized in a number of states as an appropriate form of proceeding under special circumstances, when not calculated to prejudice either of the parties in interest;<sup>351</sup> and it is considered especially applicable in order to cut off the rights of subsequent incumbrancers or lien holders.<sup>352</sup> In states where

<sup>350</sup> 4 Kent's Comm. 181; Coote, Mortgages (4th Ed.) 990.

<sup>350</sup> See 4 Kent's Comm. 181; 2 Jones, Mortgages, §§ 1538-1570; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346; *Clark v. Rayburn*, 8 Wall. (U. S.) 318.

<sup>351</sup> *Farrell v. Parlier*, 50 Ill. 274; *Stephens v. Bichnell*, 27 Ill. 444. 81 Am. Dec. 242; *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 125 Ill. 237; *Moulton v. Cornish*, 138 N. Y. 133; *Bresnahan v. Bresnahan*, 46 Wis. 385.

<sup>352</sup> *Jefferson v. Coleman*, 110 Ind. 515; *Bolles v. Duff*, 43 N. Y. 469; *Shaw v. Hersey*, 48 Iowa, 468; *Ross v. Boardman*, 22 Hun (N. Y.) 527, *Finch's Cas.* 1112.

the statute absolutely requires a sale of the land, a strict foreclosure is of course not permissible.<sup>363</sup> It is apparently a usual method of foreclosure in Connecticut and Vermont.<sup>364</sup>

A decree of strict foreclosure vests the absolute title in the mortgagee,<sup>365</sup> but the mortgage debt is not necessarily satisfied, and the mortgagor's personal liability for any excess in the amount of the mortgage over the value of the land may be enforced in an action at law.<sup>366</sup>

### § 551. Foreclosure by entry.

Akin to strict foreclosure in equity, as vesting in the mortgagee an absolute estate in the land itself, is foreclosure by the peaceable entry of the mortgagee upon the premises, and his retention of possession thereafter for a specified time. This is provided for by the statutes of Maine, Massachusetts, New Hampshire, and Rhode Island.<sup>367</sup>

The entry must be in the presence of witnesses, whose certificate as to the entry is filed for record, and this serves as notice to the owner and persons interested in the land.<sup>368</sup>

<sup>363</sup> See *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Browne v. Browne*, 17 Fla. 607, 623, 35 Am. Rep. 96.

<sup>364</sup> *Waters v. Hubbard*, 44 Conn. 340; *Devereaux v. Fairbanks*, 52 Vt. 587; Gen. St. Conn. § 3023; St. Vt. 1894, §§ 978, 979; 2 Jones, *Mortgages*, § 1326.

<sup>365</sup> *Waters v. Hubbard*, 44 Conn. 340; *Ellis v. Leek*, 127 Ill. 60; *Brainard v. Cooper*, 10 N. Y. 356; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Champion v. Hinkle*, 45 N. J. Eq. 162.

<sup>366</sup> *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6,209; *Spencer v. Harford*, 4 Wend. (N. Y.) 386; *Vansant v. Allmon*, 23 Ill. 30; *Hazard v. Robinson*, 15 R. I. 226; *Devereaux v. Fairbanks*, 52 Vt. 587; *Paris v. Hulett*, 26 Vt. 308. See *Windham County Sav. Bank v. Himes*, 55 Conn. 438.

<sup>367</sup> 1 Stimson's Am. St. Law, § 1921. See 2 Jones, *Mortgages*, c. 23.

<sup>368</sup> *Thompson v. Kenyon*, 100 Mass. 108; *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Snow v. Pressey*, 32 Me. 552; *Thompson v. Ela*, 58 N. H. 490

The statutes require that the entry be peaceable, and, if it is opposed, judicial proceedings must be resorted to.<sup>369</sup>

The severity of foreclosure in this way without a sale is mitigated by provisions of the statutes giving a considerable time after entry in which the property may be redeemed; this being three years, except in New Hampshire, where it is one year.<sup>370</sup> The effect of the foreclosure is to cancel the mortgage debt to the extent of the value of the land at the time at which the foreclosure is completed.<sup>371</sup>

§ 552. Foreclosure by writ of entry.

In Maine, Massachusetts, and New Hampshire, the mortgagee may bring a writ of entry for the purpose of foreclosure. This proceeding, though in form a common-law action, has, when used for the purpose of foreclosure, the general characteristics of an equity proceeding, the amount due being ascertained on equitable principles, and the judgment being that, if this sum is not paid within a certain time, the mortgagee shall be put into possession of the land.<sup>372</sup> When so put into possession, the mortgagee is in the position of a mortgagee who has peaceably entered without action, and possession by him for the length of time required in such case, as stated in the preceding section, will give him an indefeasible title.<sup>373</sup>

<sup>369</sup> Rev. Laws Mass. 1902, c. 187, § 1; Rev. St. Me. 1883, c. 90, § 3; Gen. Laws R. I. 1896, c. 207, § 3; Pub. St. N. H. 1901, c. 139, § 14.

<sup>370</sup> 1 Stimson's Am. St. Law, § 1921.

<sup>371</sup> Hatch v. White, 2 Gall. 152, Fed. Cas. No. 6,209; Morse v. Merritt, 110 Mass. 458; Hunt v. Stiles, 10 N. H. 466; Flint v. Winter Harbor Land Co., 89 Me. 420; Newall v. Wright, 3 Mass. 133, 3 Am. Rep. 98.

<sup>372</sup> Holbrook v. Bliss, 9 Allen (Mass.) 69; Ladd v. Putnam, 79 Me. 568; 2 Jones, Mortgages, c. 29.

<sup>373</sup> 1 Stimson's Am. St. Law, § 1925 (A) (3). (C) (2); 2 Jones, Mortgages, § 1306.

## § 553. Equitable proceeding for sale.

The most usual method of foreclosure in this country is by a suit in equity, or by a civil proceeding under the code in the nature of a suit in equity, to obtain a sale of the land, and payment of the mortgage debt from the proceeds.<sup>374</sup> The decree in such a proceeding finds the amount due on the mortgage debt, this being determined either by the court or by a clerk, master, or other officer;<sup>375</sup> and also orders a sale of the land by an officer, who is usually designated by the statute.<sup>376</sup>

If the mortgagor has conveyed portions of the property to different owners, the decree should provide for their sale in the inverse order of alienation, in accordance with the rule of liability previously stated.<sup>377</sup> In any case, the court should, if it seems most for the interests of either party, and not incompatible with the interests of the other, order a sale of the land in separate parcels, instead of *en masse*,<sup>378</sup> and in some states such discretion is to be exercised by the officer making the sale.<sup>379</sup>

<sup>374</sup> 2 Jones, Mortgages, § 1317; Wiltzie, Mortgage Foreclosure, § 3; 1 Stimson's Am. St. Law, § 1925.

<sup>375</sup> Wernwag v. Brown, 3 Blackf. (Ind.) 457, 36 Am. Dec. 433; Wilson Sewing Mach. Co. v. Rutledge, 60 Iowa, 39; Tompkins v. Wiltberger, 56 Ill. 385; Hoy v. Bramhall, 19 N. J. Eq. 74; Collier v. Ervin, 2 Mont. 335; Vaughn v. Nims, 36 Mich. 297; Kelly v. Searling, 4 Abb. Pr. (N. Y.) 354.

<sup>376</sup> See Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154; State v. Holiday, 35 Neb. 327; Mayer v. Wick, 15 Ohio St. 548.

<sup>377</sup> See ante, 530.

<sup>378</sup> Livingston v. Mildrum, 19 N. Y. 440; Pancoast v. Duval, 26 N. J. Eq. 445; Macomb v. Prentiss, 57 Mich. 225.

If the mortgage covers distinct tracts of land, these should be sold separately. Patton v. Smith, 113 Ill. 499; Brake v. Brownlee, 91 Ind. 359; Schilling v. Lintner, 43 N. J. Eq. 444; Cunningham v. Cassidy, 17 N. Y. 276.

<sup>379</sup> Jones v. Gardner, 57 Cal. 641; Stone v. Missouri Guarantee Savings & Building Ass'n, 53 Ill. App. 78; Hughes v. Riggs, 34 Md. 502.

The decree of sale cannot be attacked collaterally for irregularities therein which do not affect the jurisdiction, and, until reversed, it is binding on all parties to the suit.<sup>330</sup> An innocent purchaser at the sale is not affected by a subsequent reversal of the decree, though the rule is different if the purchaser is the mortgagee, or some other party to the proceeding, and a sale to him is invalidated by the reversal.<sup>331</sup>

The sale, to be valid, must, in most jurisdictions, be confirmed by the court,<sup>332</sup> and a deed to the purchaser is usually, if not invariably, made by the officer conducting the sale.<sup>333</sup> Any surplus proceeds of sale remaining after the payment of the debt secured by the mortgage are thereafter paid to the mortgagor, or, if there are subsequent purchasers or incumbrancers, such surplus proceeds belong to them, usually in the order in which their interests were acquired.<sup>334</sup>

The completed sale vests in the purchaser whatever title the mortgagor had when he executed the mortgage,<sup>335</sup> and thus cuts off the interests of any subsequent purchasers or in-

<sup>330</sup> *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Woolery v. Grayson*, 110 Ind. 149; *Burford v. Rosenfield*, 37 Tex. 42.

<sup>331</sup> *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Phillips v. Benson*, 82 Ala. 500; *Gott v. Powell*, 41 Mo. 416; *Hubbell v. Broadwell's Adm'rs*, 8 Ohio, 120; *Adams v. Odom*, 74 Tex. 206; *Lambert v. Livingston*, 181 Ill. 161; 17 Am. & Eng. Enc. Law (2d Ed.) 1017-1019.

<sup>332</sup> *Williamson v. Berry*, 8 How. (U. S.) 495; *Lathrop v. Nelson*, 4 Dill. 194, Fed. Cas. No. 8,111; *Wells v. Rice*, 34 Ark. 346; *Hart v. Burch*, 130 Ill. 426; *Allen v. Poole*, 54 Miss. 323; *Woehler v. Endter*, 46 Wis. 301.

<sup>333</sup> 2 Jones, *Mortgages*, §§ 1652-1655; *Jackson v. Warren*, 32 Ill. 331; *Mitchell v. Bartlett*, 51 N. Y. 447.

<sup>334</sup> See 2 Jones, *Mortgages*, §§ 1684-1693; *Wiltsie, Mortgage Foreclosure*, cc. 32, 33.

<sup>335</sup> *King v. McCully*, 38 Pa. St. 76; *Davis v. Connecticut Mut. Life Ins. Co.*, 84 Ill. 508; *Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260, *Kirchwey's Cas.* 304; *Poweshiek County v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 521; *Champion v. Hinkle*, 45 N. J. Eq. 162

cumbrancers, who were made parties to the proceeding, and deprives them of all right of redemption.<sup>336</sup> Persons whose interests and claims were prior to the mortgage are not affected by the sale, and the purchaser acquires, as against them, no better title than the mortgagor had at the time of making the mortgage.<sup>337</sup> If, however, a prior mortgagee is made a party to the proceeding, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being one both to foreclose the second mortgage and to redeem from the first mortgage.<sup>338</sup>

In a number of states, the statute gives the mortgagor and other persons interested a right to redeem for a certain period after the sale, such period varying in different states from six months to two years.<sup>339</sup> This right is purely the creation of statute, and is to be carefully distinguished from the right of redemption in equity before foreclosure.

**§ 554. Parties to proceeding—Persons interested in mortgage.**

The mortgagee, if he has not assigned his rights, is, of course, the proper party plaintiff in a foreclosure suit. An

<sup>336</sup> *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 438; *Shaw v. Helsey*, 48 Iowa, 468; *Gamble v. Horr*, 40 Mich. 561.

<sup>337</sup> *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Bozarth v. Landers*, 118 Ill. 181; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Iowa County Sup'rs v. Mineral Point R. Co.*, 24 Wis. 93, 121; *City & County of San Francisco v. Lawton*, 18 Cal. 465; *Summers v. Bromley*, 28 Mich. 125. And see 1 *Stimson's Am. St. Law*, § 1927.

<sup>338</sup> *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747; *Hagan v. Walker*, 14 How. (U. S.) 29, 37; *Jerome v. McCarter*, 94 U. S. 734; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 459; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Cronin v. Hazeltine*, 3 Allen (Mass.) 324.

<sup>339</sup> See 1 *Stimson's Am. St. Law*, § 1944; 11 *Am. & Eng. Enc. Law* (2d Ed.) pp. 213, 226, 232.



assignee of the mortgage debt, with or without the mortgage, may foreclose, and is the proper person to do so, since he is the person interested in realizing on the security;<sup>390</sup> and one to whom the mortgage and the debt are assigned merely as collateral security may foreclose,<sup>391</sup> as may his assignor, since the latter is still interested in the mortgage debt.<sup>392</sup> One who is entitled to but part of the mortgage debt, as being the assignee of one of the notes secured, or otherwise,<sup>393</sup> and likewise a person who is subrogated to the rights of the mortgagee, may foreclose.<sup>394</sup>

One who has assigned the mortgage absolutely cannot institute a foreclosure suit, since he is no longer a party in interest;<sup>395</sup> nor can one to whom the mortgage alone is assigned, without the debt.<sup>396</sup>

In cases in which all the persons interested in the mortgage debt do not join as plaintiffs in the institution of the proceeding, those not so joining must be made parties de-

<sup>390</sup> *Bendey v. Townsend*, 109 U. S. 665; *Center v. Planters' & Merchants' Bank*, 22 Ala. 743; *Carper v. Munger*, 62 Ind. 481; *Holmes v. French*, 70 Me. 341; *Merritt v. Bartholick*, 36 N. Y. 44.

<sup>391</sup> *Hunter v. Levan*, 11 Cal. 11; *Chicago & Great Western Railroad Land Co. v. Peck*, 112 Ill. 408, 439; *Bard v. Poole*, 12 N. Y. 495; *McKinney v. Miller*, 19 Mich. 142; *Brown v. Tyler*, 3 Gray (Mass.) 135. See *Chew v. Brumagen*, 13 Wall. (U. S.) 497.

<sup>392</sup> *Norton v. Warner*, 3 Edw. Ch. (N. Y.) 106; *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Consolidated Nat. Bank of San Diego v. Hayes*, 112 Cal. 75; *Wells v. Wells*, 53 Vt. 1.

<sup>393</sup> *Goodall v. Mopley*, 45 Ind. 355; *Pugh v. Holt*, 27 Miss. 461; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Utz v. Utz*, 34 La. Ann. 752; 2 Jones, Mortgages, § 1378.

<sup>394</sup> *Risk v. Hoffman*, 69 Ind. 137; *Wood v. Smith*, 51 Iowa, 156; *Shinn v. Shinn*, 91 Ill. 477; *Hamilton v. Dobbs*, 19 N. J. Eq. 227. See ante, § 345.

<sup>395</sup> *Cutler v. Clementson* (C. C.) 67 Fed. 409; *Barraque v. Manuel*, 7 Ark. 516; *Call v. Leisner*, 23 Me. 25; *Pryor v. Wood*, 31 Pa. St. 142. See *McGuffey v. Finley*, 20 Ohio, 474; *Gould v. Newman*, 6 Mass. 239.

<sup>396</sup> *Bulkley v. Chapman*, 9 Conn. 5; *Pope v. Jacobus*, 10 Iowa, 263; *Ellison v. Daniels*, 11 N. H. 274; *Merritt v. Bartholick*, 36 N. Y. 44; 4 Kent's Comm. 194.

fendant, in order to cut off their interests, and pass a clear title to the mortgagee or purchaser at the mortgage sale.<sup>397</sup> Accordingly, one who has assigned the mortgage as collateral security,<sup>398</sup> or received such an assignment,<sup>399</sup> and joint owners with the plaintiff of the mortgage, including owners of other notes secured thereby,<sup>400</sup> must be made parties in order to cut off their rights against the land.

— — Personal representatives of mortgage claimant.

Upon the death of the owner of the mortgage debt, the title thereto, with the right to proceed by foreclosure, passes to his personal representatives, and not to his heirs, and consequently the former are the proper persons to foreclose.<sup>401</sup>

In the case of a mortgage owned jointly by more than one person, the doctrine of "survivorship" applies, and, on the death of one, the survivor or survivors may foreclose without making the representatives of the deceased owner parties to the suit.<sup>402</sup>

<sup>397</sup> *Mangels v. Donau Brewing Co.* (C. C.) 53 Fed. 513; *Pine v. Shannon*, 30 N. J. Eq. 501; *Goodall v. Mopley*, 45 Ind. 355.

<sup>398</sup> *Woodruff v. Depue*, 14 N. J. Eq. 168; *Dalton v. Smith*, 86 N. Y. 176.

<sup>399</sup> *Plowman v. Riddle*, 14 Ala. 169.

<sup>400</sup> *Goodall v. Mopley*, 45 Ind. 355; *Rankin v. Major*, 9 Iowa, 297; *Johnson v. Brown*, 31 N. H. 405; *Pettibone v. Edwards*, 15 Wis. 95; *Bacon v. O'Keefe*, 13 Wash. 655; *Myers v. Wright*, 33 Ill. 285; *Delepine v. Campbell*, 45 Tex. 628; *Brown v. Bates*, 55 Me. 520.

<sup>401</sup> *Thornborough v. Baker*, 3 Swanst. 628; *White v. Rittenmyer*, 30 Iowa, 268; *Felch v. Hooper*, 20 Me. 163; *Newton v. Stanley*, 23 N. Y. 61; *Griffin v. Lovell*, 42 Miss. 402; *Miller v. Donaldson*, 17 Ohio, 264; *Buck v. Fischer*, 2 Colo. 182; *Roath v. Smith*, 5 Conn. 133; *Douglass v. Durin*, 51 Me. 121.

<sup>402</sup> *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Lannay v. Wilson*, 30 Md. 536; *Blake v. Sanborn*, 8 Gray (Mass.) 154. But that such representatives must be made parties, see *Mutual Life Ins. Co. of New York v. Sturges*, 32 N. J. Eq. 678.

## — Persons interested in land.

Since the purpose of a foreclosure proceeding is to cut off rights of redemption, all those persons having such rights should be made parties. Accordingly, as a general rule, all persons who are in any way interested in the mortgaged land, and whose rights were acquired after the mortgage, should be made parties, in order that their rights of redemption may be completely extinguished by the foreclosure.<sup>403</sup>

All owners of liens of any kind subsequent to the mortgage, including subsequent mortgagees and judgment creditors, should be made parties.<sup>404</sup>

The failure to make any particular lienor a party does not invalidate the foreclosure proceeding for all purposes, but only as regards such person, who still has the right to redeem.<sup>405</sup> A failure to make the owner of an estate in the land a party has, on the other hand, the effect not only of rendering the proceeding ineffective for the purpose of cutting off his right of redemption, but renders it utterly nugatory for the purpose of divesting his estate, and a purchaser at the sale is in such case merely subrogated to the rights of the mortgagee as against such owner.<sup>406</sup>

<sup>403</sup> *Clark v. Reyburn*, 8 Wall. (U. S.) 318; *Noyes v. Hall*, 97 U. S. 24; *Ballard v. Carter*, 71 Tex. 161.

<sup>404</sup> *Alexander v. Greenwood*, 24 Cal. 506; *Goodman v. White*, 26 Conn. 317; *Wiley v. Ewing*, 47 Ala. 423; *Strang v. Allen*, 44 Ill. 428; *Hosford v. Johnson*, 74 Ind. 479; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Harris v. Hooper*, 50 Md. 537; *Brainard v. Cooper*, 10 N. Y. 356; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91.

<sup>405</sup> *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Porter v. Kilgore*, 32 Iowa, 379; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Harris v. Hooper*, 50 Md. 537; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Kay v. Whittaker*, 44 N. Y. 565; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Johnson v. Hosford*, 110 Ind. 572; *Johnson v. Hambleton*, 52 Md. 378; *Cram v. Cotrell*, 43 Neb. 546.

<sup>406</sup> *Watson v. Spence*, 20 Wend. (N. Y.) 260; *Bogga v. Hargrave*, 16 Cal. 559, 76 Am. Dec. 561; *Stark v. Brown*, 12 Wis. 572, 78 Am.

The mortgagor need not be made a party if he has transferred all his interest, unless it is desired to obtain a personal judgment against him.<sup>407</sup>

On the death of an owner of the mortgaged land, his heirs must be made parties;<sup>408</sup> or, in case the mortgaged land is devised, his devisees.<sup>409</sup>

The wife of the mortgagor or of a subsequent purchaser of the property, if entitled to dower, should be made a party if her right of dower is subordinate to the mortgage, as where she joined therein;<sup>410</sup> and the wife's right of homestead cannot generally be foreclosed unless she is a party to the foreclosure proceeding.<sup>411</sup>

Dec. 762; *Ohling v. Luitjens*, 32 Ill. 23; *Watts v. Julian*, 122 Ind. 124; *Terrell v. Allison*, 21 Wall. (U. S.) 292; *Berlack v. Halle*, 22 Fla. 236, 1 Am. St. Rep. 185; *Barrett v. Blackmar*, 47 Iowa, 565; *Williams v. Terrell*, 54 Ga. 462; *Bailey v. Myrick*, 36 Me. 50; *Lenox v. Reed*, 12 Kan. 223; *Raynor v. Selmes*, 52 N. Y. 579; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Carpenter v. Ingalls*, 3 S. D. 49; *Hall v. Huggins*, 19 Ala. 200; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Reed v. Marble*, 10 Paige (N. Y.) 409; *South Carolina Mfg. Co. v. Price*, 4 Rich. (S. C.) 338.

<sup>407</sup> *Boutwell v. Steiner*, 84 Ala. 307, 5 Am. St. Rep. 375; *Johnson v. Monell*, 13 Iowa, 300; *Davis v. Hardy*, 76 Ind. 272; *Miller v. Thompson*, 34 Mich. 10; *Andrews v. Stelle*, 22 N. J. Eq. 478; *Bigelow v. Bush*, 6 Paige (N. Y.) 343; *Buchanan v. Monroe*, 22 Tex. 537.

<sup>408</sup> *Hunt v. Acre*, 28 Ala. 580; *Kiernan v. Blackwell*, 27 Ark. 235; *Lane v. Erskine*, 13 Ill. 501; *White v. Rittenmyer*, 30 Iowa, 268; *Britton v. Hunt*, 9 Kan. 228; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Isler v. Koonce*, 83 N. C. 55; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

In some states, however, under particular statutes, it is sufficient to make the personal representative a party. See 9 Enc. Pl. & Pr. 811.

<sup>409</sup> *Chew v. Hyman* (C. C.) 7 Fed. 7; *Chadbourn v. Johnston*, 119 N. C. 282.

<sup>410</sup> *Leonard v. Villars' Adm'r*, 23 Ill. 377; *McArthur v. Franklin*, 15 Ohio St. 485, 16 Ohio St. 193; *Swan v. Wiswall*, 15 Pick. (Mass.) 126; *Byrne v. Taylor*, 46 Miss. 95. See *Merchants' Bank v. Thomson*, 55 N. Y. 7. And see ante, § 190.

<sup>411</sup> *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Morris v. Ward*, 5 Kan. 246; *Larson v. Reynolds*, 13 Iowa, 534. Compare *Townsend* (1266)

Persons asserting adverse claims to the mortgaged land, alleged to be paramount to the rights of the mortgagee, are not proper parties to the foreclosure proceeding, since the object of such proceeding is to cut off the right of redemption of persons whose rights are subject to the mortgage, and not to determine the title to the property.<sup>412</sup> So, upon a foreclosure proceeding by a junior mortgagee, it is not proper, as a general rule, to make a prior mortgagee or other prior lienor a party, since his rights are not subject to the mortgage, but the land will be sold subject to his lien.<sup>413</sup> If, however, the prior lienor is made a party, and the complainant specifically asks that his claim be first paid from the proceeds of the sale, and he consents thereto, the land may be sold free from his lien.<sup>414</sup> Such a proceeding is, as against the prior lienor, in effect a bill to redeem from his lien.

§ 555. Power of sale.

Owing to the delays and expense incident to foreclosure by bill in equity, and the difficulty of making proper parties

*Sav. Bank of New Haven v. Epping*, 3 Woods, 390, Fed. Cas. No. 14,120.

<sup>412</sup> *Dial v. Reynolds*, 96 U. S. 340; *City & County of San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Hambrick v. Russell*, 86 Ala. 199; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Summers v. Bromley*, 28 Mich. 125; *Kinsley v. Scott*, 58 Vt. 470; *Bogey v. Shute*, 57 N. C. 174; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note. See authorities cited in *King v. Mason*, 89 Am. Dec. 434, note.

<sup>413</sup> *Tome v. Merchants' & Mechanics' Permanent Building & Loan Co.*, 34 Md. 12; *Hancock v. Hancock*, 22 N. Y. 568; *Krutsinger v. Brown*, 72 Ind. 466; *White v. Holman*, 32 Ark. 753; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note; *Hague v. Jackson*, 71 Tex. 761; *Hagan v. Walker*, 14 How. (U. S.) 29, 37.

<sup>414</sup> *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Raymond v. Holborn*, 23 Wis. 57; *Waters v. Bossel*, 58 Miss. 602; *Clark v. Prentice*, 3 Dana (Ky.) 468; ante, note 383.

thereto, the device has been largely resorted to of inserting in the mortgage a "power of sale," as it is called, being a provision authorizing the mortgagee to sell the property, without resort to a judicial proceeding, in case of default. In this country, such powers were in general use earlier than in England, and they have been recognized as valid, even in the absence of any statute authorizing them.<sup>415</sup> There are, however, in many states, statutes expressly authorizing or recognizing such powers.<sup>416</sup> In a few states, on the other hand, it is provided by statute that a power of sale in a mortgage shall not authorize a sale otherwise than by decree of court, or there is an implication to that effect from a requirement that foreclosure shall be by judicial proceedings.<sup>417</sup>

The question whether such a power of sale in the mortgagee is terminated by the death of the mortgagor before its exercise has been the subject of a number of decisions. For the purpose of considering this question, it is important to distinguish between those jurisdictions in which the mortgage vests the legal title in the mortgagee and those in which it does not. When the mortgagee has the legal title, the power of sale answers to the definition of a power "coupled with an interest," as being "engrafted on an estate in the thing," and as being exercised by the donee of the power, not in the name of the donor of the power, but in the name of the donee.<sup>418</sup> In other words, it is not a mere "power of

<sup>415</sup> *Walthall's Ex'rs v. Rives*, 34 Ala. 91; *Bloom v. Van Renaselaer*, 15 Ill. 503; *Eaton v. Whiting*, 3 Pick (Mass.) 484; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Devereux*, 63 N. C. 624; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32; *Very v. Russell*, 65 N. H. 646.

<sup>416</sup> See 1 *Stimson's Am. St. Law*, § 1924; 2 *Jones, Mortgages*, c. 39; *Wiltale, Mortgage Foreclosure*, c. 34.

<sup>417</sup> 1 *Stimson's Am. St. Law*, § 1924 (D); 2 *Jones, Mortgages*, §§ 1733-1740, 1747, 1748.

<sup>418</sup> *Hunt v. Rousmanier's Adm'rs*, 5 Wheat. (U. S.) 175.

agency," but is what we have referred to as an "equitable power," being a power in the holder of the bare legal title to convey the equitable interest.<sup>419</sup> Consequently, it confers a right of a proprietary character, which is not divested by the death of the person who conferred the right,—the mortgagor.<sup>420</sup> In those jurisdictions, however, in which the legal title does not pass to the mortgagee, but remains in the mortgagor, the power cannot be regarded as a power coupled with an interest, but is merely a "power of agency" in the mortgagee, which cannot be exercised in his own name, because he has no title to the land, and, being exercisable only in the name of the mortgagor, cannot be exercised after the latter's death.<sup>421</sup> But even in this latter class of juris-

<sup>419</sup> Edwards, Prop. Land, 209. "When the legal fee is vested in the mortgagee, a power of sale given to him operates in equity only, and is in effect a trust." 2 Hayes, Conveyancing (5th Ed.) 141, note. See ante, § 276.

In *Hall v. Bliss*, 18 Mass. 554, 19 Am. Rep. 476, Gray, C. J., assumes that a power in the mortgagee to sell on default operates as a legal power of appointment, taking effect under the statute of uses, such as is described ante, §§ 275-277. And the same idea is indicated in the decisions cited post, note 426. If this were so, the mere sale would operate as an appointment of the use, and the legal title would vest in the vendee without any conveyance by the mortgagee,—a view which has never been adopted apart from statute. See 2 Jones, Mortgages, § 1839 et seq. Furthermore, a mortgage in the ordinary form would seem to be inadequate for the creation of a power of appointment, it not raising any seisin to serve uses, and not containing any declaration of uses. Compare Sugden, Powers, 149; Farwell, Powers, 3.

<sup>420</sup> *Hudgins v. Morrow*, 47 Ark. 515; *Berry v. Skinner*, 30 Md. 567; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *McGuire v. Van Pelt*, 55 Ala. 344; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Bergen v. Bennett*, 1 Caines Cas. (N. Y.) 1; *Strother v. Law*, 54 Ill. 413; *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714.

<sup>421</sup> *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636; *Wilkins v. McGehee*, 86 Ga. 764; *Baum v. Raley*, 53 S. C. 32; *Lockett v. Hill*, 1 Woods, 552, Fed. Cas. No. 8,443.

In Texas, though the legal title does not there vest in the mortgagee, it has been decided that the power of sale survives the death

dictions the mortgagor cannot, by voluntary act, revoke the power.<sup>422</sup>

The power will usually pass to the assigns of the mortgagee when the latter has the legal title,<sup>423</sup> while it will not do so, it would seem, in jurisdictions in which the legal title remains in the mortgagor. Moreover, in the former class of states, the mortgagee's personal representative, as the successor to the mortgagee's interest upon his death, is regarded as entitled to exercise the power in his place and stead,<sup>424</sup> while in the latter class the power must be regarded as personal to the mortgagee, like any other power of agency.<sup>425</sup>

It is usually stated that the purchaser under the power of sale acquires the title which the mortgagor had at the time of making the mortgage, unaffected by any subsequent trans-

of the mortgagor. *Rogers' Heirs v. Watson*, 81 Tex. 400; *Robertson's Adm'r v. Paul*, 16 Tex. 472. These cases merely adopt, without discussion, the statements made in other states that the power is "coupled with an interest." They cannot be supported under the doctrine of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 175.

<sup>422</sup> *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317. "Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law." *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174. So in the case of a deed of trust vesting the legal title in the trustee. *More v. Calkins*, 95 Cal. 435.

<sup>423</sup> *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *McGuire v. Van Pelt*, 55 Ala. 344 (by stat.); *Pickett v. Jones*, 63 Mo. 195; *Sanford v. Kane*, 133 Ill. 199, 23 Am. St. Rep. 602; *Harnickell v. Orndorff*, 35 Md. 341; *Chilton v. Brooks*, 71 Md. 450. See *Randall v. Hazelton*, 12 Allen (Mass.) 412. Occasionally, the right of the mortgagee's assigns to exercise the power is made dependent on the express mention of "assigns" in the creation of the power. *Dolbear v. Norduff*, 84 Mo. 619; *Chilton v. Brooks*, 71 Md. 450. And see *Pardee v. Lindley*, 31 Ill. 174. Such is the rule in England. 2 *Robbins, Mortgages*, 890.

<sup>424</sup> *Lewis v. Wells*, 50 Ala. 198; *Harnickell v. Orndorff*, 35 Md. 341; *Collins v. Hopkins*, 7 Iowa, 463; *Merrin v. Lewis*, 90 Ill. 505.

<sup>425</sup> See *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283.



fers or liens.<sup>426</sup> This is unquestionably the case when the mortgage vests the legal title in the mortgagee, since such legal title, vested in the mortgagee for certain purposes, including that of sale, cannot be divested by any equity subsequently accruing in favor of a third person. When, however, the mortgage gives the mortgagee merely a lien, since the sale under the power is merely the exercise of a power of agency, and it is, in legal effect, the act of the principal, it can, it would seem, in the absence of a statute providing otherwise, transfer only such title as the mortgagor has at the time of sale.<sup>427</sup>

— Mode of procedure.

The statute usually contains provisions as to the notice of sale, to be given by publication or otherwise, and also as to the manner of conducting the sale, and these are controlling, even when in conflict with the terms of the power in the mortgage.<sup>428</sup> These latter control, however, in the absence of an overruling statutory provision, and they must be strictly complied with.<sup>429</sup> There is usually a requirement in the statute

<sup>426</sup> 2 Jones, Mortgages, § 1897; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Sims v. Field*, 66 Mo. 111; *Torrey v. Cook*, 116 Mass. 163; *Brown v. Smith*, 116 Mass. 108; *Aiken v. Bridgeford*, 84 Ala. 295; *Powers v. Andrews*, 84 Ala. 289; *Bull's Petition*, 15 R. I. 534; *Woonsocket Sav. Institution v. American Worsted Co.*, 13 R. I. 255.

These decisions, while correct in their results, are based on the view, erroneous, it would seem, that the power of sale in the mortgage is a power to appoint a use. See ante, note 419.

<sup>427</sup> This difficulty is, in some states, obviated by statute, as in New York (see Thomas, Mortgages, § 1139) and Wisconsin (*Nau v. Brunette*, 79 Wis. 664).

<sup>428</sup> *Butterfield v. Farnham*, 19 Minn. 85 (Gil. 38); *Webb v. Hoefler*, 53 Md. 187; *Pierce v. Grimley*, 77 Mich. 273; *Bragdon v. Hatch*, 77 Me. 433.

<sup>429</sup> *Ormsby v. Tarascon*, 3 Litt. (Ky.) 404; *Thornburg v. Jones*, 36 Mo. 514; *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Hall v. Towne*, 45 Ill. 493; *Cranston v. Crane*, 97 Mass. 459.

or in the mortgage that the sale shall be by public auction, but, in the absence of such express requirement, the sale may be private.<sup>420</sup>

In the absence of a statutory provision or an express stipulation in the mortgage to the contrary, a mortgagee cannot usually purchase at a sale made by him under such a power, since he bears, so far as concerns the exercise of such a power, at least a *quasi* trust relation towards others interested in the land, and a sale to him will be set aside upon an application, made with reasonable promptness, by the owner of the land or other person interested therein.<sup>421</sup>

The power usually provides that the mortgagee shall make a conveyance to the person purchasing at the sale, and this he may no doubt do when the legal title is in him under the mortgage.<sup>422</sup> When, however, by the law of the state, he is not the holder of the legal title, he cannot, unless authorized by statute, convey it to another, and he must make such a conveyance merely as the representative or attorney of the mortgagor, and in the latter's name.<sup>423</sup> Sometimes the

<sup>420</sup> *Davey v. Durrant*, 1 De Gex & J. 535; *Mowry v. Sanborn*, 68 N. Y. 153, 160. See *Griffin v. Marine Co. of Chicago*, 52 Ill. 130.

<sup>421</sup> *Hyndman v. Hyndman*, 19 Vt. 9, *Kirchwey's Cas.* 582; *Ezzel v. Watson*, 83 Ala. 120; *Blockley v. Fowler*, 21 Cal. 326, 32 Am. Dec. 747; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Hall v. Towne*, 45 Ill. 493; *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678; *Howard v. Ames*, 3 Metc. (Mass.) 308; *Very v. Russell*, 65 N. H. 646; *Dyer v. Shurtleff*, 112 Mass. 165; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *McCall v. Mash*, 39 Ala. 487, 13 Am. St. Rep. 145.

If the mortgage in terms authorizes the mortgagee to purchase, he may do so. *Knox v. Armistead*, 37 Ala. 511, 13 Am. St. Rep. 65; *Ellenbogen v. Griffey*, 55 Ark. 268; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Montague v. Dawes*, 12 Allen (Mass.) 397; *Elliott v. Wood*, 45 N. Y. 71.

<sup>422</sup> *Tripp v. Ide*, 3 R. I. 51; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Munn v. Burges*, 70 Ill. 604.

<sup>423</sup> *Dendy v. Waite*, 36 S. C. 569; *Williams v. Washington*, 40 S. C. 457.

power provides expressly that he shall make the conveyance as the attorney of the mortgagor.<sup>434</sup>

The statute sometimes requires that a certificate or affidavit by the mortgagee as to the proceedings leading up to the sale shall be recorded by him. Such a provision is, however, regarded as directory only, and not mandatory.<sup>435</sup>

Any surplus over and above the mortgage debt must be paid over to the mortgagor or to other persons having interests in the property subsequent to the mortgage, as in the case of a sale under decree of court.<sup>436</sup>

— Sale under deed of trust.

In some parts of the country, particularly in the South, a "deed of trust" is commonly used to secure debts, the land being thereby conveyed to a trustee, usually with a provision that he reconvey to the grantor if the debt be paid, and that, in case of nonpayment, he sell the land, and apply the proceeds of the sale in paying the debt. Such an instrument is commonly used in all parts of the country when the persons whose claims are to be secured are numerous, or when they are unknown, and it is universally used to secure issues of bonds by corporations.

In some of the states, where a mortgagee does not acquire the legal title, a deed of trust of this character is regarded as merely in effect a mortgage, and as consequently not vesting any legal title in the trustee, so called, and this apparently without reference to whether the parties intended that

<sup>434</sup> *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106; *Speer v. Hadduck*, 31 Ill. 439; *Mulvey v. Gibbons*, 87 Ill. 367.

<sup>435</sup> See 1 *Stimson's Am. St. Law*, § 1924; *Tuthill v. Tracy*, 31 N. Y. 157; *Field v. Gooding*, 106 Mass. 310; *Mundy v. Monroe*, 1 Mich. 68.

<sup>436</sup> *Cope v. Wheeler*, 41 N. Y. 303; *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Newhall v. Lynn Five Cents Sav. Bank*, 101 Mass. 428, 3 Am. Rep. 387; *Stoevers v. Stoevers*, 9 Serg. & R. (Pa.) 434; *Reynolds v. Hennessy*, 15 R. I. 215. See 1 *Stimson's Am. St. Law*, § 1924a.

he should have the legal title.<sup>437</sup> In others of such states, the grantee in the deed is regarded as actually having the legal title.<sup>438</sup> But even in this latter class of states, presumably the conveyance would be construed as not conveying the legal title upon a clear expression of intention to that effect, and, generally speaking, the question whether a particular instrument is to be regarded as merely a mortgage, or as a conveyance of the legal title to a trustee for the purpose of selling the land in certain contingencies in order to pay a debt or debts, would seem to be properly a question of the construction of the language of the particular instrument, and this view is quite ordinarily adopted. The fact that the conveyance is to the creditor, though named as a trustee, rather than to a third person, is usually regarded as conclusive that the instrument is a mortgage,<sup>439</sup> and the use of a provision ordinarily found in a mortgage, that the conveyance shall be void if the debt is paid at maturity, is apparently evidence to the same effect;<sup>440</sup> while, on the other

<sup>437</sup> *McLane v. Paschal*, 47 Tex. 365; *Hurley v. Estes*, 6 Neb. 386; *Thompson v. Marshall*, 21 Or. 171. Where this view is taken, the trustee's power of sale would seem to be subject to the same infirmities as attend a power of sale in a mortgage in states where the mortgagee has no legal title. See ante, § 454.

<sup>438</sup> *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480; *Soutter v. Miller*, 15 Fla. 625; *Devin v. Hendershott*, 32 Iowa, 192; *Stephens v. Clay*, 17 Colo. 489. See *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336.

<sup>439</sup> *Marvin v. Tittsworth*, 10 Wis. 320; *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859. And see *Sargent v. Howe*, 21 Ill. 148; *Eaton v. Whiting*, 3 Pick. (Mass.) 484. Contra, *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128.

<sup>440</sup> See *Austin v. Sprague Mfg. Co.*, 14 R. I. 464; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162, 181; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 283; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94; *Turner v. Watkins*, 31 Ark. 429. But see *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336. So, in Ohio, the instrument is merely a mortgage if it contains a condition that it shall be void if the debt is paid when due; while it is a deed of trust, vesting all the (1274)

hand, the fact that the instrument names no time at which the trustee shall exercise his power of sale, or at which the right of redemption shall terminate, tends to show that it is not a mortgage.<sup>441</sup> Such a conveyance, however, even though regarded as strictly a deed of trust, as distinguished from a mortgage, may, as having some of the elements of a mortgage, be within the scope of a statute in reference to sales under a power in a mortgage.<sup>442</sup>

The same rule applies to a purchase by the trustee selling under the power as to a sale by a mortgagee, and a sale to himself may be set aside.<sup>443</sup>

#### § 556. *Scire facias*.

In Pennsylvania, foreclosure is by a writ of *scire facias*, issued twelve months after default, requiring the mortgagor, his heirs or executors, to show cause why the mortgaged land should not be taken in execution for the mortgage, and, on the rendition of judgment in favor of the mortgagee, a writ of *levari facias* issues, under which the land is sold.<sup>444</sup> Foreclosure by *scire facias* is also allowed by the statutes of two or three other states, but it is not apparently a usual method of procedure.<sup>445</sup>

#### § 557. Stipulation for attorney's fees.

A stipulation in the mortgage or instrument evidencing the debt secured that, upon foreclosure, there shall be in-

legal estate in the trustee, if it is in form an absolute conveyance for the purpose of raising money to pay the debt if it is not paid as agreed. *Martin v. Alter*, 42 Ohio St. 94.

<sup>441</sup> *Shepard v. Richardson*, 145 Mass. 32; 2 Perry, Trusts, 602d.

<sup>442</sup> *Shillaber v. Robinson*, 97 U. S. 75; *Cross v. Fombey*, 54 Ark. 179; *Wolfe v. Dowell*, 13 Smedes & M. (Miss.) 103.

<sup>443</sup> *Cunningham v. Macon & B. R. Co.*, 156 U. S. 400; *Williamson v. Stone*, 128 Ill. 129; *Lass v. Sternberg*, 50 Mo. 124.

<sup>444</sup> 1 Brightley, *Purd. Dig.* § 169, p. 659, et seq.

<sup>445</sup> *Laws Del.* 1893, p. 843; 2 *Starr & Curt. Ann. St. Ill.* c. 95, § 15; *Gen. St. N. J.* p. 2103, §§ 4, 5.

cluded in the decree the amount of the attorney's fees in the foreclosure proceeding, is valid, in the majority of states,<sup>446</sup> though in some a different view is taken.<sup>447</sup> The amount of the attorney's fees named in such stipulation is not, however, it has been held, conclusive upon the court, and it may allow such less sum as may seem reasonable.<sup>448</sup>

§ 558. Enforcement of personal liability.

As previously stated, the mortgage is usually given to secure a debt for which the mortgagor is personally liable, and the enforcement of this liability becomes a matter of importance in case the amount of the debt cannot be realized from the mortgaged property. It has always been considered, in the absence of a statutory provision to the contrary, that the mortgagee may enforce his different rights at the same time, pursuing concurrently his suit in equity to foreclose and his action at law on the note or bond evidencing the mortgagor's personal liability.<sup>449</sup> Likewise, recovery in an action on the debt does not affect the right to subsequently foreclose;<sup>450</sup> nor does the completion of foreclosure prevent

<sup>446</sup> *Tholen v. Duffy*, 7 Kan. 405, *Kirchwey's Cas.* 493; *Barry v. Guild*, 126 Ill. 439; *McAllister's Appeal*, 59 Pa. St. 204; *Pierce v. Kneeland*, 16 Wis. 672; *Mason v. Luca*, 116 Cal. 232; *Bowie v. Hall*, 69 Md. 434, 9 Am. St. Rep. 433; *Miner v. Paris Exchange Bank*, 53 Tex. 559.

<sup>447</sup> *Thomasson v. Townsend*, 10 Bush (Ky.) 114; *Kittermaster v. Brossard*, 105 Mich. 219, 55 Am. St. Rep. 437; *Security Co. of Hartford v. Eyer*, 36 Neb. 507; *Jarvis v. Southern Grocery Co.*, 63 Ark. 225. See *State v. Taylor*, 10 Ohio, 378.

<sup>448</sup> *Daly v. Maitland*, 83 Pa. St. 334, 32 Am. Rep. 457, *Kirchwey's Cas.* 495. See *Gibson v. Southwestern Land Co.*, 89 Wis. 49. Contra, under statute, *Scholey v. De Mattos*, 18 Wash. 504.

<sup>449</sup> *Burnell v. Martin*, 2 Doug. 417; *Booth v. Booth*, 2 Atk. 243; *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, 616; *Very v. Watkins*, 18 Ark. 546; *Colt v. Fitch*, *Kirby (Conn.)* 254, 1 Am. Dec. 20; *Vansant v. Allmon*, 23 Ill. 30; *Copperthwaite v. Dummer*, 18 N. J. Law, 258; *Brown v. Cascaden*, 43 Iowa, 103.

<sup>450</sup> *Connecticut Mut. Life Ins. Co. v. Jones*, 1 McCrary, 383, 3 Fed. 303; *Thornton v. Pigg*, 24 Mo. 249; *Wahl v. Phillips*, 12 Iowa, 81. See ante, § 549.

a subsequent suit to recover on the personal liability, unless the result of the foreclosure is to satisfy the debt.<sup>451</sup>

— In foreclosure proceeding.

Formerly, in case the proceeds of the sale of the property were insufficient to pay the obligation, the only mode in which the mortgagee could enforce the mortgagor's personal liability was by a separate action at law against the mortgagor.<sup>452</sup> Of recent years, however, statutes have been passed in many states authorizing the entry in the foreclosure proceeding of a personal judgment or decree for the deficiency against the mortgagor or other person liable for the debt;<sup>453</sup> and in such states the mortgagee is usually subject to restrictions of a more or less positive character upon his right to institute separate proceedings to enforce the personal liability and to foreclose.<sup>454</sup>

<sup>451</sup> *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Morgan v. Sherwood*, 53 Ill. 171; *Marston v. Marston*, 45 Me. 412; *Stark v. Mercer*, 3 How. (Miss.) 377; *Leland v. Loring*, 10 Metc. (Mass.) 122; *Paris v. Hulett*, 26 Vt. 308. See, also, ante, § 550.

<sup>452</sup> *Hunt v. Lewis*, 4 Stew. & P. (Ala.) 138; *Johnson v. Shepard*, 35 Mich. 115; *Stark v. Mercer*, 3 How. (Miss.) 377; *Fithian v. Monks*, 43 Mo. 502, 519; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69; *Dunkley v. Van Buren*, 3 Johns. Ch. (N. Y.) 380.

<sup>453</sup> 1 Stimson's Am. St. Law, § 1926; 9 Enc. Pl. & Pr. 454; 2 Jones, Mortgages, c. 38.

<sup>454</sup> The statute sometimes requires the mortgage security to be exhausted before an action is brought to enforce the personal liability. See *Bartlett v. Cottle*, 63 Cal. 366; *Johnson v. Lewis*, 13 Minn. 364 (Gil. 337). In some states, by statute, during the pendency of an action at law for the recovery of the debt, a foreclosure suit cannot be maintained, and a subsequent foreclosure suit is allowed only if execution on a judgment for the debt is returned unsatisfied. 1 Stimson's Am. St. Law, § 1932 (B). In other states, while a foreclosure suit is pending, an action on the debt cannot be brought except by leave of court. 1 Stimson's Am. St. Law, § 1932 (D). And the statute sometimes forbids the bringing of a subsequent action on the debt, after a decree of foreclosure, the creditor having a right to a personal decree in the foreclosure proceeding. Code Civ. Proc. N. Y. § 1628.

## **CHAPTER XXXVI**

### **EQUITABLE LIENS**

- § 559. General considerations.**
- 560. Express charges on land.**
- 561. Agreements for security (equitable mortgages).**
- 562. Lien for improvements.**
- 563. Lien for owelty of partition.**
- 564. Implied lien of grantor (vendor's lien).**
- 565. Express lien of grantor.**
- 566. Vendor's lien before conveyance.**
- 567. Vendee's lien.**

An equitable lien is a right in equity to have a personal claim paid, in case of necessity, by the sale of specific land. It may result from: (1) An express charge by the owner of the land of a certain sum thereon. (2) An agreement that the land shall be security for a certain sum. (3) The making of improvements on land by one mistakenly believing himself the owner thereof. (4) The creation of a claim for owelty of partition. (5) It also exists, in some states, upon land conveyed to secure purchase money remaining unpaid. (6) It may, in any state, be created for this purpose by agreement. (7) It also exists in favor of a vendee to secure payments made by him under the contract before receiving a conveyance.

- § 559. General considerations.**

At common law there was no lien upon a thing owned by one person in favor of another except when accompanied by possession, and, furthermore, there could be no lien upon land, but only on things of a personal nature.<sup>1</sup> In equity, however, there are certain rights in regard to land, as well

<sup>1</sup> 2 Spence, Eq. Jur. 794.



as to personalty, not based on possession, yet of a character analogous to common-law liens, and known as "equitable liens." These rights consist of personal obligations upon the owners of land, which equity will enforce against the land, and which will follow the land into whosoever hands it may pass, until it reaches those of a purchaser for value without notice.<sup>3</sup>

§ 560. Express charges on land.

An "equitable lien" is created by provisions, in a conveyance *inter vivos* or in a will, charging the land with the payment of debts or legacies.<sup>4</sup> So, land may be charged by will, or in a family settlement, with the payment of an annuity,<sup>5</sup> or the support of some person other than the owner.<sup>6</sup>

<sup>3</sup> Pomeroy, Eq. Jur. §§ 165-167, 1233 et seq.; article by Prof. C. C. Langdell, 1 Harv. Law Rev. 65, 66, 70.

Equitable liens do not confer "proprietary" or "real" rights, but, as stated in the text, they merely constitute a means by which equity enforces a personal obligation. Consequently, the owner of the obligation has, in theory, no rights in the land until the decree subjecting the land to his claim. See 1 Harv. Law Rev. 65, 66; Gilman v. Brown, 1 Mason, 221, Fed. Cas. No. 5,441; Hutton v. Moore, 26 Ark. 382; Sparks v. Hess, 15 Cal. 186. It is on this theory, apparently, that a vendor's lien is in some states regarded as personal to the vendor, and not assignable (see post, § 564), and, on the same theory, the right to enforce the lien may well be regarded as barred by the fact that the statutory period has run against the claim (Borst v. Corey, 15 N. Y. 505, Kirchwey's Cas. 758), whatever be the rule in the case of a formal mortgage (see ante, § 549).

<sup>4</sup> See 2 Jarman, Wills, 1387 et seq; Bigelow, Wills, 312. Equitable liens of this class, as well as other such liens, are admirably treated in the work on Equity Jurisprudence by the late John Norton Pomeroy (volume 3, §§ 1233-1267), on which the present chapter is, to a considerable extent, based.

<sup>5</sup> In re Tucker [1893] 2 Ch. 323; Merritt v. Bucknam, 78 Me. 504; Gallaher v. Herbert, 117 Ill. 160; Glenn v. Spry, 5 Md. 110; Hines v. Hines, 95 N. C. 482; In re Pierce's Estate, 56 Wis. 560.

<sup>6</sup> Bell v. Watkins, 104 Ga. 345; Donnelly v. Edelen, 40 Md. 117; Commons v. Commons, 115 Ind. 162; Outland v. Outland, 113 N. C. 138; Dickson v. Field, 77 Wis. 439.

Under the common-law rule that lands were not liable for the simple contract debts of a decedent, the question frequently arose whether his will expressed an intention to the contrary,—that is, charged his land with the payment of debts in favor of creditors. With the change in the law, making land as well as personalty liable for debts of the decedent,—a rule which prevails in all the states,—these questions have become of comparatively little importance, so far as the creditor is concerned. The question may still arise, however, whether, under a particular will, the land is charged with debts, so as to render it primarily liable for the payment thereof, thus reversing the ordinary rule that the personalty is the primary fund for that purpose. This concerns, not the creditor, but the devisees or heirs of the land on the one side, and the legatees or other persons entitled to share in the personalty on the other. The question also frequently arises whether land is charged with the payment of a particular legacy, so as to make it liable for this purpose, either before the personalty, which is ordinarily alone so liable, or *pari passu* with the personalty. In the absence of such a charge, the legacy must abate in case of insufficiency of personal assets.

Since land is ordinarily the primary fund for the payment of both debts and legacies, the presumption is always to that effect, and a clear intention is necessary to charge the land.<sup>6</sup> An intention that the land shall be charged with the payment of debts or legacies may be expressly stated, as by use of the word "charge," or by a devise to A. "on condition that" he pay a certain debt or legacy.<sup>7</sup> Moreover, such an intention

<sup>6</sup> Bigelow, Wills, 313; Wright v. Denn, 10 Wheat. (U. S.) 204; In re Powers, 124 N. Y. 361; Heslop v. Gatton, 71 Ill. 528; Owens v. Claytor, 56 Md. 129; Shenk v. Shenk, 150 Pa. St. 521; Lee v. Lee, 88 Va. 305.

<sup>7</sup> McFait's Appeal, 8 Pa. St. 290; Merritt v. Buckman, 78 Me. 504; Gardenville Permanent Loan Ass'n v. Walker, 52 Md. 452; Sistrunk v. Ware, 69 Ala. 273; Couch v. Eastham, 29 W. Va. 784. See Baker's Appeal, 59 Pa. St. 313

is usually inferred from the fact that, in the same clause with a devise of land, there is a direction to the devisee to pay a debt or a legacy.<sup>8</sup>

In this country the use of general words directing the payment of debts does not usually have the effect of charging the debts on land devised, such words being found in most wills, and being merely a direction for the doing of what the law compels.<sup>9</sup> In England, on the other hand, a mere direction by the testator that his debts shall be paid charges the land with the debts, though a direction that they shall be paid by his executors charges only the land devised to such executors.<sup>10</sup>

A legacy is charged on land by a devise of the land "after" the payment of such legacy.<sup>11</sup> Likewise, if, after the gift of a pecuniary legacy or legacies, there is a gift of the "residue" or "remainder" of testator's property, thereby blending the real and personal property into one fund, the legacy or legacies are charged upon the land, since the term "residue" or "remainder" could in such case only refer to what remains after the payment of the previous gifts.<sup>12</sup>

<sup>8</sup> Bigelow, Wills, 318; Potter v. Gardner, 12 Wheat. (U. S.) 498; Brown v. Knapp, 79 N. Y. 136, 143; Henry v. Griggs, 39 Iowa, 543; Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285; Merrill v. Bickford, 65 Me. 118; Dudgeon v. Dudgeon, 87 Mo. 218; Chase v. Warner, 106 Mich. 695; Carter v. Worrell, 96 N. C. 358, 60 Am. Rep. 420; Yearly v. Long, 40 Ohio St. 27; Buchanan v. Lloyd, 88 Md. 642; Wyckoff v. Wyckoff, 49 N. J. Eq. 344.

<sup>9</sup> Starke v. Wilson, 65 Ala. 576; Decker v. Decker, 121 Ill. 341; Hamilton v. Smith, 110 N. Y. 159; Harmon v. Smith (C. C.) 38 Fed. 482; White v. Kauffman, 66 Md. 92. Contra, Tuohy v. Martin, 2 MacArthur (D. C.) 572; Bishop v. Howarth, 59 Conn. 455, 465.

<sup>10</sup> 2 Jarman, Wills, 1390; Theobald, Wills (5th Ed.) 725, 726; Hawkins, Wills (2d Am. Ed.) 282.

<sup>11</sup> Pond v. Allen, 15 R. I. 171; Pendleton v. Kinney, 65 Conn. 222; Smith v. Cairns, 92 Tex. 667. See Smith v. Fellows, 131 Mass. 20.

<sup>12</sup> Greville v. Browne, 7 H. L. Cas. 689; In re Dyson [1896] 2 Ch. 720; Lewis v. Darling, 16 How. (U. S.) 1; Turner v. Laird, 68 Conn.

## § 561. Agreements for security (equitable mortgages).

In equity, any agreement in writing, made upon a valid consideration, however informal, by which an intention is shown that certain land shall be a security for the payment of money, creates an equitable lien upon that land.<sup>13</sup> To such an agreement the term "equitable mortgage" is frequently applied, the instrument being, for most purposes, at least, equivalent to a regular mortgage in the view of a court of equity, though utterly null and void at law. Accordingly, one may create an equitable lien on land by an agreement in terms pledging or giving a lien on the land,<sup>14</sup> and may, by a mere indorsement on a note to the effect that it is a charge on land, make it such in legal effect.<sup>15</sup> So, a power of attorney authorizing one to collect the rents of land belonging to the donor of the power, and to apply them on a debt, or for other specific purposes, has been regarded as creating an equitable lien on the land;<sup>16</sup> as has an agreement that a cer-

198; *Stevens v. Flower*, 46 N. J. Eq. 340; *Reid v. Corrigan*, 143 Ill. 402; *Hutchinson v. Gilbert*, 86 Tenn. 464; *Hill v. Bean*, 86 Me. 200; *Peebles v. Acker*, 70 Miss. 356; *Bennett's Estate*, 148 Pa. St. 139. See *Lee v. Lee*, 88 Va. 805; *Hoyt v. Hoyt*, 85 N. Y. 142. In one or two states, however, such a disposition of testator's property is regarded as insufficient to show an intention to charge the land when unaccompanied by other evidence of such an intention. *Pearson v. Wartman*, 80 Md. 528; *Brill v. Wright*, 112 N. Y. 129; *Morris v. Sickly*, 133 N. Y. 456.

<sup>13</sup> 3 *Pomeroy*, Eq. Jur. § 1237; *Walker v. Brown*, 165 U. S. 654; *Ketchum v. St. Louis*, 101 U. S. 306; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cotterell v. Long*, 20 Ohio, 464; *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Cummings v. Jackson*, 55 N. J. Eq. 805; *Wayt v. Carwithen*, 21 W. Va. 516. See *Perry v. Board of Missions of Protestant Episcopal Church*, 102 N. Y. 99, *Kirchwey's Cas.* 135.

<sup>14</sup> *Chase v. Peck*, 21 N. Y. 581.

<sup>15</sup> *Peckham v. Haddock*, 36 Ill. 38.

<sup>16</sup> *Joseph Smith Co. v. McGuinness*, 14 R. I. 59; *Spooner v. Sandilands*, 1 Younge & C. 390; *Cradock v. Scottish Provident Institution*, (1282)

tain debt shall be paid out of the price to be paid for certain land.<sup>17</sup>

An assignment, for purposes of security, by a vendee of land, of his contract rights in the land, is regarded as creating a lien on the land, or, rather, on his equitable interest in the land.<sup>18</sup> Likewise, when one who furnishes the money for the purchase of land by another, by agreement with the latter, takes the title from the vendor, to hold until his advance is repaid, he has an equitable lien to secure such repayment.<sup>19</sup>

An agreement to give a mortgage on land is also regarded in equity as creating a lien on the land, on the principle that equity regards that as done which ought to be done.<sup>20</sup>

An important application of the principle that equity will carry out the intention to give a security is seen in the case

63 Law J. Ch. 15; *Abbott v. Stratten*, 3 Jones & L. 603. A power to sell land and apply the proceeds on a debt has also been regarded as creating such a lien. *American Loan & Trust Co. v. Billings*, 58 Minn. 187.

<sup>17</sup> *Johnson v. Johnson*, 40 Md. 189; *Pinch v. Anthony*, 8 Allen (Mass.) 536.

<sup>18</sup> *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530; *Gamble v. Ross*, 88 Mich. 315; *Russell's Appeal*, 15 Pa. St. 319; *Hackett v. Watts*, 138 Mo. 502.

<sup>19</sup> *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; *Dryden v. Hanway*, 31 Md. 254; *Barnett v. Nelson*, 46 Iowa, 495.

<sup>20</sup> *Bridgeport Electric & Ice Co. v. Meader* (C. C. A.) 72 Fed. 115; *Sprague v. Cochran*, 144 N. Y. 104; *In re Petition of Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Remington v. Higgins*, 54 Cal. 620; *Carter v. Holman*, 60 Mo. 498.

The term "equitable mortgage" might well be restricted to these cases of equitable liens arising from a contract to make a legal mortgage, since in such a case there is a right to have the contract specifically performed by the execution of a legal mortgage, in which respect this class of equitable liens differs from the other classes described in this chapter. *Marshall v. Shrewsbury*, 10 Ch. App. 250, 254; *Matthews v. Goodday*, 31 Law J. Ch. 282. In this country, however, where a legal mortgage is foreclosed usually by sale, and not by a decree of strict foreclosure, there would be no great advantage in exchanging such an equitable lien for a legal mortgage.

of an instrument intended as a valid and legal mortgage, which, though insufficient as such, owing to some defect of form or execution, will, in equity, be regarded as creating a lien or "equitable mortgage."<sup>21</sup> Such a case arises when the mortgage is without the proper seal,<sup>22</sup> or is not witnessed as required by the statute.<sup>23</sup>

In order that an equitable lien be thus created on land by agreement, it is necessary that the land itself be specified in the instrument creating the lien,<sup>24</sup> and that the intention clearly appear that the land is to be security for the performance of the obligation.<sup>25</sup>

— By deposit of title deeds.

In England it is a well-established doctrine that, if the title deeds to land are deposited by a debtor with his creditor, such deposit is evidence of an agreement to create a charge on the land, which equity will enforce.<sup>26</sup> The deposit of the deeds does not itself create a charge, but is merely evidence, with

<sup>21</sup> *Burgh v. Francis*, Finch, 23, *Kirchwey's Cas.* 24; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306; *Price v. McDonald*, 1 Md. 414, 54 Am. Dec. 657; *McQuie v. Peay*, 58 Mo. 58; *Gale v. Morris*, 30 N. J. Eq. 285; *Sprague v. Cochran*, 144 N. Y. 104; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21, 28 Am. Dec. 616; *De laire v. Keenan*, 3 Desaus. (S. C.) 74, 4 Am. Dec. 604.

<sup>22</sup> *Sanders v. McDonald*, 63 Md. 503; *Bullock v. Whipp*, 15 R. I. 195; *McClurg v. Phillips*, 49 Mo. 315.

<sup>23</sup> *Moore v. Thomas*, 1 Or. 201.

<sup>24</sup> *Mornington v. Keane*, 2 De Gex & J. 292; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23; *Adams v. Johnson*, 41 Miss. 258; *Lee v. Cole*, 17 Or. 559.

<sup>25</sup> *Mornington v. Keane*, 2 De Gex & J. 292; *Bowen v. McCarthy*, 127 Ill. 17; *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550; *Hossack v. Graham*, 30 Wash. 184; *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790.

<sup>26</sup> *Story*, Eq. Jur. § 1020; *Russel v. Russel*, 1 Brown Ch. 269, 1 *White & T. Lead. Cas. Eq.* 921, *Kirchwey's Cas.* 110.

other circumstances, of an intention to create one,<sup>27</sup> and is regarded as a part performance taking the agreement out of the Statute of Frauds.<sup>28</sup>

A lien of this character has been recognized in a number of judicial opinions in this country, usually, however, in cases not directly involving the validity of such a lien.<sup>29</sup> In others, such a deposit is not regarded as creating a lien, on the ground that the contrary view is inconsistent with the system of conveyancing and registration in force in this country, and also involves a violation of the Statute of Frauds.<sup>30</sup>

It would seem that, as between the original parties, and as against purchasers with notice, the only possible objection to an agreement for a lien evidenced by such a deposit of title deeds lies in the fact that it is not evidenced by a writing complying with the Statute of Frauds. If an agreement for a lien is so evidenced, the fact that there is a simultaneous deposit of title deeds does not affect the validity of the agreement as creating a lien; and the English cases merely take the further step of regarding the deposit as sufficient part performance to take the agreement out of the statute.

<sup>27</sup> *Norris v. Wilkinson*, 12 Ves. 192; *Chapman v. Chapman*, 13 Beav. 308; *Ashburner*, Mortgages, 26. Consequently, a deposit merely to enable the lender to prepare a regular mortgage is not sufficient to create a lien. *Norris v. Wilkinson*, 12 Ves. 192; *Lloyd v. Attwood*, 3 De Gex & J. 614, 651; *Hutzler v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687.

<sup>28</sup> *Russel v. Russel*, 1 Brown Ch. 269, *Kirchwey's Cas.* 110.

<sup>29</sup> *Richards v. Leaming*, 27 Ill. 431; *Hall v. McDuff*, 24 Me. 311; *Gale's Ex'rs v. Morris*, 29 N. J. Eq. 224; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9; *Chase v. Peck*, 21 N. Y. 584, *Kirchwey's Cas.* 124; *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43, 51; *Hackett v. Reynolds*, 4 R. I. 512; *Hutzler v. Phillips*, 26 S. C. 137, 4 Am. St. Rep. 687; *Jarvis v. Dutcher*, 16 Wis. 307.

<sup>30</sup> *Lehman v. Collins*, 69 Ala. 127; *Vanmeter v. McFaddin*, 3 B. Mon. (Ky.) 437; *Gardner v. McClure*, 6 Minn. 250 (Gil. 167); *Hackett v. Watts*, 138 Mo. 502; *Bloomfield State Bank v. Miller*, 55 Neb. 243; *Shitz v. Dissenbach*, 3 Pa. St. 233; *Meador v. Meador*, 3 Heisk. (Tenn.) 562.

**§ 562. Lien for improvements.**

As before stated, one who makes improvements on land in the mistaken belief that he is the owner thereof is given, by equity, a right to compensation for such improvements as against the true owner coming into equity to assert his rights,<sup>31</sup> and this right to compensation is regarded as constituting a lien on the land.<sup>32</sup>

An owner of an undivided interest in land who is entitled to contribution from his cotenants on account of repairs or improvements made by him has a lien on their interests to secure such contribution.<sup>33</sup> Likewise, a life tenant under a will who completes improvements begun by his testator is entitled to compensation therefor, and a lien to secure such compensation.<sup>34</sup>

According to a few decisions, a tenant under a lease providing that he shall be compensated, at the end of the term, for any improvements made by him, has a lien on the land for the value of such improvements.<sup>35</sup> Usually, however, his right to a lien is denied.<sup>36</sup>

<sup>31</sup> See ante, § 241.

<sup>32</sup> *Hannibal & St. J. R. Co. v. Shortridge*, 86 Mo. 662; *Hatcher v. Briggs*, 6 Or. 31; *Field v. Moody*, 111 N. C. 353; *Preston v. Brown*, 26 Ohio St. 18; 2 Story, Eq. Jur. § 1237; 3 Pomeroy, Eq. Jur. § 1241.

<sup>33</sup> *Baird v. Jackson*, 98 Ill. 73; *Prentice v. Janssen*, 79 N. Y. 478; *Alexander v. Ellison*, 79 Ky. 148; *Kelly v. Kelly*, 54 Mich. 30; 3 Pomeroy, Eq. Jur. § 1240. See *Houston v. McCluney*, 8 W. Va. 135.

<sup>34</sup> *Hibbert v. Cooke*, 1 Sim. & S. 552; *Sohier v. Eldredge*, 103 Mass. 345, 351; *Broyles v. Waddel*, 11 Hetsk. (Tenn.) 32; *Gavin v. Carling*, 55 Md. 530; 2 Story, Eq. Jur. § 1237.

<sup>35</sup> *Berry v. Van Winkle's Ex'rs*, 2 N. J. Eq. 269; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Ecke v. Fetzner*, 65 Wis. 55.

<sup>36</sup> *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135; *Beck v. Birdsall*, 19 Kan. 550; *Watson v. Gardner*, 119 Ill. 312; *Coffin v. Talman*, 8 N. Y. 465; *Hite v. Parks*, 2 Tenn. Ch. 373. See *Spears v. Flack*, 34 Mo. 101, 84 Am. Dec. 74.



## § 563. Lien for owelty of partition.

When, by a decree for the partition of land, one of the parties is directed to pay to another a certain sum for "owelty of partition,"<sup>37</sup> the property received by him on the partition is subject to a lien for such sum until paid.<sup>38</sup>

## § 564. Implied lien of grantor (vendor's lien).

Upon the conveyance of land, a lien on the land is, in England and a number of the states of this country, raised by implication of law in favor of the vendor for the purchase price, so far as this remains unpaid.<sup>39</sup> In other jurisdictions, however, the existence of the lien is denied.<sup>40</sup> In the United

<sup>37</sup> See ante, § 175.

<sup>38</sup> Freeman, Cotenancy, § 507; Davis v. Norris, 3 Pa. St. 125; McCandless' Appeal, 98 Pa. St. 439; Baltimore & O. R. Co. v. Trimble, 51 Md. 99; Dobbin v. Rex, 106 N. C. 444; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726.

<sup>39</sup> Mackreth v. Symmons, 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 447; Crampton v. Prince, 83 Ala. 246, 3 Am. St. Rep. 718; Shall v. Biscoe, 18 Ark. 142; Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Trustees of Schools v. Wright, 11 Ill. 603; Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651; Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90; Magruder v. Peter, 11 Gill & J. (Md.) 217; Carr v. Hobbs, 11 Md. 285; Peters v. Tunell, 48 Minn. 473, 19 Am. St. Rep. 252; Marsh v. Turner, 4 Mo. 253; Corlies v. Howland, 26 N. J. Eq. 311; Seymour v. McKinstry, 106 N. Y. 230; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Gee v. McMillan, 14 Or. 268, 58 Am. Rep. 315; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Marshall v. Christmas, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199; Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703.

<sup>40</sup> Simpson v. Mundee, 3 Kan. 172; Atwood v. Vincent, 17 Conn. 575; Philbrook v. Delano, 29 Me. 410; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Kirchwey's Cas. 131; Ansley v. Pasahro, 22 Neb. 662; Womble v. Battle, 38 N. C. 182; Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428; Hlester v. Green, 48 Pa. St. 96, 86 Am. Dec. 569; Wragg's Representatives v. Comptroller-General, 2 Dessaus. (S. C.) 520. See Arlin v. Brown, 44 N. H. 102.

In Georgia, Vermont, Virginia, and West Virginia it has been abolished by statute. 1 Stimson's Am. St. Law, § 1950.

States courts the lien is regarded as existing in a particular state only when it is recognized by the laws or courts of such state.<sup>41</sup> Even in those states where the lien is recognized, it is not favored by the courts, it being regarded as inconsistent with the policy of the registration laws, which is adverse to secret equities, and the vendor being in a position, by a mortgage or express reservation of a lien, to protect his interests otherwise.<sup>42</sup>

The lien does not exist unless the amount to be secured thereby is capable of exact ascertainment, and consequently it will not arise in the case of an unliquidated claim,<sup>43</sup> as when the consideration for the conveyance is the vendee's

<sup>41</sup> *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Chilton v. Braidem's Adm'r*, 2 Black (U. S.) 458; *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Rice v. Rice* (C. C.) 36 Fed. 860.

<sup>42</sup> Various explanations of the origin and basis of the doctrine of the lien are given. Thus, it is said to rest on "natural equity" (4 Kent's Comm. 152); an implied trust in favor of the vendor (*Mackreth v. Symmons*, 15 Ves. 329; 2 Story, Eq. Jur. § 1217; *Blackburn v. Greggson*, 1 Brown Ch. 420. Contra, 3 Pomeroy, Eq. Jur. § 1250, note; *Ahrend v. Odiorne*, 118 Mass. 264, 19 Am. Rep. 449, *Kirchwey's Cas.* 131); and the desire of chancery, in the time when land could not be subjected to a debt, to evolve some device by which land could be made liable in the hands of the purchaser for the unpaid price (notes to *Mackreth v. Symmons*, 1 White & T. Lead. Cas. Eq. 500; Gray, C. J., in *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449, *Kirchwey's Cas.* 131. Contra, 3 Pomeroy, Eq. Jur. § 1250). Mr. Pomeroy considers that it is merely the application of a general judicial conception that the thing sold constitutes, to some extent at least, a fund for the payment of the price, a conception which was not applied to chattels because they were of less importance than land, and, furthermore, were articles of commerce, the transfer of which it was undesirable in any way to hamper. See 3 Pomeroy, Eq. Jur. § 1250.

<sup>43</sup> *Harris v. Hanle*, 37 Ark. 348; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252; *Payne v. Avery*, 21 Mich. 524; *Hiscock v. Norton*, 42 Mich. 320; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 3 Leigh (Va.) 522; *Chapman v. Beardsley*, 31 Conn. 115.

agreement to support the vendor during his life,<sup>44</sup> nor when there is a sale of land and personalty together, and it does not appear what part of the consideration is to be paid for each.<sup>45</sup> Nor is the lien available for the enforcement of collateral agreements by the vendee, as to assume incumbrances, or to erect buildings.<sup>46</sup>

— Persons affected by the lien.

The lien binds the land in the hands of the heirs and devisees of the vendee,<sup>47</sup> and is effective as against all persons other than purchasers for value,<sup>48</sup> including the widow of the vendee claiming dower in the land.<sup>49</sup> Purchasers of the land for value also take it subject to the lien if they have notice, actual or constructive, of its existence, and not otherwise.<sup>50</sup> Knowledge on the part of a purchaser from the vendee that the purchase price is still unpaid, in whole or in

<sup>44</sup> *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.) 522. Compare *Chase v. Peck*, 21 N. Y. 581.

<sup>45</sup> *Stringfellow v. Ivie*, 73 Ala. 209; *McCandlish v. Keen*, 13 Grat. (Va.) 615, 629; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252.

<sup>46</sup> *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Patterson v. Edwards*, 29 Miss. 67; *Clarke v. Royle*, 3 Sim. 499.

<sup>47</sup> *Edmonson v. Phillips*, 73 Mo. 57; *Pintard v. Goodloe*, *Hempst.* 502, *Fed. Cas.* No. 11,171; *Solomon v. Skinner*, 82 Tex. 345.

<sup>48</sup> *Pylant v. Reeves*, 53 Ala. 132, 25 Am. Rep. 605; *Higgins v. Kendall*, 73 Ind. 522; *Acton v. Waddington*, 46 N. J. Eq. 16; *Beal v. Harrington*, 116 Ill. 113; *Christopher v. Christopher*, 64 Md. 583; *Thomas v. Bridges*, 73 Mo. 530.

<sup>49</sup> *Thorn v. Ingram*, 25 Ark. 52; *Noyes v. Kramer*, 54 Iowa, 22; *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Miller v. Stump*, 3 Gill (Md.) 304; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Martin v. Smith*, 25 W. Va. 579.

<sup>50</sup> 4 *Kent's Comm.* 153; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Craft v. Russell*, 67 Ala. 9; *Koch v. Roth*, 150 Ill. 212; *Hawes v. Chaille*, 129 Ind. 435; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Dance v. Dance*, 56 Md. 433; *Seymour v. McKinstry*, 106 N. Y. 230; *Lewis v. Henderson*, 22 Or. 548; *Poe v. Paxton's Heirs*, 26 W. Va. 607.

part, is sufficient to charge him with notice of the lien;<sup>51</sup> as when there is a recital in the original conveyance to the vendee that the purchase price is unpaid.<sup>52</sup>

— Transfer of the lien.

In some jurisdictions the lien may be assigned by the vendor along with the claim for purchase money,<sup>53</sup> and an assignment of the claim for purchase money is regarded as transferring the lien, as merely accessory thereto.<sup>54</sup> And in such states the principle of subrogation or "equitable assignment" may be applied, as in the case of mortgages, in favor of one who is forced to pay off the lien to protect himself, he being thereupon substituted in the place of the vendor as regards the lien rights.<sup>55</sup> In a majority of the states, however, in which the lien is recognized, it is regarded as personal to the vendor, and not capable of transfer.<sup>56</sup>

On the death of the person entitled to enforce the lien, the

<sup>51</sup> *Swan v. Benson*, 31 Ark. 728; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60.

<sup>52</sup> *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Melross v. Scott*, 18 Ind. 250; *Kilpatrick v. Kilpatrick*, 23 Miss. 124, 55 Am. Dec. 79; *McAlpine v. Burnett*, 23 Tex. 649.

<sup>53</sup> *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 817, 14 Am. Dec. 135; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493.

<sup>54</sup> *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344; *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *White v. Downs*, 40 Tex. 225.

<sup>55</sup> *Thomas v. Bridges*, 73 Mo. 530; *Otis v. Gregory*, 111 Ind. 504; *Rodman v. Saunders*, 44 Ark. 504; *Oury v. Saunders*, 77 Tex. 278; *Carey v. Boyle*, 53 Wis. 574.

<sup>56</sup> *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *Baum v. Grigsby*, 21 Cal. 172, 31 Am. Dec. 153; *First Nat. Bank of Salem v. Salem Central Flour-Mills Co. (C. C.)* 39 Fed. 89; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427; *Richards v. Leaming*, 27 Ill. 431, 31 Am. Dec. 239; *Hammons v. Peyton*, 34 Minn. 529; *White v. Williams*, 1 Paige (N. Y.) 502.

right passes, with the claim for the purchase price, to his personal representatives.<sup>57</sup>

— Waiver. .

The vendor's lien may be waived, either expressly or by implication.<sup>58</sup> What constitutes a waiver by implication has been much discussed, and it is generally agreed that a waiver is not shown by the fact that the vendor takes the personal obligation of the vendee, such as his bond or note, for the unpaid purchase price; this being considered as merely intended to countervail the acknowledgment in the deed of the payment of the purchase money, or to show the time and manner in which the payment is to be made.<sup>59</sup> But the taking of the personal obligation of a person other than the vendee, by way of indorsement, guaranty, or otherwise, is usually regarded as a waiver;<sup>60</sup> and the same effect is given to the taking of security, such as a mortgage, on the land itself or on other property.<sup>61</sup> Taking independent security, however, merely

<sup>57</sup> 2 Story, Eq. Jur. § 1227; *Robinson v. Appleton*, 124 Ill. 276; *Evans v. Enloe*, 70 Wis. 345. See *Leeper v. Lyon*, 68 Mo. 216.

<sup>58</sup> 4 Kent's Comm. 152; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Wilson v. Lyon*, 51 Ill. 166; *Schnebley v. Ragan*, 7 Gill & J. (Md.) 125, 28 Am. Dec. 195.

<sup>59</sup> 4 Kent's Comm. 153; *Winter v. Anson*, 3 Russ. 483; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Fish v. Howland*, 1 Paige (N. Y.) 20; *Honore's Ex'r v. Blakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; *Madden v. Barnes*, 45 Wis. 135, 30 Am. Rep. 703; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60.

<sup>60</sup> 4 Kent's Comm. 153; *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Andrus v. Coleman*, 82 Ill. 26, 25 Am. Rep. 239; *Kendrick v. Eggleston*, 56 Iowa, 123, 41 Am. Rep. 90; *Carrico v. Farmers' & Merchants' Nat. Bank of Baltimore*, 33 Md. 235; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Durette v. Briggs*, 47 Mo. 356; *Follett v. Reese*, 20 Ohio, 546, 55 Am. Dec. 472; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199.

<sup>61</sup> 4 Kent's Comm. 153; *Kinney v. Ensminger*, 94 Ala. 536; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272; *Baker v. Updike*, 155 Ill. 54; *Young v. Wood*, 11 B. Mon. (Ky.) 123; *Fonda v. Jones*, 42 Miss.

raises a presumption of waiver, which may be rebutted by evidence of an agreement or intention that the lien shall still exist.<sup>63</sup> A receipt or acknowledgment of payment of the price does not involve a waiver of the lien if the price has not actually all been paid.<sup>63</sup>

§ 565. Express lien of grantor.

In all jurisdictions, including those in which there is no vendor's lien by implication of law, it is recognized that the vendor may, by express provision in the deed of conveyance, or in a separate instrument, reserve a lien for a part or the whole of the purchase price.<sup>64</sup> Such a lien is recognized by the courts as closely approximating to a mortgage in its character and effect,<sup>65</sup> it being, as has been well said, a "mode of realizing the purely equitable conception of a mortgage,

792, 2 Am. Rep. 669; *Orrick v. Durham*, 79 Mo. 174. But that the lien is not waived by taking a mortgage on the land, see *Boos v. Ewing*, 17 Ohio, 521, 49 Am. Dec. 478; *Wasson v. Davis*, 34 Tex. 159.

<sup>63</sup> *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Woodall v. Kelly*, 85 Ala. 268, 7 Am. St. Rep. 57; *Stroud v. Allison*, 35 Ark. 100; *McGonigal v. Plummer*, 30 Md. 422; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Sanders v. McAfee*, 41 Ga. 684; *Lord v. Wilcox*, 99 Ind. 491; *Hunt v. Marsh*, 80 Mo. 396; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199; *Kendrick v. Eggleston*, 56 Iowa, 128, 41 Am. Rep. 90; *Boles v. Benham*, 127 N. Y. 620.

<sup>64</sup> *Mackreth v. Symmons*, 15 Ves. 329; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Thompson v. Corrie*, 57 Md. 197; *Simpson v. McAllister*, 56 Ala. 228; *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612.

<sup>65</sup> 2 *Pomeroy*, Eq. Jur. § 1257; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57; *Greeno v. Barnard*, 18 Kan. 518; *Morrison v. Brown*, 83 Ill. 562; *Carr v. Thompson*, 67 Mo. 472; *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; *Helm v. Weaver*, 69 Tex. 143. See *Hlester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

<sup>66</sup> *Ober v. Gallagher*, 93 U. S. 199; *King v. Young Men's Ass'n*, 1 Woods, 386, Fed. Cas. No. 7,811; *Markoe v. Andras*, 67 Ill. 34; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Ufford v. Wells*, 53 Tex. 612.

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stripped of all its legal forms and features."<sup>66</sup> The lien binds the land in the hands of all persons except purchasers for value without notice, and one claiming under the vendee is necessarily charged with notice if the lien is expressly reserved in the deed, and this is recorded.<sup>67</sup> No particular language is necessary to give rise to this lien, provided the intention to reserve the lien is clearly expressed;<sup>68</sup> but the mere recital that the purchase money or a part thereof is unpaid is insufficient.<sup>69</sup> This express lien may be assigned, and the benefit thereof will pass to the assignee of the whole or part of the purchase money secured by the lien.<sup>70</sup>

§ 566. Vendor's lien before conveyance.

Upon the making of a contract for the sale of land, with a stipulation for the making of a conveyance in the future, as when the vendor gives a bond to convey upon the performance of certain conditions by the purchaser, the vendor becomes, as before explained, a trustee for the purchaser, and holds the legal title subject to the terms of the contract of sale.<sup>71</sup> The equitable interest or estate which the purchaser has in such case is, however, subject to the right of the vendor to payment of the purchase price, and this right the vendor may, if necessary, enforce by a proceeding in equity somewhat analogous to the foreclosure of a mortgage, by which the vendee loses all his contract rights in the land.<sup>72</sup> The courts,

<sup>66</sup> 3 Pomeroy, Eq. Jur. § 1257.

<sup>67</sup> 3 Pomeroy, Eq. Jur. §§ 1257, 1258; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Sidwell v. Wheaton*, 114 Ill. 267; *Stratton v. Gold*, 40 Miss. 778; *Eichelberger v. Gitt*, 104 Pa. St. 64.

<sup>68</sup> *Moore v. Lackey*, 53 Miss. 85; 3 Pomeroy, Eq. Jur. § 1256, note.

<sup>69</sup> *Hlester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

<sup>70</sup> *Ober v. Gallagher*, 93 U. S. 199; *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Markoe v. Andras*, 67 Ill. 34; *Duncan v. Louisville*, 13 Bush (Ky.) 378; *Balley v. Smock*, 61 Mo. 213; *Moore v. Lackey*, 53 Miss. 85.

<sup>71</sup> See ante, § 110.

<sup>72</sup> *Micou v. Ashurst*, 55 Ala. 607; *Sparks v. Hess*, 15 Cal. 186, 194;

in referring to this right of the vendor to enforce his claim against the land, frequently assimilate the relation of the vendor and vendee to that of mortgagee and mortgagor;<sup>73</sup> and the right of the vendor to enforce his claim for the price against the vendee's equitable interest in the land itself is frequently spoken of as a "vendor's lien,"—a use of the latter term which is to be carefully distinguished from its use to describe what we have treated of above under the name of "the implied lien of the grantor."<sup>74</sup> Since the retention of the legal title shows a clear intention to rely on such title as security for payment of the price, a waiver of this right of the vendor will not be implied from the taking of other security for the price.<sup>75</sup> This lien, so called, in favor of the vendor, passes to one to whom he transfers the right of action for the purchase money, as by an assignment of a note given therefor.<sup>76</sup>

### § 567. Vendee's lien.

The vendee under a contract for the sale of land has, in equity, before he receives a conveyance of the land, a lien

*Gaston v. White*, 46 Mo. 486; *Moore v. Anders*, 14 Ark. 623, 60 Am. Dec. 551.

<sup>73</sup> *Hardin v. Boyd*, 113 U. S. 756; *Moses v. Johnson*, 38 Ala. 517, 16 Am. St. Rep. 58; *Hutchinson v. Crane*, 100 Ill. 269; *Strickland v. Kirk*, 51 Miss. 795; *Graham v. McCampbell*, Meigs (Tenn.) 56, 33 Am. Dec. 126; *Church v. Smith*, 39 Wis. 492.

<sup>74</sup> The confusion arising from these different uses of the term "vendor's lien," and the essential distinctions between these various equitable rights, are admirably discussed in 3 Pomeroy, Eq. Jur. §§ 1260, 1261.

<sup>75</sup> *Robinson v. Appleton*, 124 Ill. 276; *McCaslin v. State*, 44 Ind. 151; *Hurley v. Hollyday*, 35 Md. 469.

<sup>76</sup> *Burkhart v. Howard*, 14 Or. 39; *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 348; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501; *McClintic v. Wise's Adm'rs*, 25 Grat. (Va.) 448, 18 Am. Rep. 694; *McConnell v. Beattie*, 24 Ark. 113; *Hutchinson v. Crane*, 100 Ill. 269.

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thereon for any payments which he has made upon the purchase price in case the contract fails of consummation owing to the fault of the vendor.<sup>77</sup>

<sup>77</sup> *Rose v. Watson*, 10 H. L. Cas. 672; *Stults v. Brown*, 112 Ind. 370, 3 Am. St. Rep. 190; *Cooper v. Merritt*, 30 Ark. 686; *Wickman v. Robinson*, 14 Wis. 493, 30 Am. Dec. 789; *Galbraith v. Reeves*, 32 Tex. 357; 2 Story, Eq. Jur. § 1217; 3 Pomeroy, Eq. Jur. § 1263.

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A "subcontractor"—that is, a person furnishing labor, not by contract with the owner, but by contract with the contractor—is in most states entitled to a lien.<sup>5</sup>

In undertaking to give to a subcontractor a lien for his labor, two different theories or systems have been adopted in the statutes of the different states. By one system, sometimes known as the "New York" system, a subcontractor is given a lien by way of "subrogation," as it is expressed, to the rights of the contractor,—that is, he stands in the place of the contractor, and cannot claim a lien for a sum greater than that due to the contractor at such time as the subcontractor may give notice of his claim to the owner, who is thus enabled to withhold from the principal contractor sufficient to satisfy the claim of the subcontractor.<sup>6</sup> Under the other system, sometimes termed the "Pennsylvania" system, the subcontractor is given a direct lien, without reference to the rights of the contractor, and consequently the owner acts at his peril if he makes any payments to the contractor, unless he has first satisfied himself that the subcontractor's claims are paid.<sup>7</sup> So, while under the New York system the subcontractor has no lien if the contractor makes default in his contract, so as to leave nothing owing to the latter,<sup>8</sup> such default does not, under the Pennsylvania system, affect the subcontractor's lien

<sup>5</sup> 1 Stimson's Am. St. Law, § 1966; Phillips, Mech. Liens, §§ 44, 45.

<sup>6</sup> See *Larkin v. McMullin*, 120 N. Y. 206; *Renton v. Conley*, 49 Cal. 185; *McIntire v. Barnes*, 4 Colo. 288; *Culver v. Elwell*, 73 Ill. 536; *Cudworth v. Bostwick*, 69 N. H. 536; *Copeland v. Manton*, 23 Ohio St. 398; *Berry v. McAdams*, 93 Tex. 431.

<sup>7</sup> *Merrigan v. English*, 9 Mont. 113; *White v. Miller*, 18 Pa. St. 52; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Andis v. Davis*, 63 Ind. 17; *Laird v. Moonan*, 32 Minn. 358; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170.

<sup>8</sup> *Kelly v. Bloomingdale*, 139 N. Y. 343; *Smith v. Sheltering Arms*, 89 Hun (N. Y.) 70; *Mayer v. Mutchler*, 50 N. J. Law, 162; *Fullenwider v. Longmoor*, 73 Tex. 430.

for the full amount of his claim.<sup>9</sup> But even where the latter system prevails, the subcontractor's right to a lien arises from the original contract between the owner and the contractor, and he cannot claim for work not authorized by such contract, nor demand payment in a mode other than that named therein.<sup>10</sup>

**"Materialmen"**—that is, persons furnishing, not labor, but materials—have liens only when the statute so provides, and are not usually regarded as within the scope of provisions for the benefit of "contractors," "mechanics," or the like.<sup>11</sup> Materialmen may be those furnishing materials under contract either with the owner, with the contractor, or even with a subcontractor, and the phraseology of the statute may, of course, be such as to give a lien to a materialman of one of such classes, and not to others. The distinct systems of legislation referred to in connection with subcontractors exist also in the case of persons furnishing materials to the contractor, their rights being dependent on the state of accounts between the contractor and the owner in those states in which the New York rule is followed,<sup>12</sup> while their rights are unaffected by this consideration in states where the Pennsylvania rule is adopted.<sup>13</sup>

<sup>9</sup> *Linden Steel Co. v. Rough Run Mfg. Co.*, 153 Pa. St. 233; *Seeman v. Blemann*, 108 Wis. 365; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391.

<sup>10</sup> *Boisot*, Mech. Liens, §§ 228-231; *Phillips*, Mech. Liens, §§ 58, 62g; 2 *Jones*, Liens, § 1289; *Schroeder v. Galland*, 134 Pa. St. 277; *Taylor v. Murphy*, 148 Pa. St. 227, 33 Am. St. Rep. 325; *Siebrecht v. Hogan*, 99 Wis. 437.

<sup>11</sup> *Hinckley v. Field's Biscuit & Cracker Co.*, 91 Cal. 136; *Duff v. Hoffman*, 63 Pa. St. 191; *Arnold v. Budlong*, 11 R. I. 561; *Davis v. Betz*, 66 Ala. 206; *Boisot*, Mech. Liens, § 241; *Phillips*, Mech. Liens, § 47.

<sup>12</sup> *Shelton v. Merrill*, 63 Ala. 343; *Carman v. McInerow*, 13 N. Y. 70; *Turner v. Strenzel*, 70 Cal. 28; *Berry v. McAdams*, 93 Tex. 431.

<sup>13</sup> *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47; *White v. Miller*, 18 Pa. St. 52.

— Contract or consent of owner.

The statute usually provides that the labor or materials must have been furnished by agreement with, or sometimes by the "consent" of, the "owner."<sup>14</sup> The term "owner" includes not only those who have an estate in fee in the land, but also those having an estate less than freehold. One having such limited estate can, however, as a rule, not create a lien more extensive than his own interest; that is, on others' interests in the land.<sup>15</sup> Labor or materials furnished under a contract with one having a mere leasehold estate in the land may, however, support a lien upon the reversion, if the owner of the latter expressly or impliedly authorizes or adopts such contract,<sup>16</sup> and, where the statute creates a lien for labor or materials furnished with the consent or permission of the owner, the reversion may become subject to a lien for work or labor furnished under a contract with the lessee, by reason of consent, expressed or implied, on the part of the reversioner, to the making of the improvements.<sup>17</sup>

A vendee under an executory contract for the sale of land is sometimes regarded as the "owner," within the meaning of the mechanic's lien acts, he having, as before explained, an equitable interest in the land. On this theory, one furnish-

<sup>14</sup> 1 Stimson's Am. St. Law, § 1366.

<sup>15</sup> See *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Currier v. Cummings*, 40 N. J. Eq. 145; *Choteau v. Thompson*, 2 Ohio St. 114; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486; *Francis v. Sayles*, 101 Mass. 435; *Cornell v. Barney*, 94 N. Y. 394; *Long v. McLanahan*, 103 Pa. St. 537; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 75 Am. St. Rep. 862; *Hoffman v. McColgan*, 81 Md. 390; 2 *Jones, Liens*, §§ 1272-1276; *Phillips, Mech. Liens*, §§ 83-89.

<sup>16</sup> *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Kremer v. Walton*, 11 Wash. 120, 48 Am. St. Rep. 870; *Hall v. Parker*, 94 Pa. St. 109.

<sup>17</sup> *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Gay v. Hervey*, 41 N. J. Law, 39; *Bentley v. Adams*, 92 Wis. 386; *Burkitt v. Harper*, 79 N. Y. 273.

ing labor or materials under contract with such vendee has a lien on his interest in the land, which extends to the legal title when acquired by the latter, and which is, on the other hand, terminated if the vendee loses all rights under his contract by a failure to comply therewith.<sup>18</sup> A lien has been sustained in favor of one furnishing labor or materials under a contract with a vendee, in some cases, on the theory that he was, under the particular circumstances, the agent of the vendor,<sup>19</sup> and, in other cases, on the ground that the improvements on the land were with the vendor's consent, and so within the statutory requirement of the owner's consent, as when it was stipulated in the contract of sale that such improvements were to be made.<sup>20</sup>

— Priorities.

A mechanic's lien is valid, in most, if not all, jurisdictions, as against purchasers of the land; the purchaser being affected with notice of the lien either by the fact that improvements are being made on the land, or by the presence upon the court records of proceedings to obtain or enforce the lien.<sup>21</sup> Likewise, a mortgage of the land or other lien thereon, taking effect after the inception of the mechanic's lien, is subject there-

<sup>18</sup> *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Colman v. Goodnow*, 36 Minn. 9, 1 Am. St. Rep. 632; *Fullmer v. Poust*, 155 Pa. St. 275, 35 Am. St. Rep. 881; *Paulsen v. Manske*, 126 Ill. 72; *Kerrick v. Ruggles*, 78 Wis. 274; *Chicago Lumber Co. v. Osborn*, 40 Kan. 168. Contra, to the effect that the vendee is not an "owner," see *Brown v. Morison*, 5 Ark. 217; *Hayes v. Fessenden*, 106 Mass. 228.

<sup>19</sup> *Moore v. Jackson*, 49 Cal. 109; *Henderson v. Connelly*, 128 Ill. 98, 5 Am. St. Rep. 490; *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616; *Sheehy v. Fulton*, 38 Neb. 691, 41 Am. St. Rep. 767.

<sup>20</sup> *Baker v. Waldron*, 92 Me. 17, 69 Am. St. Rep. 483; *Hackett v. Badeau*, 63 N. Y. 476; *Edwards & McCulloch Lumber Co. v. Mosher*, 88 Wis. 672; *Davis v. Humphrey*, 112 Mass. 309.

<sup>21</sup> See *Work v. Hall*, 79 Ill. 196; *Miller v. Barroll*, 14 Md. 173; *Fleming v. Bumgarner*, 29 Ind. 424; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Burr v. Maulsby*, 99 N. C. 263, 6 Am. St. Rep. 517; *Ambrose v. Woodmansee*, 27 Ohio St. 147; *Williams v. Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463, 34 Am. St. Rep. 403.

to.<sup>22</sup> A mortgage executed and recorded before the attaching of the lien will take precedence thereof,<sup>23</sup> and, in some states, it is sufficient that it be executed, though not recorded.<sup>24</sup> Under the statutes of some states, a mechanic's lien, while subject to a prior mortgage or other incumbrance as regards the land and pre-existing improvements thereon, takes precedence as to improvements for the creation or repair of which the lien is claimed.<sup>25</sup>

The time at which the mechanic's lien attaches to the land is of primary importance in determining priorities as between the lien and the claims of purchasers or other incumbrancers. In some states the lien attaches when the contract under which the labor or materials are furnished was made;<sup>26</sup> in some, when the building or improvement was commenced;<sup>27</sup> in some, when the person asserting the lien first began to furnish the labor or materials for which the lien is claimed;<sup>28</sup> and in

<sup>22</sup> Jones, Liens, §§ 1457-1486; Soule v. Hurlbut, 58 Conn. 511; Thielman v. Carr, 75 Ill. 385; Dunklee v. Crane, 103 Mass. 470; Hahn's Appeal, 39 Pa. St. 409.

<sup>23</sup> National Bank of Athens v. Danforth, 80 Ga. 55; Thielman v. Carr, 75 Ill. 385; Batchelder v. Hutchinson, 161 Mass. 462; Folsom v. Cragen, 11 Colo. 205; Jean v. Wilson, 38 Md. 233; 2 Jones, Liens, § 1460.

<sup>24</sup> Root v. Bryant, 57 Cal. 48; Oliver v. Davy, 34 Minn. 292; Ryder v. Cobb, 68 Iowa, 235.

<sup>25</sup> Preston v. Sonora Lodge, No. 10, 39 Cal. 116; Jarvis v. State Bank of Ft. Morgan, 22 Colo. 309, 55 Am. St. Rep. 129; Bradley v. Simpson, 93 Ill. 93; Ivey v. White, 50 Miss. 142; Russell v. Grant, 122 Mo. 161, 43 Am. St. Rep. 563; 2 Jones, Liens, § 1462; Boisot, Mech. Liens, § 149.

<sup>26</sup> Paddock v. Stout, 121 Ill. 571; Dunklee v. Crane, 103 Mass. 470.

<sup>27</sup> Apperson v. Farrell, 56 Ark. 640; Hahn's Appeal, 39 Pa. St. 409; Neilson v. Iowa Eastern Ry. Co., 44 Iowa, 71; Delaware Railroad Construction Co. v. Davenport & St. P. Ry. Co., 46 Iowa, 406; Kansas Mortgage Co. v. Weyerhaeuser, 48 Kan. 355; Milner v. Norris, 13 Minn. 455 (Gil. 424); Oriental Hotel Co. v. Griffiths, 38 Tex. 574, 53 Am. St. Rep. 790.

<sup>28</sup> Tritch v. Norton, 10 Colo. 327; Kellenberger v. Boyer, 37 Ind. (1802)

others, when a claim or statement of the lien is filed, or notice of the claim is given to the owner.<sup>29</sup>

— Assertion and enforcement of lien.

The statutes quite frequently provide that one seeking to enforce a mechanic's lien shall so notify the owner of the land; this requirement existing especially in the case of liens in favor of persons not contracting directly with such owner, such as subcontractors, and persons furnishing materials to contractors.<sup>30</sup>

In most states there is a statutory requirement that the person claiming the lien file, within a certain time, a verified statement of the character of the contract, the work done thereunder, the amount due, the property on which the lien is claimed, and, frequently, other matters concerning the claim. This statement is called by different names, such as "claim," "notice," or "account," and the statutory requirements in regard thereto must be strictly complied with.<sup>31</sup> The effect of filing such a statement is to establish the lien, since it serves as notice to all the world of the existence of the claim. After the lien is thus established, the lienor may begin a proceeding to sell the land under the lien. This proceeding is usually in equity, and is similar, in its general aspects, to an equitable suit for the sale of land under a mortgage.<sup>32</sup>

188; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779; *Burr v. Maulsby*, 99 N. C. 263, 6 Am. St. Rep. 517.

<sup>29</sup> *McCorkle v. Herrman*, 117 N. Y. 297; *Ritchey v. Risley*, 3 Or. 184; *Hinckley & Egery Iron Co. v. James*, 51 Vt. 240; *Cahoon v. Levy*, 6 Cal. 295, 65 Am. Dec. 515.

<sup>30</sup> 1 Stimson's Am. St. Law, §§ 1965, 1967.

<sup>31</sup> 1 Stimson's Am. St. Law, § 1968; Phillips, *Mech. Liens*, § 337 et seq.; Boisot, *Mech. Liens*, § 374 et seq.

<sup>32</sup> 2 Jones, *Liens*, § 1554 et seq.; Boisot, *Mech. Liens*, § 507 et seq.; 13 Enc. Pl. & Pr. 939.

— Release or waiver of lien.

The right to a mechanic's lien may be waived or released.<sup>22</sup> In some states, but in a minority only, a waiver is *prima facie* inferred from the fact that the person furnishing labor or materials has taken collateral security<sup>24</sup> or a mortgage on the specific land<sup>25</sup> for his claim. The mere acceptance of a note, signed by the owner or other person liable for the debt, is not a waiver, in the absence of an intention to that effect.<sup>26</sup>

§ 570. Judgment liens.

At common law, a creditor had no remedy against the lands of his debtor for the satisfaction of his claim; but by 13 Edw. I. c. 18,<sup>27</sup> it was provided that, when a debt is recovered or damages awarded, it shall be thenceforth "in the election" of the creditor to have a writ of *feri facias* against the goods and chattels of the debtor, or else a writ that the sheriff deliver to him all the chattels of the debtor and the one-half of

<sup>22</sup> Phillips, *Mech. Liens*, cc. 24, 26; 2 Jones, *Liens*, §§ 1500-1537; Boisot, *Mech. Liens*, §§ 705-719, 732.

<sup>24</sup> *Clark v. Moore*, 64 Ill. 273; *Bristol-Goodson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co.*, 99 Tenn. 371. See *Grant v. Strong*, 18 Wall. (U. S.) 623. By statute in several states the lien is waived by taking collateral security. 2 Jones, *Mortgages*, § 1519. But that taking collateral security raises no presumption of waiver, see *Ford v. Wilson*, 85 Ga. 109; *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16; *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32; *Hoagland v. Lusk*, 33 Neb. 376, 29 Am. St. Rep. 485. See *McKeen v. Haseltine*, 46 Minn. 426.

<sup>25</sup> *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708; *Willison v. Douglas*, 66 Md. 99; *Weaver v. Demuth*, 40 N. J. Law, 233; *Grant v. Strong*, 18 Wall. (U. S.) 623. Contra, *Farberry v. Johnson*, 51 Miss. 291; *Gilerest v. Gottschalk*, 39 Iowa, 311; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779; *Farmers' & Mechanics' Nat. Bank of Fort Worth v. Taylor*, 91 Tex. 78.

<sup>26</sup> *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 34; *McKeen v. Haseltine*, 46 Minn. 426; *Ehlers v. Elder*, 51 Miss. 493.

<sup>27</sup> *St. Westminster II.* (A. D. 1235).



his land. The writ issued to the sheriff under this statute was called a writ of *elegit*, because it stated that the creditor had elected (*elegit*) to pursue the remedy furnished by the statute. In construing this statute it was decided that the creditor could enforce his remedy against the lands even in the hands of one to whom they had been sold by the debtor after the recovery of the judgment, and this in effect made the judgment a lien or incumbrance on all the lands of the debtor.<sup>38</sup> In one or two states the lien has been regarded as existent by force of this statute, or of a colonial statute giving a right to levy an execution,<sup>39</sup> but it is usually considered that no such lien exists, in the absence of a state statutory provision therefor,<sup>40</sup> and there is, in most of the states, such a provision subjecting the judgment debtor's land, or certain interests therein, to the lien of a judgment.<sup>41</sup>

The lien of a judgment is not, it seems, to be regarded as a proprietary right in the lands subject thereto, but merely as a right to levy on any of such lands for the purpose of satisfying the judgment, to the exclusion or destruction of any rights which may have accrued to others since the attachment of the lien.<sup>42</sup> Consequently, the lienor has no right

<sup>38</sup> See Williams, Real Prop. (18th Ed.) 251; Massingill v. Downs, 7 How. (U. S.) 760; Morsell v. First Nat. Bank of Washington, 91 U. S. 357.

<sup>39</sup> United States v. Morrison, 4 Pet. (U. S.) 124; Coombs v. Jordan, 3 Bland Ch. (Md.) 284, 22 Am. Dec. 236; Borst v. Nalle, 28 Grat. (Va.) 423; Hutcheson v. Grubbs, 80 Va. 254.

<sup>40</sup> Woods v. Maina, 1 G. Greene (Iowa) 275; Thompson v. Avery, 11 Utah, 214; Shrew v. Jones, 2 McLean, 78, Fed. Cas. No. 12,813. See Groves' Appeal, 68 Pa. St. 143.

<sup>41</sup> In the New England states, the judgment creditor has no lien, but he may secure payment of such judgment as may be rendered by the previous issuance of an attachment. See post, § 571.

<sup>42</sup> See Brace v. Duchess of Marlborough, 2 P. Wms. 491, Kirchwey's Cas. 36; Conard v. Atlantic Ins. Co. of New York, 1 Pet. (U. S.) 336, 442; Ashton v. Slater, 19 Minn. 347 (Gil. 300); Foute v. Fairman, 48 Miss. 536; Mansfield v. Gregory, 11 Neb. 297; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562.

in the land subject to the lien which authorizes him to complain of waste thereon by the judgment debtor,<sup>43</sup> and he could not, it would seem, maintain an action of tort against third persons for injury thereto.

—— Character of the judgment.

In order that a judgment may constitute a lien, it must be one on which execution could immediately issue,<sup>44</sup> and consequently it must be a final, and not an interlocutory, judgment,<sup>45</sup> and must be for a definite sum of money.<sup>46</sup> Subject to these requirements, the fact that the judgment is by confession<sup>47</sup> or by default<sup>48</sup> is immaterial.

The judgment of a justice of the peace or of any other inferior court usually, by the express provision of the statute, becomes a lien only after the filing of a transcript or record thereof in one of the superior courts.<sup>49</sup>

The judgment of a federal court is, by act of congress, made a lien on property throughout the state in which it is

<sup>43</sup> *Lanning v. Carpenter*, 43 N. Y. 408, 412; *Independent School Dist. of West Point v. Werner*, 43 Iowa, 643. But see *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505, where an injunction against the removal of fixtures was issued on the petition of the judgment creditor.

<sup>44</sup> 2 *Freeman, Judgments*, § 340; *Davidson v. Myers*, 24 Md. 533; *In re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746; *Towner v. Wells*, 3 Ohio, 136.

<sup>45</sup> *Grant v. Bennett*, 96 Ill. 513; *Eastham v. Sallis*, 60 Tex. 576; *Davidson v. Myers*, 24 Md. 533; 2 *Freeman, Judgments*, § 341.

<sup>46</sup> *Noe v. Moutray*, 170 Ill. 177; *Eastham v. Sallis*, 60 Tex. 576; *Linn v. Patton*, 10 W. Va. 187.

<sup>47</sup> *Gilman v. Hovey*, 26 Mo. 230; *White v. Bogart*, 73 N. Y. 256; *Lauffer v. Cavett*, 87 Pa. St. 479.

<sup>48</sup> *Sellers v. Burk*, 47 Pa. St. 344.

<sup>49</sup> See *Petray v. Howell*, 20 Ark. 615; *Laughlin v. Hawley*, 9 Colo. 170; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Easterling v. Chiles*, 93 Ky. 315; *Jackson v. Jones*, 9 Cow. (N. Y.) 182; *Adams v. Guy*, 106 N. C. 275; *White v. Espey*, 21 Or. 333.

rendered to the same extent, and subject to the same conditions, as in the case of a judgment rendered by a state court.<sup>50</sup>

In a number of the states there is a statutory provision making a decree in equity for the payment of money a lien on land to the same extent as a judgment at law, either by an express provision to that effect, or by a general declaration that such a decree shall have the same force and effect as a legal judgment.<sup>51</sup>

The judgment must, by the law of most of the states, be docketed or recorded, in order to constitute a lien, and there is usually a further requirement that it be indexed. The statutory requirements in these respects must be strictly followed, and a failure to comply therewith will usually render the judgment nugatory as against a subsequent *bona fide* purchaser of the land.<sup>52</sup> Such provisions are, however, usually regarded as intended merely to protect persons without notice of the judgment, so that the failure to comply therewith will not affect the lien as against subsequent purchasers or lienors with notice of the judgment.<sup>53</sup>

<sup>50</sup> Act Aug. 1, 1888 (25 Stat. 357). See *Cooke v. Avery*, 147 U. S. 375.

<sup>51</sup> *Eames v. Germania Turn Verein*, 74 Ill. 54; *Hohman's Appeal*, 127 Pa. St. 209; *Battle v. Bering*, 7 Yerg. (Tenn.) 529, 27 Am. Dec. 526; *Conard v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679; *Myers v. Hewitt*, 16 Ohio, 449; *Linn v. Patton*, 10 W. Va. 187. In *Blake v. Heyward*, 1 Bailey, Eq. (S. C.) 208, it was held that the same result followed from a statute authorizing an execution to issue under an equity decree.

<sup>52</sup> As to docketing, see *Roll v. Rea*, 57 N. J. Law, 647; *Reid v. McGowan*, 28 S. C. 74; *Flanagan v. Oberthier*, 50 Tex. 379; *Duncan v. Custard*, 24 W. Va. 730; *Josselyn v. Stone*, 28 Miss. 753; *Wood v. Reynolds*, 7 Watts & S. (Pa.) 406; *Berry v. Reed*, 73 Ind. 235; *Bush v. Faris*, 30 U. S. App. 626, 71 Fed. 770, 18 C. C. A. 315. As to indexing, see *Metz v. State Bank of Brownville*, 7 Neb. 165; *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297; *Hughes v. Lacock*, 63 Miss. 112; *Dewey v. Sugg*, 109 N. C. 323; *Crouse v. Murphy*, 140 Pa. St. 335, 23 Am. St. Rep. 232; *Gullett Gin Co. v. Oliver*, 78 Tex. 182.

<sup>53</sup> *York Bank's Appeal*, 36 Pa. St. 458; *Craig v. Sebrall*, 9 Gratt. (1807)

— Lands and interests therein subject to the lien.

The lien of a judgment usually extends only to land within the jurisdiction of the court rendering the judgment,—that is, it is ordinarily restricted to the limits of the particular county.<sup>54</sup> In most states, however, there are statutory provisions for extending the lien to land in another county by docketing or recording therein a transcript of the judgment.<sup>55</sup>

An estate for life is subject to the lien as being “real estate” or “real property,” within the statutes creating the lien.<sup>56</sup> Whether a leasehold estate is subject to the lien is determined differently in different states, on a construction of the state statute.<sup>57</sup>

An equitable estate or interest in land was not subject to the lien of a judgment under the early English statute before referred to, and is not, at the present day, regarded as so subject, in the absence of a statutory provision to the con-

(Va.) 131; *Cushing v. Edwards*, 68 Iowa, 145. Contra, *Glasscock v. Stringer* (Tex. Civ. App.) 32 S. W. 920.

<sup>54</sup> *Sapp v. Wightman*, 103 Ill. 150; *Kerngood v. Davis*, 21 S. C. 183; *Alsop v. Moseley*, 104 N. C. 60; *Baker v. Chandler*, 51 Ind. 85; 1 Black, Judgments, §§ 417, 418.

<sup>55</sup> *Farmers' Bank of Maryland v. Helghe*, 8 Md. 357; *Firebaugh v. Ward*, 51 Tex. 409; *Yackle v. Wightman*, 103 Ill. 169; *Hubbard v. Jones*, 61 Kan. 722; *Donner v. Palmer*, 23 Cal. 40; *Stewart v. Wheeling & L. E. Ry. Co.*, 53 Ohio St. 151; *Seaton v. Hamilton*, 10 Iowa, 394; *Bergen v. State*, 58 Miss. 623; *Lamb v. Sherman*, 19 Neb. 681.

<sup>56</sup> *Verdin v. Slocum*, 71 N. Y. 345; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398; *Bridge v. Ward*, 35 Wis. 687.

<sup>57</sup> That a leasehold estate is not subject to the lien, see *Bismark Building & Loan Ass'n v. Bolster*, 92 Pa. St. 123; *Ely v. Beaumont*, 5 Serg. & R. (Pa.) 124. See, also, *Merry v. Hallet*, 2 Cow. (N. Y.) 497. Contra, *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537; *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 334. The statute sometimes expressly provides for a lien on all terms which have more than a certain number of years to run.

trary.<sup>58</sup> In some states, however, a statute imposing the lien on the "real estate" or "real property" of the debtor is considered to include equitable as well as legal interests, and express provisions to the same effect are quite usual.<sup>59</sup> The judgment creditor, moreover, apart from statute, may, after return of execution unsatisfied, file a bill to obtain satisfaction of the judgment out of an equitable interest, and, upon so doing, the judgment becomes effective thereon as against any incumbrances or conveyances subsequent to the date of such filing.<sup>60</sup> Under statutes subjecting equitable interests to the lien, mortgaged land belonging to the judgment debtor, the "equity of redemption," is subject to the lien, even where the legal view of a mortgage is adopted, and, in states where the mortgagee has merely a lien without the legal title, the mortgagor's interest in the land is so subject as a legal estate.<sup>61</sup>

When land is owned concurrently by two or more persons, the undivided interest of each is subject to the lien of a

<sup>58</sup> *Morsell v. First Nat. Bank of Washington*, 91 U. S. 361; *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710; *Nessler v. Neher*, 18 Neb. 649; *Sipley v. Wasa*, 49 N. J. Eq. 463; *Smith v. Ingles*, 2 Or. 43; *Terrell v. Prestel*, 68 Ind. 86; *Dixon v. Dixon*, 81 N. C. 323. In Pennsylvania a different view has been taken, for reasons growing out of the want of a court of equity. *Auwerter v. Mathiot*, 9 Serg. & R. (Pa.) 402.

<sup>59</sup> See *Niantic Bank v. Dennis*, 37 Ill. 331; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354; *McKeithan v. Walker*, 66 N. C. 95; *Maxwell v. Vaught*, 96 Ind. 141.

<sup>60</sup> *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Roach's Ex'rs v. Bennett*, 24 Miss. 98; *Coutts v. Walker*, 2 Leigh (Va.) 263. See *Ware v. Delahaye*, 95 Iowa, 667.

<sup>61</sup> *Pahlman v. Shumway*, 24 Ill. 127; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354; *Trimble v. Hunter*, 104 N. C. 129; *McGuire v. Wilkinson*, 72 Mo. 199; *Macaulay v. Smith*, 132 N. Y. 524; *McKeithan v. Walker*, 66 N. C. 95; *Kinports v. Boynton*, 120 Pa. St. 306, 6 Am. St. Rep. 706. And see *Morsell v. First Nat. Bank of Washington*, 91 U. S. 357.

judgment against him to the same extent as an interest in severalty. In case of partition, the lien attaches to the specific land allotted to the judgment debtor,<sup>62</sup> or, in case of sale for purposes of partition, to the fund obtained thereby.<sup>63</sup>

The legal title of a vendor of land who has not yet executed a conveyance is subject to the lien of a judgment against him, to the extent of the purchase money still unpaid,—that is, the lien binds the land so far as the rights of the vendee will not be affected thereby.<sup>64</sup> If all the purchase money has been paid, the vendor has merely a bare legal title, which is not subject to the lien;<sup>65</sup> and if part only, or if none, has been paid, the vendor's title is subject to the lien, which is, however, liable to be divested by the payment of whatever remains due by the vendee.<sup>66</sup>

The equitable interest of the vendee of land who has not yet received a conveyance is, of course, not subject to the lien in those states in which no equitable interests are so

<sup>62</sup> *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 124, 21 Am. Dec. 432; *Emson v. Polhemus*, 28 N. J. Eq. 439, 6 Gray's Cas. 679; *Inhabitants of Argyle v. Dwinel*, 29 Me. 45.

<sup>63</sup> *Eldridge v. Post*, 20 Fla. 579; *Garvin v. Garvin*, 1 Rich. (S. C.) 55.

<sup>64</sup> *Courtney v. Parker*, 21 Neb. 582; *Lefferson v. Dallas*, 20 Ohio St. 68; *Chahorn v. Hollenback*, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; *Moyer v. Hinman*, 13 N. Y. 180; *O'Neill v. Wabash Ave. Baptist Church Soc.*, 4 Biss. 482, Fed. Cas. No. 10,531; *Ware v. Jackson*, 19 Ga. 452.

<sup>65</sup> *Baker v. Thompson*, 36 Minn. 314; *Stannis v. Nicholson*, 2 Or. 335; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740.

<sup>66</sup> *Shinn v. Taylor*, 28 Ark. 523; *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Minneapolis & St. L. Ry. Co. v. Wilson*, 25 Minn. 382; *Money v. Dorsey*, 7 Smedes & M. (Miss.) 15; *Moyer v. Hinman*, 13 N. Y. 180; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590; *Hurt's Adm'r v. Prillaman*, 79 Va. 257; *Kraner v. Chambers*, 92 Iowa, 681. But, under particular statutes, the failure to record the contract may defeat the vendee's rights as against the judgment lien. *Young v. Devries*, 31 Grat. (Va.) 304; *Anderson v. Nagle*, 12 W. Va. 32.

subject.<sup>67</sup> In states where the judgment lien does exist upon equitable as well as legal interests, the vendee's interest is subject to the lien to the extent to which the purchase money has been paid,—that is, the lien on his interest is subject to the prior right of the vendor to payment of whatever part of the price remains unpaid.<sup>68</sup>

Not only lands which belonged to the judgment debtor at the time of the rendition or docketing of the judgment, but also those thereafter acquired by him, are subject to the lien in all but two of the states.<sup>69</sup>

—Priorities.

The whole purpose and effect of a judgment lien is to render the lands of the debtor liable to execution under the judgment, without reference to any rights subsequently acquired by other persons, and that it does have such effect has never been questioned.<sup>70</sup> The question, however, whether a judgment lien can bind the land as against rights acquired by others before the rendition of the judgment is a subject as to which the law of the various states is not wholly in accord.

<sup>67</sup> *Evans v. Feeny*, 81 Ind. 532; *Roddy v. Elam*, 13 Rich. Law (S. C.) 343; *Whittington v. Simmons*, 32 Ark. 377.

<sup>68</sup> *Rand v. Garner*, 75 Iowa, 311; *Pugh v. Good*, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534; *Adams v. Harris*, 47 Miss. 144. See *Stewart v. Berry*, 84 Ga. 177.

<sup>69</sup> *Jackson v. Bank of United States*, 5 Cranch, C. C. 1, Fed. Cas. No. 7,131; *Wales v. Bogue*, 31 Ill. 464; *Ware v. Delahaye*, 95 Iowa, 667; *Colt v. Du Bois*, 7 Neb. 391; *Moore v. Jordan*, 117 N. C. 86, 53 Am. St. Rep. 576; *Barron v. Thompson*, 54 Tex. 235; *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161.

In Ohio the lien does not attach to after-acquired lands (*Smith v. Hogg*, 52 Ohio St. 527), nor does it in Pennsylvania, except in the case of a judgment against a vendee subsequently acquiring the legal title (*Waters' Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354).

<sup>70</sup> See *Fawcetts v. Kimmey*, 33 Ala. 261; *Clark v. Merriam*, 83 Ind. 58; *Hoppock v. Shober*, 69 N. C. 153; *Anderson v. Neff*, 11 Serg. & R. (Pa.) 208; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Logans v. Second German Building Ass'n*, 37 Ohio St. 392.

As a general rule, and subject to the statements in the next paragraph, the lien of a judgment is inferior to prior equities,—that is, a court of equity will protect all equitable rights which may have accrued before the attachment of the lien.<sup>71</sup> It is on this principle that the rights of a vendee under an executory contract of sale are regarded as superior to the lien;<sup>72</sup> and likewise the rights of a *cestui que trust* are upheld as against a lien under a judgment against the trustee.<sup>73</sup> So, an equitable lien in favor of a grantor for a part of the price has been held to be superior to a lien subsequently attaching under a judgment against the grantee;<sup>74</sup> and the same principle would seem to apply in the case of any other equitable lien.<sup>75</sup>

While, by the well-settled principles of equity, in thus giving protection to prior equities as against the judgment lien, it is immaterial that the judgment creditor had, before obtaining his judgment, no notice, express or implied, of the existence of such equities,<sup>76</sup> in many states the adoption of

<sup>71</sup> *Brown v. Pierce*, 7 Wall. (U. S.) 205; *Monticello Hydraulic Co. v. Longhry*, 72 Ind. 562; *Frazer v. Thatcher*, 49 Tex. 26; *White v. Denman*, 1 Ohio St. 110; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Goodell v. Blumer*, 41 Wis. 436; 2 *Pomeroy, Eq. Jur.* § 721; 1 *Black, Judgments*, § 445; 2 *Freeman, Judgments*, § 357.

<sup>72</sup> See ante, note 66.

<sup>73</sup> *Withnell v. Courtland Wagon Co.* (C. C.) 25 Fed. 372; *Hays v. Regar*, 102 Ind. 524; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

<sup>74</sup> *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Bowman v. Faw*, 5 Lea (Tenn.) 472; *Messmore v. Stephens*, 83 Ind. 524. Contra, *Allen v. Loring*, 34 Iowa, 499; *Johnson v. Cawthorn*, 21 N. C. 32.

<sup>75</sup> *Wharton v. Wilson*, 60 Ind. 591; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Martin v. Nixon*, 92 Mo. 26; *Galway v. Mulchow*, 7 Neb. 285; *Dwight v. Newell*, 3 N. Y. 185; 2 *Pomeroy, Eq. Jur.* § 721.

<sup>76</sup> *Rodgers v. Bonner*, 45 N. Y. 379; *Doswell v. Adler*, 23 Ark. 32; *Wharton v. Wilson*, 60 Ind. 591; *Valentine v. Seiss*, 79 Md. 187. And see cases cited in the four preceding notes.



the recording laws has given rise to a different view, it being held that the lien takes precedence of a prior equity which does not appear of record, and of which the creditor has no actual or constructive notice.<sup>77</sup> So, in some states, holders of judgment liens are regarded as within the protection of the recording laws, with the result that a conveyance of the land, or a mortgage thereof, made by the judgment debtor, if not recorded, is subordinate to the lien of a judgment subsequently rendered in favor of a person without notice of the prior conveyance or mortgage.<sup>78</sup> In other states, however, the judgment creditor cannot take advantage of the failure to record a prior conveyance or mortgage, the equity of the prior grantee or mortgagee being regarded as superior.<sup>79</sup> But even in states in which the judgment lien is thus within the protection of the recording laws, it is usually held that the failure to record the conveyance or mortgage is immaterial if the judgment creditor had notice thereof at the time of recovery of judgment, the requirement of record being regarded as merely for the purpose of furnishing notice.<sup>80</sup>

<sup>77</sup> 2 Pomeroy, Eq. Jur. §§ 722, 723; *Buchanan v. Kimes*, 2 Bart. (Tenn.) 275; *Humphrey v. Copeland*, 54 Ga. 543; *Massey v. Westcott*, 40 Ill. 160; *Cutler v. Ammon*, 65 Iowa, 281; *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259.

<sup>78</sup> *McCoy v. Rhodes*, 11 How. (U. S.) 131; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Town of Tarboro v. Micks*, 118 N. C. 162; *Heermans v. Montague* (Va.) 20 S. E. 899; *King v. Paulk*, 85 Ala. 186; *Grace v. Wade*, 45 Tex. 522; *Berryhill v. Smith*, 59 Minn. 285; *Hunt v. Swayze*, 55 N. J. Law, 33; 2 Pomeroy, Eq. Jur. § 722; *Manly v. Pettee*, 38 Ill. 128; *Semple v. Burd*, 7 Serg. & R. (Pa.) 286.

<sup>79</sup> *Pierce v. Spear*, 94 Ind. 127; *SeEVERS v. Delashmutt*, 11 Iowa, 174, 77 Am. Dec. 139; *Moorman v. Gibbs*, 75 Iowa, 537; *Holden v. Garrett*, 23 Kan. 98; *Wilcox v. Miller*, 49 Cal. 194; *Donovan v. Simmons*, 96 Ga. 340; *Schroeder v. Gurney*, 73 N. Y. 430; *Knell v. Green Street Building Ass'n*, 34 Md. 67; *Sappington v. Oeschli*, 49 Mo. 244.

<sup>80</sup> *Northwestern Land Co. v. Dewey*, 53 Minn. 359; *Hutchinson v. Bramhall*, 43 N. J. Eq. 372; *Williams v. Tatnall*, 39 Ill. 553; *Britton's Appeal*, 45 Pa. St. 172; *Wyatt v. Stewart*, 34 Ala. 716, 721; 2 Pome-

In the case of a mortgage given for the price of land as a part of the transaction of purchase, no beneficial interest to which the lien can attach is considered to vest in the mortgagor, as against the mortgagee, and it is immaterial that the mortgage is given, not to the vendor, but to a third person, who advances the purchase money.<sup>81</sup>

At common law, a judgment related back to, and was regarded as rendered upon, the first day of the term. This rule still applies in some states, so as to give the lien of the judgment precedence over a prior conveyance made during the term.<sup>82</sup> More generally, however, the lien attaches either at the time of the rendition of the judgment<sup>83</sup> or at the time of its docketing or record.<sup>84</sup>

#### § 571. Attachment liens.

In most, if not all, of the states, there are provisions for the issuance of a writ of "attachment" as auxiliary to an action for the recovery of money, and in advance of the trial thereof, the effect of such process being to give the plaintiff a lien upon such property of the defendant as may be levied on under the writ. In most jurisdictions this writ

roy, Eq. Jur. § 723. *Contra*, *Coward v. Culver*, 12 Heisk. (Tenn.) 540; *Mayham v. Coombs*, 14 Ohio, 428.

<sup>81</sup> *Curtis v. Root*, 20 Ill. 53; *Ransom v. Sargent*, 22 Kan. 516; *Bradley v. Byran*, 43 N. J. Eq. 396; *Haywood v. Nooney*, 3 Barb. (N. Y.) 643; *Cake's Appeal*, 23 Pa. St. 186, 62 Am. Dec. 323; *Laidley v. Aiken*, 80 Iowa, 112, 20 Am. St. Rep. 408; *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651.

<sup>82</sup> *Norfolk State Bank v. Murphy*, 40 Neb. 735; *Clements v. Berry*, 11 How. (U. S.) 398; *Kellerman v. Aultman* (C. C.) 30 Fed. 838; *Davis v. Messenger*, 17 Ohio St. 231; *Jackson v. Luce*, 14 Ohio, 514; *Trbana Bank v. Baldwin*, 3 Ohio, 65.

<sup>83</sup> *Balley v. Mizell*, 4 Ga. 123; *Smith v. Lind*, 29 Ill. 24. See 1 Black, Judgments, § 443.

<sup>84</sup> *Elwell v. Hitchcock*, 41 Kan. 130; *Reeves v. Johnson*, 12 N. J. Law, 29; *Firebaugh v. Ward*, 51 Tex. 409; *Balley v. Balley*, 93 Ga. 768.

can be obtained only for certain causes, specifically named in the statute, usually these being such as render it probable that property of the defendant sufficient to satisfy the judgment may not be legally accessible for the satisfaction of the judgment unless immediately seized. Thus it is frequently provided that an attachment may issue when the defendant has absconded, or is a nonresident, when he has made, or intends to make, a fraudulent conveyance of his property, or when he is about to remove property from the state.<sup>85</sup> In the New England states, however, there are no such restrictions upon the issuance of an attachment, and as a rule it issues as of course upon the direction of the plaintiff. The result is that a creditor may, in these states, usually establish a lien upon the defendant's property from the time of the commencement of the suit, and this has apparently been regarded as sufficient for his protection, without the enactment of any laws providing that his judgment, when obtained, shall be a lien on the debtor's land.

In the absence of a statute otherwise providing, the lien of an attachment does not exist until the officer actually levies under the writ upon property of the defendant, and it extends only to the property so levied on.<sup>86</sup> This levy does not, in the case of land, involve an actual seizure thereof, nor any interference with the possession, it being usually sufficient that the officer indorse on the writ that he has attached the land,<sup>87</sup> describing it with such certainty as is

<sup>85</sup> Drake, Attachment, § 38 et seq.; Kneeland, Attachment, co. 8-11.

<sup>86</sup> See *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Schacklett's Appeal*, 14 Pa. St. 326; *Gray's Adm'r v. Patton's Adm'r*, 13 Bush (Ky.) 625; *Riordan v. Britton*, 69 Tex. 198; *Taft's v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

<sup>87</sup> *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Boyle v. Ferry*, 12 La. Am. 425; *Perrin v. Leverett*, 13 Mass. 130; *Burkhardt v. McClellan*, 1 Abb. Dec. (N. Y.) 263; *Hancock v. Henderson*, 45 Tex. 479; *Lackey v. Seibert*, 23 Mo. 85.

necessary in the case of a conveyance.<sup>88</sup> In some states, moreover, the return of the officer must be filed or recorded in a particular office in order that the attachment may bind the land as against adverse rights subsequently accruing.<sup>89</sup>

An attachment may usually be levied upon estates in land of almost every character,—both those of freehold and those less than freehold.<sup>90</sup> The right to subject equitable interests to attachment differs in different states.<sup>91</sup> Mortgaged land is subject to attachment in many states, either as constituting a legal interest, or by force of a special statute.<sup>92</sup> The interest of a mortgage before foreclosure, being a mere chose in action, is usually not attachable.<sup>93</sup>

As a general rule, the attachment lien binds only such interest as the debtor has at the time of the levy, and is subject to all rights or equities which may have accrued in favor of

<sup>88</sup> *Biggs v. Blue*, 5 McLean, 148, Fed. Cas. No. 1,408; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Henry v. Mitchell*, 32 Mo. 512; *Howard v. Daniels*, 2 N. H. 137; *Grier v. Rhyne*, 67 N. C. 338.

<sup>89</sup> See *Wheaton v. Neville*, 19 Cal. 41; *Raynolds v. Ray*, 12 Colo. 108; *Worcester Nat. Bank v. Cheeney*, 37 Ill. 602; *Coffin v. Ray*, 1 Mete. (Mass.) 212; *Bryant v. Duffy*, 128 Mo. 18.

<sup>90</sup> *Waples*, Attachment (2d Ed.) § 246; *Drake*, Attachment, § 232 et seq.; *Kneeland*, Attachment, § 361.

<sup>91</sup> That an equitable interest is not subject to attachment, see *Lowry v. Wright*, 15 Ill. 95; *Shoemaker v. Harvey*, 43 Neb. 75; *Blackburn v. Clarke*, 35 Tenn. 506. That equitable interests are so subject, see *Fish v. Fowlie*, 58 Cal. 373; *Davenport v. Lacon*, 17 Conn. 373; *Bullene v. Hiatt*, 12 Kan. 98; *Bailey v. Warner*, 28 Vt. 87; *McCamant v. Batsell*, 59 Tex. 363. So, in some states, the interest of the vendee under a contract of sale is attachable. *Johnson v. Bell*, 53 N. H. 395; *Higgins v. McConnell*, 130 N. Y. 482; *Whittier v. Vaughan*, 27 Me. 301.

<sup>92</sup> *Reed v. Bigelow*, 5 Pick. (Mass.) 281; *De Wolf v. Murphy*, 11 R. I. 630; *Godfrey v. Monroe*, 101 Cal. 224; *Eastman v. Knight*, 35 N. H. 551; *Hawes' Appeal*, 50 Conn. 317.

<sup>93</sup> *McGurran v. Garrity*, 68 Cal. 566; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Marsh v. Austin*, 1 Allen (Mass.) 235; *Columbia Bank v. Jacobs*, 10 Mich. 349, 31 Am. Dec. 792; *Barrett v. Sargeant*, 13 Vt. 365.

other persons before the date of the levy.<sup>94</sup> Accordingly, apart from any question of notice, an attachment against a trustee cannot affect the rights of a *cestui que trust*,<sup>95</sup> and a conveyance or mortgage takes precedence of an attachment subsequently levied.<sup>96</sup> In some states, however, attaching creditors, like judgment creditors,<sup>97</sup> are within the protection of the recording acts, and are consequently not affected by prior equities, incumbrances, or conveyances, which do not appear of record, and of which they have no notice.<sup>98</sup>

The attachment lien is perfected by a judgment for plaintiff in the action to which the attachment is auxiliary, he then having a lien on the property attached, which he may enforce by a sale under execution, or, in some states, by a special proceeding under the order of the court. The judgment should specifically recognize the attachment lien, and in some states its failure so to do involves a loss of the lien.<sup>99</sup>

A sale under execution upon the judgment passes to the purchaser the interest of the judgment debtor as it existed at the time of the levy of the attachment, free from any ad-

<sup>94</sup> *Tennant v. Watson*, 58 Ark. 252; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Furman v. McMillan*, 2 Lea (Tenn.) 121; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Jamison v. Miller*, 27 N. J. Eq. 586; *Harrall v. Gray*, 10 Neb. 186; *Bateman v. Backus*, 4 Dak. 433; *Hoag v. Howard*, 55 Cal. 564; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366.

<sup>95</sup> *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Houghton v. Davenport*, 74 Me. 590; *Haynes v. Jones*, 5 Metc. (Mass.) 292; *Dow v. Sayward*, 14 N. H. 9; *Tucker v. Vandermark*, 21 Kan. 263.

<sup>96</sup> See cases cited in note 94.

<sup>97</sup> Ante, § 570.

<sup>98</sup> *Woodward v. Sartwell*, 129 Mass. 210; *Houston v. McCluney*, 3 W. Va. 135; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Wise v. Tripp*, 13 Me. 9; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264; *Carr v. Thomas*, 18 Fla. 736; *Jerome v. Carbonate Nat. Bank of Leadville*, 22 Colo. 37.

<sup>99</sup> See *Waples, Attachment*, § 893 et seq.

verse rights or claims which may have accrued since such levy.<sup>100</sup>

§ 572. Execution liens.

In some states, the delivery to the sheriff of a writ of execution under a judgment creates a lien on such property of the judgment defendant as is subject to levy under the execution.<sup>101</sup> In most states, however, the mere delivery of the writ to the sheriff does not create any lien, and a levy under the writ is necessary to make the claim of the creditor effective as against adverse claims to and equities in the debtor's property.<sup>102</sup>

So far as a lien already exists by force of the judgment, any additional lien by virtue of the execution is usually of no value,<sup>103</sup> and, in view of the fact that the former lien is recognized in most of the states, there seems to be but slight occasion for the consideration of an execution lien in connection with the law of land.<sup>104</sup>

The lien of an execution, whether arising from the issue or the levy of an execution, is superior to all rights subse-

<sup>100</sup> *Mattocks v. Farrington*, 2 Hask. 331, Fed. Cas. No. 9,298; *Nason v. Grant*, 21 Me. 160; *Lackey v. Seibert*, 23 Mo. 85.

<sup>101</sup> *Dalley v. Burke*, 28 Ala. 328; *Whitehead v. Woodruff*, 11 Bush (Ky.) 209; *Doe d. McLean v. Upchurch*, 6 N. C. 353; *Williams v. Nellor*, 12 Colo. 1; 2 *Freeman, Executions*, § 200.

<sup>102</sup> See *Wilson's Appeal*, 90 Pa. St. 370; *Anderson v. Taylor*, 6 Lea (Tenn.) 382; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Smith v. Hogg*, 52 Ohio St. 527; *Sawyers v. Sawyers*, 93 N. C. 321; *Mills-paugh v. Mitchell*, 3 Barb. (N. Y.) 333; *Reeves v. Sebern*, 16 Iowa, 234, 85 Am. Dec. 513; *Albrecht v. Long*, 25 Minn. 163; 2 *Freeman, Executions*, § 202.

<sup>103</sup> See *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Riland v. Eckert*, 23 Pa. St. 215; *McIntyre v. Sanford*, 9 Daly (N. Y.) 21; *Farrior v. Houston*, 100 N. C. 369, 6 Am. St. Rep. 597.

<sup>104</sup> In states where an execution may be issued to another county without first docketing or recording the judgment therein, the effect of the execution, when so issued, as creating a priority or "lien," may be important.

quently arising, as when the land is sold or incumbered by the execution defendant after the inception of the lien.<sup>105</sup> As a general rule, it takes effect only upon the actual title of the judgment defendant, and is postponed to all rights and equities which may have accrued before its inception.<sup>106</sup> This is not, however, the case in that class of states, before referred to, in which a judgment creditor is regarded as within the protection of the recording acts, and there the lien of an execution takes precedence of unrecorded conveyances, mortgages, or other incumbrances existing at the inception of the lien, but of which the creditor has no notice.<sup>107</sup>

§ 573. Liens for taxes and assessments.

In most of the states it is provided by statute that taxes on a particular piece of land shall constitute a lien thereon. In the absence of such an express provision, there is, it is sometimes said, no such lien.<sup>108</sup> But the effect of a statute authorizing a sale of the land for taxes is undoubtedly to make, in effect, the taxes a lien on the land, since any purchaser or incumbrancer acquires his interest subject to the possibility of such sale unless the taxes are paid.<sup>109</sup> Occa-

<sup>105</sup> *French v. Allen*, 50 Me. 437; *Hall v. Crocker*, 3 Metc. (Mass.) 245; *Doe d. Huggins v. Ketchum*, 20 N. C. 414; *Castleberry v. Weaver*, 30 Ga. 534; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Young v. Schofield*, 132 Mo. 650; 2 *Freeman, Executions*, § 195.

<sup>106</sup> *O'Rourke v. O'Connor*, 39 Cal. 442; *Phillips v. Roquemore*, 96 Ga. 719; *Holden v. Garrett*, 23 Kan. 98; *Sappington v. Oeschli*, 49 Mo. 244; *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105; *Righter v. Forrester*, 1 Bush (Ky.) 278.

<sup>107</sup> *Hawkins v. Fles*, 51 Ark. 417; *O'Hara v. Booth*, 29 La. Ann. 817; *Davidson v. Beard*, 9 N. C. 520; *Stephens v. Keating* (Tex.) 17 S. W. 37; *Stevenson v. Texas & P. Ry. Co.*, 105 U. S. 703.

<sup>108</sup> *Miller v. Anderson*, 1 S. D. 539; *Morrow v. Dows*, 28 N. J. Eq. 463; *City of Philadelphia v. Greble*, 38 Pa. St. 339; *Cooley, Taxation*, 447.

<sup>109</sup> See *Dunlap v. County of Gallatin*, 15 Ill. 7; *Dougherty v. Miller*, (1319)

sionally, taxes due on personalty are made a lien on the land of the owner.<sup>110</sup>

Usually the lien for taxes on the land is, by the statute, imposed upon the land as a whole, and not upon any particular estates or interests therein, so that all equities, interests, and incumbrances, whether they accrued before or after the levy or assessment of the tax, are subordinate to the lien, and liable to be divested by a sale for taxes.<sup>111</sup>

In the absence of any statutory provision determining the time of the inception of the lien, it commences at the time when, "by an extension of the tax upon the roll, a particular sum has become a charge upon a particular parcel of land."<sup>112</sup> This is a matter of importance only for the purpose of determining which of two private individuals shall pay the tax, when, as is ordinarily the case, the tax is a lien on the land as a whole, and not on a particular interest therein.

Assessments for local improvements also may be, and usually are, liens on the land assessed for benefits from the im-

36 Cal. 83; *Hoglen v. Cohan*, 30 Ohio St. 436; *Stokes v. State*, 46 Ga. 412; *Lyon v. Alley*, 130 U. S. 177.

<sup>110</sup> See *New England Loan & Trust Co. v. Young*, 81 Iowa, 732; *Union Trust Co. v. Weber*, 96 Ill. 346; *State v. City of Newark*, 42 N. J. Law, 38; *Albany Brewing Co. v. Town of Meriden*, 48 Conn. 243; *Miller v. Anderson*, 1 S. D. 539; *Cooley, Taxation*, 445.

<sup>111</sup> *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Dunlap v. County of Gallatin*, 15 Ill. 7; *Keating v. Craig*, 73 Mo. 507; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Cooper v. Holmes*, 71 Md. 20. But the statute is sometimes construed as giving a lien only on the interest of the person primarily bound to pay the tax. See *Rhein Bldg. Ass'n v. Lea*, 100 Pa. St. 210; *O'Neill v. Dringer*, 31 N. J. Eq. 507; *Shaw v. City of Allegheny*, 115 Pa. St. 46; *Morrow v. Dows*, 28 N. J. Eq. 459. And a tax on personalty is generally construed as intended to be a lien only on the interest in the land of the person owing the taxes. *State v. City of Newark*, 42 N. J. Law, 38; *Miller v. Anderson*, 1 S. D. 539; *Carter v. Rodewald*, 108 Ill. 351. Contra, *New England Loan & Trust Co. v. Young*, 81 Iowa, 732.

<sup>112</sup> *Cooley, Taxation* (2d Ed.) 448; *Black, Tax Titles*, § 189.

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provement.<sup>113</sup> The assessment may even take precedence of liens and incumbrances placed on the land before the commencement, or even the ordering of the improvement.<sup>114</sup>

United States internal revenue taxes are, by express statutory provision, made liens upon the real estate of any person liable for such a tax.<sup>114a</sup>

§ 574. The lien of decedent's debts.

The liability of the land of a deceased person to be sold in payment of his debts may be, in most jurisdictions, enforced against not only the heirs or devisees of the land, but against persons claiming by purchase, mortgage, or otherwise, under such heirs and devisees.<sup>115</sup> Consequently, this liability of the land to sale constitutes, in effect, a lien on the land. In England, however, and in at least one state, the liability is enforceable against the land only so long as it

<sup>113</sup> *Lyon v. Alley*, 130 U. S. 177; *Allegheny City's Appeal*, 41 Pa. St. 60; *McKeesport v. Fidler*, 147 Pa. St. 538; *Mix v. Ross*, 57 Ill. 121; *Hawthorne v. City of East Portland*, 13 Or. 271; *Dillon, Mun. Corp.* (4th Ed.) § 821.

<sup>114</sup> *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Wabash Eastern Ry. Co. v. East Lake Fork Special Drainage Com'rs*, 134 Ill. 384; *Keating v. Craig*, 73 Mo. 507; *Chaney v. State*, 118 Ind. 494; *Provident Institution for Savings v. Jersey City*, 113 U. S. 506.

<sup>114a</sup> Rev. St. U. S. § 3186, as amended by Act March 1, 1879, § 3; Id. § 3207; *United States v. Snyder*, 149 U. S. 210.

<sup>115</sup> *Myers v. Pierce*, 86 Ga. 786; *Davis v. Vansands*, 45 Conn. 600; *Nelson v. Murfee*, 69 Ala. 598; *Den d. Warwick v. Hunt*, 11 N. J. Law, 1; *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *McCoy v. Morrow*, 18 Ill. 519; *Smith v. Gorham*, 119 Ind. 436; *Faran v. Robinson*, 17 Ohio St. 242, 93 Am. Dec. 617.

The court will, however, in particular cases, consider the fact that the land has passed into the hands of a bona fide purchaser, in determining whether the application for sale has been unreasonably delayed. *Ferguson v. Scott*, 49 Miss. 500; *Rosenthal v. Renick*, 44 Ill. 202; *Creswell v. Slack*, 68 Iowa, 110. In New York, the statute requiring the sale to be made in three years applies expressly only in favor of a bona fide purchaser of the land. *Dodge v. Stevens*, 105 N. Y. 585.

remains in the hands of the heirs or devisees, and consequently there it cannot be regarded as a lien.<sup>116</sup>

§ 575. Liens on crops.

In many states the landlord has a lien for rent on crops raised on the demised premises,<sup>117</sup> and in some states has likewise a lien thereon for any supplies furnished by him to the tenant for the purpose of raising such crops.<sup>118</sup> This lien usually takes priority of all other liens.<sup>119</sup>

In some states, moreover, a person not the landlord, who makes advances or furnishes supplies for the purpose of enabling the owner of land to raise a crop, may obtain, by agreement made at the time of making the advances or furnishing the supplies, a lien on the crops to be raised.<sup>120</sup> In some states, a lien on crops is given by statute to laborers employed in making them.<sup>121</sup>

<sup>116</sup> *Kindersley v. Jervis*, 22 Beav. 1; *British Mut. Inv. Co. v. Smart*, L. R. 10 Ch. App. 567; *Smith v. Thomas' Heirs*, 14 Lea (Tenn.) 324.

<sup>117</sup> See *Nelson v. Webb*, 54 Ala. 436; *Rotzler v. Rotzler*, 46 Iowa, 189; *Lemay v. Johnson*, 35 Ark. 225; *Love v. Law*, 57 Miss. 596; *Miles v. James*, 36 Ill. 399; *Jones v. Fox*, 23 Fla. 454; *Knowles v. Sell*, 41 Kan. 171; *State v. Reeder*, 36 S. C. 497.

<sup>118</sup> See *Bell v. Hurst*, 75 Ala. 44; *Stewart v. Hollins*, 47 Miss. 708; *Whitmore v. Polindexter*, 7 Baxt. (Tenn.) 248; *Jones v. Eubanks*, 86 Ga. 616; *Stafford v. Pearsop*, 26 La. Am. 658.

<sup>119</sup> *Saloy v. Bloch*, 136 U. S. 338; *Lake v. Gaines*, 75 Ala. 143; *Brown v. Hamil*, 76 Ala. 506; *Smith v. Fouche*, 55 Ga. 120; *Carroll v. Bancker*, 43 La. Ann. 1078; *Brewer v. Chappell*, 101 N. C. 251.

<sup>120</sup> See *Boyett v. Potter*, 80 Ala. 476; *Bank of America v. Fortier*, 27 La. Ann. 243; *Airey v. Weinstein*, 54 Ark. 443; *Herman v. Perkins*, 52 Miss. 813; *Warder, Bushnell & Glessner Co. v. Minnesota & Dakota Elevator Co.*, 44 Minn. 390; *Rawlings v. Hunt*, 90 N. C. 270.

<sup>121</sup> *Willson v. Taylor*, 89 Ala. 368; *Saloy v. Dragon*, 37 La. Ann. 71; *Buck v. Paine*, 50 Miss. 648; *Emerson v. Hedrick*, 42 Ark. 263. Compare *Schilling v. Carter*, 35 Minn. 287.

A statute giving a lien to one who bestows labor on personal property has been held not to give an agricultural laborer a lien on crops. *McDearmid v. Foster*, 14 Or. 417. Contra, *Hogue v. Sheriff*, 1 Wash. T. 172.

## § 576. The statutory lien for improvements.

The equitable right of a *bona fide* occupant of land to an allowance for improvements made by him is, as has been stated, secured by courts of equity by the establishment of an equitable lien on the land for the amount thereof.<sup>122</sup> The statutes likewise, in providing for compensation for improvements made by an occupying claimant,<sup>123</sup> sometimes provide expressly or by implication that he shall have a lien for the amount thereof.<sup>124</sup>

## § 577. Widow's allowance.

In some states, the statute provides for a pecuniary allowance to the widow of decedent. Occasionally, these statutes have been construed as making the land liable for the payment of such allowance in case of a deficiency of personalty, and in that case the amount thereof may be regarded as a lien on the land until other satisfaction of the claim.<sup>125</sup>

<sup>122</sup> Ante, § 562.

<sup>123</sup> Ante, § 241.

<sup>124</sup> *Barker v. Owen*, 93 N. C. 198; *Whitcomb v. Provost*, 102 Wis. 278.

<sup>125</sup> See *Detweiler's Appeal*, 44 Pa. St. 243; *Rector v. Reavill*, 3 Ill. App. 232; *Blakeman v. Blakeman*, 64 Minn. 315; *Allen v. Allen's Adm'r*, 18 Ohio St. 234; 1 *Woerner, Administration*, § 85.



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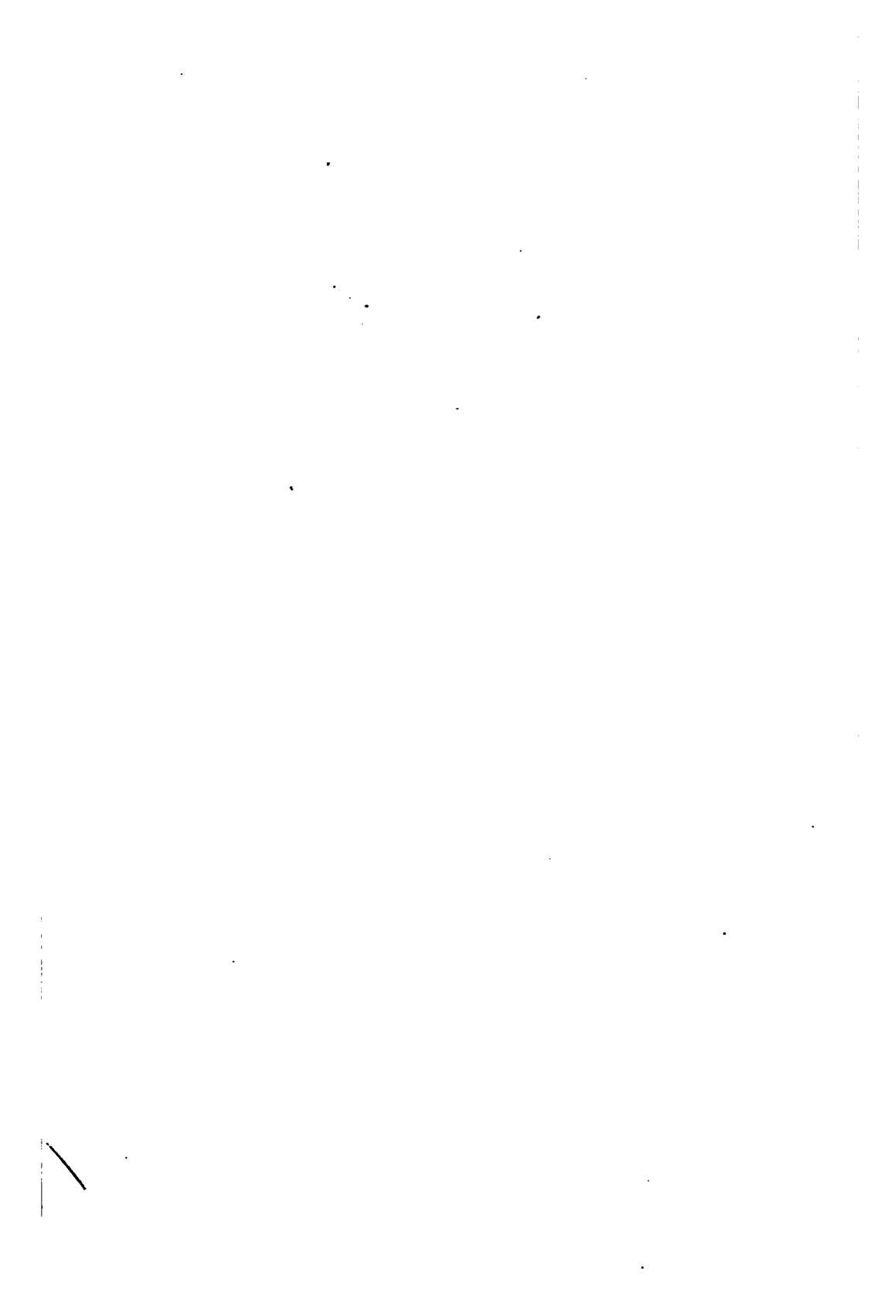












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